COURT OF JUSTICE
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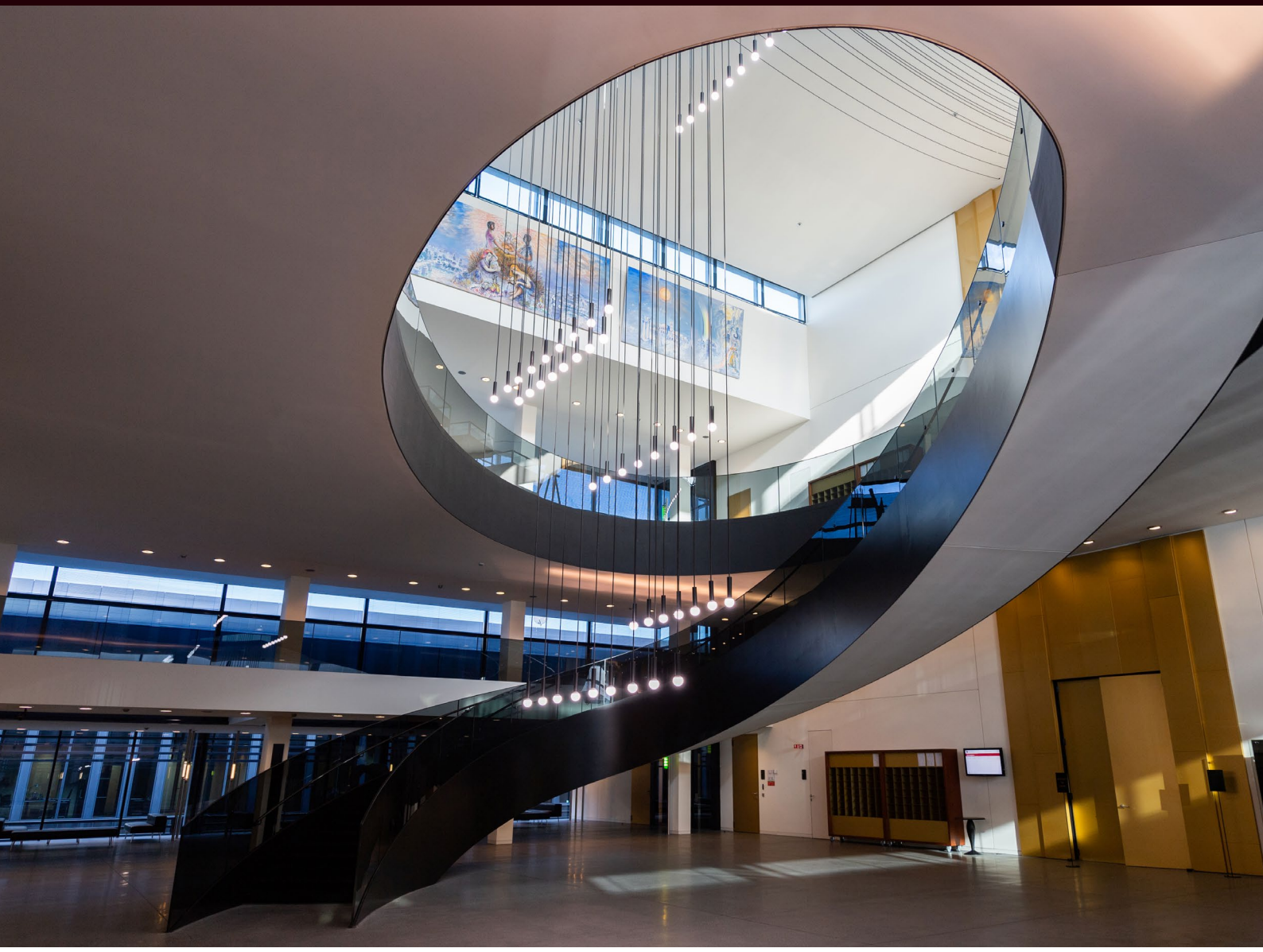
ANNUAL REPORT 2019
JUDICIAL ACTIVITY



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ANNUAL REPORT 2019
JUDICIAL ACTIVITY

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

Luxembourg, 2020

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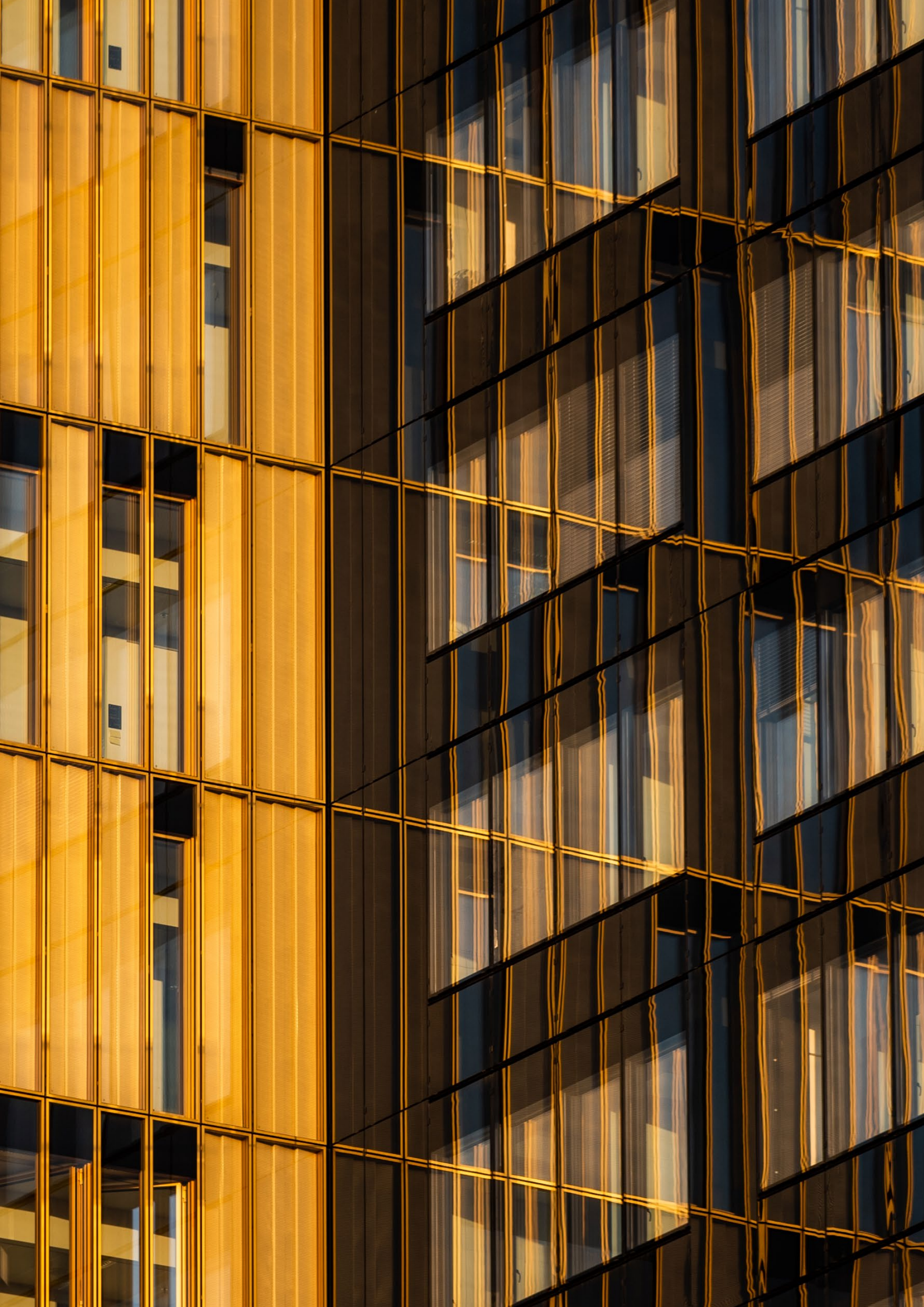


Koen Lenaerts

President of the Court of Justice
of the European Union

Looking back, 2019 was a year punctuated by anniversaries.

The 10th anniversary of the Treaty of Lisbon, which, among other things, changed the name of the Court of Justice and the General Court as well as the process for appointing members to those courts, incorporated new features into judicial proceedings and elevated the Charter of Fundamental Rights of the European Union to the status of primary law.

The 15th anniversary of the European Union's 'major enlargement', itself the result of the end of a divided European continent, symbolised by the fall of the Berlin Wall on 9 November 1989.

And the 30th anniversary of the establishment of the General Court, celebrated in September 2019 at a colloquium that provided an opportunity to cast a retrospective glance over its key contribution to the development of EU law and to reflect on future challenges, in particular, upon implementation of the third and final phase of the reform of the judicial structure of the European Union.

One other cause for celebration: the inauguration of the third tower on 19 September 2019, attended by H.R.H. the Grand Duke of Luxembourg, the President of the Chamber of Deputies and the Prime Minister of Luxembourg, and other distinguished figures. This event marked the completion of the fifth extension to the *Palais*, enabling 750 members of staff to join their colleagues in the institution's building complex. More than just bricks and mortar, the tower symbolises the gathering of all the institution's staff under the same roof for the first time in 20 years, bringing efficiency gains and fostering a friendly working environment.

However, 2019 was also an eventful year for the European Union. Brexit, climate emergency, the migration crisis, concerns about respect for the values of freedom, democracy and the rule of law: these and many other issues call for appropriate responses, in consonance with the objectives of the European project, and have — or will ultimately have — a direct impact on cases brought before the Court of Justice and the General Court.

Against that background, we must, more than ever, channel all our efforts into advocating tirelessly for a European Union based on the rule of law and raising public awareness about the achievements of the European venture and the fundamental values underpinning it.

I am pleased, from that perspective, to note the ever-growing success of initiatives such as the institution's 'Open Day', to which many members of staff contribute every year, and our improved website, which now provides access, across the spectrum of available languages, to all requests for a preliminary ruling lodged before the Court since 1 July 2018.

At the institutional level, 2019 was marked by the departure of five members of the Court of Justice and the arrival of four new members, as well as by the death, on 9 June 2019, of Advocate General Yves Bot, to whom I pay tribute for his intellectual legacy, particularly in matters relating to EU criminal law.

The General Court saw the departure of 8 of its members and welcomed the arrival of 14 new members as a result of the combined effect of its three-year partial renewal and the implementation of the third phase of the reform of the judicial structure, which increased the number of judges at that court to two judges per Member State. Let me take the occasion of this foreword to express my sincere thanks to Judge Jaeger — who handed over the presidency of the General Court to Judge van der Woude in September 2019 — for his unfailing dedication at the helm of that court spanning 12 years.

Statistically, 2019 was an exceptional year in two respects. While the overall number of cases closed by the two courts in 2019 came within a hair's breadth of last year's all-time high (1 739 cases compared to 1 769 in 2018), the Court of Justice settled a record number of 865 cases (compared to 760 in 2018). The overall number of cases brought before both courts stands at an unprecedented level: 1 905 cases (compared to 1 683 in 2018 and 1 656 in 2017). The trend is particularly striking for the Court of Justice, which registered 966 new cases in 2019 (compared to 849 in 2018 and 739 in 2017). This is due to a very sharp rise in the number of requests for a preliminary ruling (641 cases compared to 568 in 2018), as well as a significant increase in the number of appeals lodged against decisions of the General Court (266 appeals compared to 199 in 2018), which is largely related to the General Court's improved productivity in 2018.

In that respect, the entry into force on 1 May 2019 of the mechanism whereby the Court determines whether an appeal should be allowed to proceed is to be welcomed as it should help ease congestion at the Court in certain areas so that it can better focus on its primary task of interpreting EU law through preliminary rulings.

This report provides a full record of changes concerning the institution and of its work in 2019. As in previous years, a substantial part is devoted to a review of the main developments in the case-law 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 thank warmly my colleagues and the entire staff of the institution for the outstanding work carried out by them during the year.

Chapter 1
The Court of Justice

A | The Court of Justice: changes and activity in 2019

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

This first chapter summarises the activities of the Court of Justice in 2019. It begins, in the first part (A), by describing briefly how the Court 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 2019 (E).

1.1. 2019 was characterised by the departure of four members of the Court of Justice: Maria Berger (Judge at the Court from 2009 to 2019), Egils Levits (Judge at the Court from 2004 to 2019) following his election as President of the Republic of Latvia, Allan Rosas (Judge at the Court from 2002 to 2019 and President of a chamber of five judges from 2004 to 2009) and Carl-Gustav Fernlund (Judge at the Court from 2011 to 2019). Moreover, we were saddened by the death of Yves Bot (Advocate General from 2006 to 2019).

Also in 2019, Nils Wahl (Sweden, Advocate General from 2012 to 2019), Andreas Kumin (Austria) and Niilo Jääskinen (Finland, Advocate General from 2009 to 2015) entered into office as judges, while Priit Pikamäe (Estonia) took office as Advocate General.

1.2. As regards the functioning of the institution, 2019 brought the implementation, almost in its entirety, of the third phase 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).

The first phase of that reform, which entered into force in December 2015, provided for the entry into office of 12 additional judges to the General Court. It is almost complete, with only one appointment remaining to be made to bring that phase to a close.

As a result of the second phase, which took effect in September 2016, the European Union Civil Service Tribunal ceased to exist and its jurisdiction was transferred to the General Court. That phase also provided for the appointment of seven additional judges to the General Court, the same as the number of judges making up the Civil Service Tribunal. The second phase was completed in full in October 2017.

The third and final phase of the reform, which the EU legislative authorities intended to coincide with the partial renewal of the General Court in September 2019, requires the number of judges at that court to be increased so that each Member State has two judges. Against that background, seven new judges took office at a formal sitting held on 26 September 2019.

1.3. Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 (OJ 2019 L 111, p. 1) made two important amendments to the Statute of the Court of Justice of the European Union with effect from 1 May 2019.

The first amendment was prompted by difficulties encountered by the General Court in actions for annulment brought by Member States against acts of the Commission relating to failure to comply with a judgment delivered by the Court of Justice under Article 260(2) or (3) TFEU, where the Commission and the Member

State concerned disagree on the adequacy of the measures adopted by that Member State to comply with the judgment of the Court of Justice. For that reason, litigation concerning a lump sum or a penalty payment imposed on a Member State pursuant to those provisions is now reserved exclusively for the Court of Justice.

The second amendment, linked to the considerable increase in recent years in the number of appeals brought before the Court of Justice against decisions of the General Court, ushered in a mechanism whereby the Court of Justice determines whether an appeal should be allowed to proceed in cases that have already been considered twice, initially by an independent board of appeal (an EU body or agency such as the European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency or the European Union Aviation Safety Agency), then by the General Court. Under this mechanism, the Court of Justice will allow an appeal to proceed in such cases, wholly or in part, only where it raises an issue that is significant with respect to the unity, consistency or development of EU law.

1.4. With the Council's approval, the Court of Justice adopted a series of amendments to its Rules of Procedure (OJ 2019 L 316, p. 103). Some of those amendments seek to take account of experience gained to clarify the scope of a number of provisions of the Rules of Procedure of the Court or, as appropriate, to supplement or simplify them. Other amendments take into account recent developments relating, in particular, to the method for designating the First Advocate General and the new regulatory framework for the protection of personal data in the European Union, which required adjustments to be made to the standard rules for the service and publication of procedural documents.

In September 2019, the Court also adopted a new version of its Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2019 C 380, p. 1). These recommendations serve as a reminder of the essential characteristics of the preliminary ruling procedure and the matters to be taken into account by the national courts and tribunals before a reference for a preliminary ruling is made to the Court, while providing practical guidance as to the form and content of requests for a preliminary ruling. Since those requests will be served, after having been translated, on all the interested persons referred to in Article 23 of the Protocol on the Statute of the Court of Justice of the European Union and the preliminary rulings of the Court will, in principle, be published in all the official languages of the European Union, the recommendations pay close attention to the presentation of such requests and, in particular, to the protection of personal data. In their exchanges with the Court, the courts and tribunals of the Member States are also encouraged to take advantage of the full potential offered by the e-Curia application, enabling procedural documents to be lodged and served instantly and securely.

Lastly, in December 2019, the Court approved a package of amendments to its Practice directions to parties concerning cases brought before the Court (OJ 2020 L 42I I, p. 1). Those amendments contain clarifications concerning the handling of requests for confidential treatment in appeals, the procedure for the transmission of procedural documents and the conduct of hearings. They also mirror recent developments, such as the entry into force on 1 May 2019 of the abovementioned mechanism whereby the Court determines whether certain categories of appeals should be allowed to proceed and the greater consideration given by the Court to the protection of personal data.

2. As regards statistics — and without prejudice to the more detailed comments set out in Part C of this chapter of the annual report — a number of trends emerge from a reading of the statistics relating to the past year.

The first very clear trend concerns the number of cases brought before the Court. In fact, with 966 new cases in 2019, the Court recorded the highest number of cases in its history, reflecting an increase of almost 14% compared to the number of cases brought in 2018 (849), which was already a record year in that respect. Just as in the previous two years, requests for a preliminary ruling accounted for the lion's share of that

increase (641 new requests compared to 568 in 2018), but the Court also recorded a significant rise in the number of appeals, appeals against interim measures and appeals on intervention (266 cases compared to 199 in 2018), unlike the number of direct actions, which fell in 2019 (41 cases).

The second striking aspect of those statistics concerns the number of cases closed by the Court, which also testifies to its intensive pace of work. Thus, in 2019, 865 cases were settled by the Court, compared to 760 in 2018. Readers perusing the statistics for the past year will find their attention drawn to the still high proportion of cases dealt with by the Grand Chamber of the Court (82 cases closed by that court formation in 2019), as well as the growing number of cases closed by chambers of three judges, which in 2019 slightly exceeded the number of cases closed by chambers of five judges (351 cases compared to 343 cases).

Finally, it should be pointed out that, in spite of the increase in the number of new cases, the average duration of proceedings before the Court remained at a very satisfactory level in 2019: 15.5 months for preliminary rulings and 11.1 months for appeals. The reasons for this include the more widespread use of orders based on Articles 53, 99, 181 and 182 of the Rules of Procedure and the implementation of the new mechanism whereby the Court determines whether an appeal should be allowed to proceed, enabling a very rapid decision not to allow an appeal to proceed where the appellant has failed to demonstrate that the appeal raises an issue that is significant with respect to the unity, consistency or development of EU law.

B | Case-law of the Court of Justice in 2019

I. Fundamental rights

In 2019, the Court ruled on numerous occasions on fundamental rights in the EU legal order. A number of those decisions are covered in this report. [1] The decisions set out in this section provide considerable guidance on the scope of some of the rights and principles laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), such as the right to a fair trial and the principle *ne bis in idem*. [2]

1. Right to an impartial tribunal and a fair trial

In three judgments, the Court was required to rule on the effects of Poland's judicial reforms in the light of the right to an impartial tribunal, the right to a fair trial and the principle of judicial independence.

In the judgment in ***Commission* v *Poland (Independence of the Supreme Court)*** (C-619/18, EU:C:2019:531), delivered on 24 June 2019, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations brought by the Commission against the Republic of Poland and seeking *a declaration that, first, by providing that the measure consisting in lowering the retirement age of Supreme Court judges is to apply to judges in post who had been appointed to that court before 3 April 2018 and, secondly, by granting the President*

1| The following judgments are included: judgment of 26 March 2019, ***SM (Child placed under Algerian kafala)*** (C-129/18, EU:C:2019:248), presented in Section II 'Citizenship of the Union'; judgment of 19 December 2019, ***Junqueras Vies*** (C-502/19, EU:C:2019:1115), presented in Section III 'Institutional provisions'; judgment of 5 November 2019, ***ECB and Others* v *Trasta Komercbanka and Others*** (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923), presented in Section V 'Proceedings of the European Union'; judgment of 21 May 2019, ***Commission* v *Hungary (Rights of usufruct over agricultural land)*** (C-235/17, EU:C:2019:432), presented in Section VII 'Freedom of movement'; judgments of 19 March 2019, ***Ibrahim and Others*** (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219), of 19 March 2019, ***Jawo*** (C-163/17, EU:C:2019:218), of 2 April 2019, ***H. and R.*** (C-582/17 and C-583/17, EU:C:2019:280), of 14 May 2019, ***M and Others (Revocation of refugee status)*** (C-391/16, C-77/17 and C-78/17, EU:C:2019:403), of 23 May 2019, ***Bilali*** (C-720/17, EU:C:2019:448), of 29 July 2019, ***Torubarov*** (C-556/17, EU:C:2019:626), of 12 November 2019, ***Haqbin*** (C-233/18, EU:C:2019:956), and of 12 December 2019, ***Bevándorlási és Menekültügyi Hivatal (Family reunification — Sister of a refugee)*** (C-519/18, EU:C:2019:1070), presented in Section VIII 'Border controls, asylum and immigration'; judgments of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456), of 27 May 2019, ***PF (Prosecutor General of Lithuania)*** (C-509/18, EU:C:2019:457), and of 15 October 2019, ***Dorobantu*** (C-128/18, EU:C:2019:857), presented in Section IX 'Judicial cooperation in criminal matters: European arrest warrant'; judgment of 29 July 2019, ***Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*** (C-654/17 P, EU:C:2019:634), presented in Section XI 'Competition'; judgments of 29 July 2019, ***Funke Medien NRW*** (C-469/17, EU:C:2019:623), of 29 July 2019, ***Pelham and Others*** (C-476/17, EU:C:2019:624), and of 29 July 2019, ***Spiegel Online*** (C-516/17, EU:C:2019:625), presented in Section XIII 'Approximation of laws'; judgments of 24 September 2019, ***Google (Territorial scope of de-referencing)*** (C-507/17, EU:C:2019:772), and of 24 September 2019, ***GC and Others (De-referencing of sensitive data)*** (C-136/17, EU:C:2019:773), presented in Section XIV 'Internet and electronic commerce'; judgments of 22 January 2019, ***Cresco Investigation*** (C-193/17, EU:C:2019:43), of 14 May 2019, ***CCOO*** (C-55/18, EU:C:2019:402), of 19 November 2019, ***TSN and AKT*** (C-609/17 and C-610/17, EU:C:2019:981), and of 20 June 2019, ***Hakelbracht and Others*** (C-404/18, EU:C:2019:523), presented in Section XV 'Social policy'. Opinion 1/17 of 30 April 2019, ***EU-Canada CET Agreement*** (EU:C:2019:341), presented in Section XXI 'International agreements', is also included.

2| The Court also adjudicated on several occasions on the principle of non-discrimination as set out in 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) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23). That case-law is presented in Section XV.1 'Equal treatment in employment and social security'.

of the Republic discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, that Member State had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

The Commission argued that, by those measures, the Republic of Poland had infringed the principle of judicial independence and, in particular, the principle of the irremovability of judges, and had thus failed to comply with the Member States' obligations resulting from the aforementioned provision.

In its judgment, the Court, in the first place, ruled on the applicability and scope of the second subparagraph of Article 19(1) TEU. In that respect, it observed that that provision requires all Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law. More specifically, every Member State must, under the second subparagraph of Article 19(1) TEU, ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, may be called upon to rule on questions concerning the application or interpretation of that law, meet the requirements of effective judicial protection, which in that case applies to the Polish Supreme Court. In order to ensure that that court is in a position to offer such protection, maintenance of its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter. The requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.

In the second place, the Court clarified the scope of that requirement. In that regard, it stated that the guarantees of independence and impartiality require rules, particularly as regards the composition of the bodies concerned, the appointment, length of service and grounds for abstention, rejection and dismissal of the members of which they consist, which are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of those bodies to external factors and their neutrality with respect to the interests before them. In particular, that freedom of the judges from all external intervention or pressure, which is essential, requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office. That principle of irremovability requires, among other things, that judges can remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality.

In that case, the Court found that the reform being challenged results in judges in post within the Supreme Court prematurely ceasing to carry out their judicial functions and that it can therefore be acceptable only if it is justified by a legitimate objective, if it is proportionate in the light of that objective and inasmuch as it is not such as to give rise, in the minds of individuals, to reasonable doubts such as those mentioned above. However, the Court held that the application of the measure lowering the retirement age of Supreme Court judges to the judges in post within that court did not meet those conditions because, in particular, it was not justified by a legitimate objective. Accordingly, the Court ruled that that application undermined the principle of the irremovability of judges, which is essential to their independence.

In the third and last place, the Court ruled on the discretion, granted by the new Law on the Supreme Court to the President of the Republic, to extend the period of judicial activity of judges of that court beyond the new retirement age fixed in that law. The Court stated that although it is for Member States alone to decide whether or not they will authorise an extension, the fact remains that, where those Member States choose that mechanism, they are required to ensure that the conditions and procedure to which the extension is subject are not liable to undermine the principle of judicial independence. In that connection, the fact that

an organ of the State such as the President of the Republic is entrusted with the power to decide whether or not to grant an extension is admittedly not sufficient in itself to conclude that that principle has been undermined. However, it is important to be satisfied that the substantive conditions and detailed procedural rules governing the adoption of those decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the independence of the judges concerned. To that end, it is necessary, in particular, that those conditions and procedural rules should be designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence. Such procedural rules must thus, in particular, make it possible to preclude not only any direct influence, in the form of instructions, but also types of more indirect influence which are liable to have an effect on the decisions of the judges concerned.

As regards the new Law on the Supreme Court, the Court stated that that law provides that the extension of the period of judicial activity of the judges of that court is now subject to a decision of the President of the Republic, which is discretionary, for which reasons need not be stated and which cannot be challenged in judicial proceedings. As regards the intervention, provided for by that law, of the National Council of the Judiciary before the President of the Republic takes a decision, the Court noted that the intervention of such a body, in the context of a procedure for extending the period during which a judge carries out his or her duties beyond the normal retirement age, may, admittedly, be such, in principle, as to contribute to making that procedure more objective. However, that will be the case only in so far as certain conditions are satisfied, in particular in so far as that body is itself independent of the legislative and executive authorities and independent of the authority to which it is required to deliver its opinion, and in so far as that opinion is delivered on the basis of objective and relevant criteria and is properly reasoned, such as to be appropriate for the purposes of providing objective information upon which that authority can take its decision. In that case, the Court considered it sufficient to state that in the light of, inter alia, their failure to state reasons, the opinions delivered by the National Council of the Judiciary are not such as to be apt to provide objective clarification in regard to the exercise of the power conferred on the President of the Republic by the new Law on the Supreme Court, with the result that that power is capable of giving rise to reasonable doubts, particularly in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them. In the judgment in ***Commission* v *Poland* *(Independence of ordinary courts)*** (C-192/18, EU:C:2019:924), delivered on 5 November 2019, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations brought by the Commission against the Republic of Poland and *held that that Member State had failed to fulfil its obligations under EU law, first, by establishing a different retirement age for male and female judges and public prosecutors in Poland and, secondly, by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges*.

A Polish law of 12 July 2017 lowered the retirement age of judges of the ordinary courts and public prosecutors, and the age for early retirement of judges of the Polish Supreme Court, to 60 years for women and 65 years for men, whereas those ages were previously set at 67 years for both sexes. In addition, that law conferred on the Minister for Justice the power to extend the period of active service of judges of the ordinary courts beyond the new retirement ages thus set, which differ according to sex. Since the Commission took the view that those rules were contrary to EU law, [3] it brought an action for failure to fulfil obligations before the Court.

3| Article 157 TFEU; Article 5(a) and Article 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23); and the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter.

As regards, in the first place, the differences thus introduced by that law, according to sex, so far as concerns the retirement ages of Polish judges, the Court pointed out, first of all, that the retirement pensions to which those judges and public prosecutors are entitled fall within Article 157 TFEU, under which each Member State is to ensure that the principle of equal pay for men and women for equal work is applied. The pension schemes at issue also fall within the scope of the provisions of Directive 2006/54 [4] ('the Directive on equality between men and women') that are devoted to equal treatment in occupational social security schemes. Next, the Court held that that law introduced directly discriminatory conditions based on sex, in particular as regards the time when the persons concerned may have actual access to the advantages provided for by the pension schemes concerned. Finally, it rejected the Republic of Poland's argument that the differences thus laid down between female judges and public prosecutors and male judges and public prosecutors regarding the age at which they have access to a retirement pension constitute a measure of positive discrimination. Those differences do not offset the disadvantages to which the careers of female public servants are exposed by helping them in their professional life and by providing a remedy for the problems which they may encounter in the course of their career. The Court accordingly concluded that the legislation at issue infringed Article 157 TFEU and the Directive on equality between men and women.

In the second place, the Court examined the measure consisting in conferring upon the Minister for Justice the power to decide whether or not to authorise judges of the ordinary courts to continue to carry out their duties beyond the new retirement age, as lowered. Relying, in particular, on the principles identified in the judgment of 24 June 2019, ***Commission* v *Poland (Independence of the Supreme Court)***, [5] it first of all found that the second subparagraph of Article 19(1) TEU was applicable because the ordinary Polish courts may be called upon to rule on questions connected with EU law. Those courts must therefore meet the requirements inherent in effective judicial protection. In order to ensure that they are in a position to offer that protection, maintaining their independence is essential.

In that regard, the Court observed that the fact that an organ, such as the Minister for Justice, is entrusted with the power to decide whether or not to grant an extension to the period of judicial activity beyond the normal retirement age is, admittedly, not sufficient in itself to conclude that the principle of independence has been undermined. However, it found that the substantive conditions and detailed procedural rules governing that decision-making power are, in the case in point, such as to give rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality. First, the criteria on the basis of which the Minister is called upon to adopt his decision are too vague and unverifiable, and that decision does not need to state reasons and cannot be challenged in court proceedings. Secondly, the length of the period for which the judges are liable to continue to wait for the decision of the Minister falls within the latter's discretion.

The Court also pointed out that the combination of the measure lowering the normal retirement age of judges of the ordinary courts and of the measure consisting in conferring upon the Minister for Justice the discretion to authorise them to continue to carry out their duties beyond the new retirement age thus set, for 10 years in the case of female judges and 5 years in the case of male judges, fails to comply with the principle of the irremovability of judges. That combination of measures is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister to remove, once the newly set normal retirement age was reached, certain groups of judges while retaining other judges in post. Furthermore, as the Minister's decision is not subject to any time

4| Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

5| Judgment of the Court of 24 June 2019, ***Commission* v *Poland (Independence of the Supreme Court)*** (C-619/18, EU:C:2019:531).

limit and the judge concerned remains in post until the decision is adopted, any decision of the Minister in the negative may be adopted after the person concerned has been retained in post beyond the new retirement age.

In the judgment in ***A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*** (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), delivered on 19 November 2019 in an expedited procedure, the Grand Chamber of the Court held that *the right to an effective remedy, enshrined in Article 47 of the Charter and reaffirmed, in the anti-discrimination field, by Directive 2000/78* [6] *('the Anti-Discrimination Directive'), precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal*.

In the cases pending before the referring court, three Polish judges (of the Supreme Administrative Court and of the Supreme Court) relied on, inter alia, infringements of the prohibition on discrimination on grounds of age in employment, on account of their early retirement pursuant to the new Law of 8 December 2017 on the Supreme Court. Despite the fact that, following a recent amendment, that law no longer concerns judges who, like the applicants in the main proceedings, were already serving members of the Supreme Court when that law entered into force and that, therefore, those applicants were kept in their posts or reinstated, the referring court considered that it was still faced with a problem of a procedural nature. Although such cases would ordinarily fall within the jurisdiction of the Disciplinary Chamber, as newly created within the Supreme Court, the referring court asked whether, on account of concerns relating to the independence of that chamber, it was required to disapply national rules on the distribution of jurisdiction and, if necessary, rule itself on the substance of those cases.

After finding that Article 47 of the Charter and the second subparagraph of Article 19(1) TEU were applicable, the Court — relying again on the principles identified in its judgment of 24 June 2019, ***Commission* v *Poland (Independence of the Supreme Court)*** [7] — noted the specific factors which must be examined by the referring court in order to allow it to ascertain whether the Disciplinary Chamber of the Supreme Court offers sufficient guarantees of independence.

In that regard, the Court, in the first place, stated that the mere fact that the judges of the Disciplinary Chamber are appointed by the President of the Republic does not give rise to a relationship of subordination to the political authorities or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role. Furthermore, the prior participation of the National Council of the Judiciary, which is responsible for proposing judicial appointments, is objectively capable of circumscribing the President of the Republic's discretion, provided, however, that that body is itself sufficiently independent of the legislature, the executive and the President of the Republic. In that respect, the Court added that regard must be had to relevant points of law and fact relating both to the circumstances in which the members of the new Polish National Council of the Judiciary are appointed and the way in which that body actually exercises its role of ensuring the independence of the courts and of the judiciary. The Court also stated that it would be necessary to ascertain the scope for the judicial review of propositions of the National Council of the Judiciary in so far as the President of the Republic's appointment decisions are not per se amenable to such judicial review.

6| 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).

7| Judgment of the Court of 24 June 2019, ***Commission* v *Poland (Independence of the Supreme Court)*** (C-619/18, EU:C:2019:531).

In the second place, the Court referred to other factors that more directly characterise the Disciplinary Chamber. In particular, it stated that in the specific circumstances resulting from the — highly contentious — adoption of the provisions of the new Law on the Supreme Court which the Court declared to be contrary to EU law in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), the fact that the Disciplinary Chamber had been granted exclusive jurisdiction to hear and determine cases relating to the retirement of judges of the Supreme Court resulting from that law, that that chamber may only be composed of newly appointed judges and that it appears to enjoy a particularly high degree of autonomy within the Supreme Court constituted relevant factors to be assessed.

The Court made clear that although each of the factors examined, taken in isolation, is not necessarily capable of calling into question the independence of that chamber, that may, however, not be true once they are taken together. It pointed out that it is for the referring court to determine, in the light of all the relevant factors established before it, whether those factors may thus lead to the new Disciplinary Chamber of the Supreme Court not being seen to be independent or impartial with the consequence of undermining the trust which justice in a democratic society must inspire in subjects of the law.

If that is the case, the principle of the primacy of EU law thus requires it to disapply the provision of national law which reserves exclusive jurisdiction to the Disciplinary Chamber to hear and determine cases relating to the retirement of judges of the Supreme Court, so that those cases may be examined by a court which meets the requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.

2. Principle *ne bis in idem*

In the judgment in ***Powszechny Zakład Ubezpieczeń na Życie*** (C-617/17, EU:C:2019:283), delivered on 3 April 2019, the Court ruled, in essence, on *the interpretation of the principle* ne bis in idem *enshrined in Article 50 of the Charter*. The request was made in proceedings between Powszechny Zakład Ubezpieczeń na Życie S.A., an insurance company, on the one hand, and the Polish competition authority, on the other, concerning a decision of the latter to fine the former for an abuse of a dominant position on the basis of infringements of national and EU competition law.

In that context, the Court held that the principle *ne bis in idem* does not preclude a national competition authority from fining an undertaking in a single decision for an infringement of national competition law and for an infringement of Article 82 EC (now Article 102 TFEU). In such a situation, the national competition authority must nevertheless ensure that, taken together, the fines are proportionate to the nature of the infringement.

The Court stated that it followed from its case-law that that principle aims to prevent an undertaking from being found liable or proceedings being brought against it afresh, which assumes that that undertaking was found liable or declared not liable by an earlier decision that can no longer be challenged.

Consequently, the Court held that the principle *ne bis in idem* should not apply to a situation in which the national competition authority applies, in accordance with Article 3(1) of Regulation No 1/2003, [8] national competition law and EU competition rules in parallel and, under Article 5 of that regulation, fines an undertaking in a single decision for an infringement of that law and for disregarding those rules.

8| Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

3. Freedom of religion

As regards the freedom of religion, mention should be made of the judgment of 22 January 2019, ***Cresco Investigation*** (C-193/17, EU:C:2019:43), delivered by the Court sitting as the Grand Chamber, concerning the compatibility with Article 21 of the Charter and with the Anti-Discrimination Directive of legislation granting a paid public holiday on Good Friday and, in the case of work carried out on that day, 'public holiday pay' only to employees belonging to certain Christian churches. [9]

Furthermore, in the judgment in ***Œuvre d'assistance aux bêtes d'abattoirs*** (C-497/17, EU:C:2019:137), delivered on 26 February 2019, the Grand Chamber of the Court examined whether the organic production logo of the European Union may be placed on products derived from animals which have been — under a derogation from Regulation No 1099/2009 [10] intended to ensure observance of the freedom of religion — slaughtered in accordance with religious rites without first being stunned. [11]

II. Citizenship of the Union

The Court delivered several judgments in the area of Union citizenship, including one concerning discrimination on grounds of nationality, [12] another dealing with the loss of citizenship of the Union on account of the loss of nationality of a Member State, and two judgments relating to the derived right of residence of third-country nationals who are family members of a citizen of the Union.

1. Discrimination on grounds of nationality

In the judgment in ***TopFit and Biffi*** (C-22/18, EU:C:2019:497), delivered on 13 June 2019, the Court interpreted Articles 18, 21 and 165 TFEU in the context of a dispute between an amateur athlete of Italian nationality and the German national athletics association concerning the *conditions for the participation of nationals of other Member States in German amateur sports championships in the senior category*.

According to the Court, those articles preclude rules of a national sports association under which a citizen of the Union, who is a national of another Member State and who has resided for a number of years in the territory of the Member State where that association, in which he or she runs in the senior category and in an amateur capacity, is established, cannot participate in the national championships in those disciplines in the same way as nationals can, or can participate in them only 'outside classification' or 'without classification',

9| That judgment is presented in Section XV.1 'Equal treatment in employment and social security'.

10| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1).

11| That judgment is presented in Section VI 'Agriculture and fisheries'.

12| Also deserving of mention, in that regard, is the judgment in ***Austria* v *Germany*** (C-591/17, EU:C:2019:504), delivered on 18 June 2019, in which the Court was required to adjudicate on an infrastructure use charge for passenger vehicles and an exemption for the owners of vehicles registered in Germany. Since the economic burden of that charge rested, de facto, only on the owners and drivers of vehicles registered in a Member State other than Germany, the Court held that it was tantamount to a difference in treatment on grounds of nationality. That judgment is presented in Section VII.1 'Free movement of goods'.

without being able to progress to the final and without being eligible to be awarded the title of national champion, unless those rules are justified by objective considerations which are proportionate to the legitimate objective pursued, this being a matter for the referring court to verify.

First, the Court found that a citizen of the Union, such as the amateur athlete in that case, who has made use of his or her right to move freely, can legitimately rely on Articles 18 and 21 TFEU in connection with his or her practice of a competitive amateur sport in the society of the host Member State. In that respect, the Court referred in particular to the role of sport as a factor for integration in the society of the host Member State, as reflected in Article 165 TFEU.

The Court then held that the rules of a national sports association which govern the access of citizens of the Union to sports competitions are subject to the rules of the Treaty, in particular Articles 18 and 21 TFEU. In that respect, the Court noted that observance of the fundamental freedoms and the prohibition of discrimination on the basis of nationality provided for by the Treaty also apply to rules which are not public in nature but which are aimed at regulating gainful employment and the provision of services in a collective manner. That principle also applies in cases where a group or organisation exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty.

Finally, the Court concluded that, in that case, there was a difference in treatment which was liable to restrict the freedom of movement of the amateur athlete in question within the meaning of Article 21 TFEU since, even if such a citizen fulfils the conditions relating to the obligatory sporting performances and has had an entitlement to participate in the sports event through a club affiliated with the national athletics association for at least one year, that citizen may not, on account of nationality, be permitted to participate in a national amateur running championship over short distances in the senior category or may be permitted to participate only in part. The Court added that the rules of a sports association can also lead to athletes who are nationals of a Member State other than the Federal Republic of Germany being less well supported by the sports clubs to which they are affiliated as compared with national athletes, since those clubs will have less interest in investing in athletes who have no prospect of participating in the national championships, which is why athletes who are nationals of other Member States would be less able to integrate themselves into the sports club to which they are affiliated and, consequently, into the society of the Member State in which they are resident.

According to the Court, such a restriction on the freedom of movement of citizens of the Union can be justified only where it is based on objective considerations and is proportionate to the legitimate objective pursued by the rules at issue, which is for the national court to determine. Indeed, it appears to be legitimate to limit the award of the title of national champion in a particular sporting discipline to a national of the relevant Member State and consider that nationality requirement to be a characteristic of the title of national champion itself. However, it is vital that the restrictions resulting from the pursuit of that objective should observe the principle of proportionality, as that objective does not systematically justify any restriction on the participation of non-nationals in the national championships. It is for the national court to examine whether there are potential justifications by taking into account the objective, arising from a combined reading of the provisions of Article 21(1) and Article 165 TFEU, of increased openness in competitions and the importance of integrating residents, in particular long-term residents, in the host Member State. In any event, the total non-admission of a non-national athlete to a national championship on account of nationality seems to be disproportionate where there is a mechanism for the participation of such an athlete in such a championship, at the very least in the heats and/or without classification.

2. Loss of citizenship of the Union on account of loss of nationality of a Member State

On 12 March 2019, in its judgment in ***Tjebbes and Others*** (C-221/189, EU:C:2019:189), the Court, sitting as the Grand Chamber, considered *whether the loss, by operation of law, of nationality of a Member State, entailing the loss of citizenship of the Union, is compatible with Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter*. In the case in the main proceedings, the Netherlands Minister for Foreign Affairs had refused to examine the passport applications of Netherlands nationals who possessed a second nationality from a third country, on the ground that those persons, including a minor, had lost, by operation of law, their Netherlands nationality. The Netherlands Minister's refusal was based on the Law on Netherlands nationality, according to which an adult loses that nationality if he or she is a national of another country and has had his or her principal residence outside the European Union for an uninterrupted period of 10 years. Moreover, under that law, a minor loses, in principle, Netherlands nationality if his or her father or mother has lost his or her Netherlands nationality because of a lack of residence within the European Union.

The Court held that EU law does not preclude, as a matter of principle, a Member State from prescribing for reasons of public interest the loss of its nationality, even if that loss entails the loss of citizenship of the Union. It is legitimate for a Member State to take the view that nationality is the expression of a genuine link between that Member State and its nationals, and therefore to prescribe that the absence, or the loss, of any such genuine link entails the loss of that nationality. It is also legitimate for a Member State to wish to protect the unity of nationality within the same family by providing that a minor loses his or her nationality when one parent loses his or her nationality.

However, for legislation such as the Netherlands legislation at issue to be compatible with Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter, it must allow the competent national authorities, including national courts where appropriate, to examine, as an ancillary issue, the consequences of the loss, by operation of law, of nationality of the Member State concerned and, where appropriate, to have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality.

In the course of that examination, the national authorities and courts must determine whether the loss of that nationality, which entails the loss of citizenship of the Union, has due regard to the principle of proportionality in the light of the consequences of that loss for the situation of the person concerned and, if relevant, that of family members, from the point of view of EU law. That examination requires an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of losing that nationality might, with regard to the objective pursued by the national legislature, disproportionately affect the normal development of his or her family and professional life from the point of view of EU law, in particular the right to respect for family life as laid down in Article 7 of the Charter.

As regards the circumstances of the individual situation of the person concerned, which are likely to be relevant for the purposes of that assessment, the Court mentioned, in particular, the fact that following the loss, by operation of law, of his or her nationality and of the status of citizen of the Union, the person concerned would be exposed to limitations when exercising his or her right to move and reside freely within the territory of the Member States, including, depending on the circumstances, particular difficulties in continuing to travel to one or another Member State in order to retain genuine and regular links with family members, to pursue a professional activity or to undertake the necessary steps to pursue that activity. Also relevant are, first, the fact that the person concerned might not have been able to renounce the nationality of a third country and, secondly, the serious risk, to which the person concerned would be exposed, that his or her

safety or freedom to come and go would substantially deteriorate because of the impossibility for that person to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country in which that person resides.

In addition, with regard to minors, the competent authorities must take into account possible circumstances from which it is apparent that the loss of the nationality of the Member State concerned by the minor concerned fails to meet the child's best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor from the point of view of EU law.

3. Derived right of residence of third-country nationals who are family members of a citizen of the Union

In the judgment in ***SM (Child placed under Algerian kafala)*** (C-129/18, EU:C:2019:248), delivered on 26 March 2019, the Court, sitting as the Grand Chamber, gave a ruling on *whether a minor for whom citizens of the Union assume responsibility under the Algerian kafala system is included in the concept of a 'direct descendant' of a citizen of the Union as referred to in Article 2(2)(c) of Directive 2004/38*. [13] Two spouses of French nationality residing in the United Kingdom had applied to the United Kingdom authorities for entry clearance for an adopted child on behalf of an Algerian minor who had been placed in their guardianship in Algeria under the *kafala* system. That institution in the family law of some countries that follow the Koranic tradition provides for the assumption by one or more adults of responsibility for the care, education and protection of a child and for the placing of that child in their permanent legal guardianship. The United Kingdom authorities refused to grant that clearance.

The Court first of all emphasised that although the concept of a 'direct descendant' of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38 primarily focuses on the existence of a biological parent-child relationship, it must also be understood, having regard to the requirement for that concept to be construed broadly which derives from the objective of that directive, namely to facilitate and strengthen the freedom of movement and residence of citizens of the Union, as also including the adopted child of such a citizen, since it is established that adoption creates a legal parent-child relationship between the child and the citizen of the Union concerned. By contrast, it held that as the Algerian *kafala* system does not create a parent-child relationship between the child and its guardian, a child who is placed in the legal guardianship of a citizen of the Union under that system cannot be regarded as a 'direct descendant' of a citizen of the Union for the purposes of Article 2(2)(c) of that directive.

However, the Court considered that such a child does fall under the definition of one of the 'other family members' referred to in point (a) of the first subparagraph of Article 3(2) of Directive 2004/38. That concept is capable of covering the situation of a child who has been placed with citizens of the Union under a legal

13| 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).

guardianship system such as Algerian *kafala* and in respect of whom those citizens assume responsibility for its care, education and protection, in accordance with an undertaking entered into on the basis of the law of the child's country of origin.

The Court then clarified the burden on national authorities under that provision. It thus stated that it is for those authorities, under point (a) of the first subparagraph of Article 3(2) of Directive 2004/28, read in the light of Article 7 and Article 24(2) of the Charter, to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned. In the context of that assessment, it is also necessary to take account of possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation or trafficking, on the understanding that such risks cannot, however, be assumed solely in the light of the fact that the procedure for placement under the Algerian *kafala* system is based on an assessment of the suitability of the adult and of the interests of the child which is less extensive than the procedure carried out in the host Member State for the purposes of an adoption or the placement of a child.

The Court concluded that in the event that it is established, following such an assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in the latter's host Member State.

In the judgment in ***Chenchooliah*** (C-94/18, EU:C:2019:693), delivered on 10 September 2019, the Grand Chamber of the Court was required to interpret *Article 15 of Directive 2004/38, which provides, inter alia, that certain procedures set out in Chapter VI of that directive, entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health'*, [14] are to apply by analogy to all decisions restricting free movement of citizens of the Union and their family members on grounds other than public policy, public security or public health. The Court found that Article 15 is applicable to a decision to expel a third-country national on the ground that that person no longer has a right of residence under that directive, in a situation where the third-country national concerned married a citizen of the Union at a time when that citizen was exercising his or her right to freedom of movement by moving to and residing with that third-country national in the host Member State and, subsequently, the citizen of the Union returned to the Member State of which he or she is a national. The Court added that that means that certain safeguards laid down in that directive in connection with decisions restricting the right to freedom of movement of a citizen of the

14| Namely the procedures laid down in Articles 30 and 31.

Union or his or her family members on grounds of public policy, public security or public health [15] are applicable when an expulsion decision, such as the decision at issue in the main proceedings, is adopted and it is not possible, under any circumstances, for such a decision to impose a ban on entry into the territory.

The judgment relates to a dispute between a Mauritian national, residing in Ireland, and the Minister for Justice and Equality concerning a decision to deport that third-country national, pursuant to Section 3 of the Irish Immigration Act 1999, following the return of her spouse, a citizen of the Union, to the Member State of which he is a national, that is, Portugal, where he is serving a prison sentence. The removal decision automatically imposed an indefinite ban on entry into the territory under national law.

First of all, the Court found that in a situation in which a citizen of the Union has returned to the Member State of which that citizen is a national and therefore no longer exercises in the host Member State his or her right to freedom of movement under EU law, a third-country national, the spouse of that citizen of the Union, no longer enjoys the status of 'beneficiary' within the meaning of that directive [16] where that person remains in the host Member State and no longer lives with the spouse.

Next, the Court ruled that even though the effect of the loss of that status is that the third-country national concerned no longer has the rights of movement and residence in the territory of the host Member State which that person had held for a certain period of time, as that person no longer meets the requirements to which those rights are subject, that loss does not mean that Directive 2004/38 is no longer applicable where the host Member States takes a decision to expel that person on such a ground. Article 15 of Directive 2004/38, [17] which appears in Chapter III, entitled 'Right of residence', lays down the rules applicable when a temporary right of residence under that directive comes to an end, in particular where a citizen of the Union or one of his or her family members who, in the past, had a right of residence of up to three months, or longer than three months, no longer satisfies the requirements for the grant of the right of residence concerned and may therefore, in principle, be expelled by the host Member State.

In that respect, the Court observed that Article 15(1) of Directive 2004/38 refers only to the application by analogy of some provisions of Chapter VI thereof, relating in particular to the notification of decisions and access to judicial redress procedures. [18] On the other hand, other provisions of Chapter VI are not applicable when a decision is adopted under Article 15 of that directive. Those other provisions are applicable only if the person concerned currently derives from that directive a right of residence in the host Member State which is either temporary or permanent.

Lastly, the Court added that, in accordance with Article 15(3) of Directive 2004/38, the expulsion decision that could be made in the case in the main proceedings could not, under any circumstances, impose a ban on entry into the territory. [19]

15| Namely the relevant safeguards laid down in Articles 30 and 31.

16| Article 3(1).

17| Article 15.

18| Articles 30 and 31.

19| Article 15(3).

III. Institutional provisions

Two judgments are worthy of mention under this heading: [20] one concerning the immunities enjoyed by Members of the European Parliament and another dealing with a European citizens' initiative.

1. Immunities enjoyed by Members of the European Parliament

In the preliminary ruling in ***Junqueras Vies*** (C-502/19, EU:C:2019:1115), delivered on 19 December 2019, the Court, sitting as the Grand Chamber, clarified *the personal, temporal and material scope of the immunities granted to Members of the European Parliament*. [21]

In that case, the Spanish Supreme Court submitted a number of questions to the Court for a preliminary ruling on the interpretation of Article 9 of the Protocol. Those questions were raised in the context of an action brought by a politician elected to the European Parliament in the elections of 26 May 2019 against an order refusing to grant him special authorisation to leave prison. The person concerned had been placed in provisional detention prior to those elections in criminal proceedings brought against him for his participation in the organisation of the referendum on self-determination held on 1 October 2017 in the autonomous community of Catalonia. He requested that authorisation in order to discharge a formality required by Spanish law following the declaration of results, namely swearing or pledging to abide by the Spanish Constitution before a central electoral board, and subsequently to travel to the European Parliament in order to take part in the constitutive session of the new legislative term. Following the referral made to the Court, the Supreme Court, on 14 October 2019, sentenced the person concerned to a 13-year term of imprisonment and, for that same period, disqualification from holding any public office or exercising any public function.

The Court held, in the first place, that a person who is elected to the European Parliament acquires the status of Member of Parliament by virtue of and from the time of the declaration of the election results, with the result that that person enjoys the immunities guaranteed by Article 9 of the Protocol.

The Court noted that although the electoral procedure and the declaration of the results are, in principle, governed by the law of the Member States, in accordance with Articles 8 and 12 of the 1976 Electoral Act, [22] the election of Members of the European Parliament by direct universal suffrage in a free and secret ballot [23] constitutes an expression of the constitutional principle of representative democracy, the scope of which is defined by EU law itself. It follows from the Treaties and the 1976 Electoral Act that the status of Member of the European Parliament arises solely from the election of the person concerned and is acquired by virtue

20| Reference should also be made to two judgments of the Court delivered on 26 March 2019: ***Spain v Parliament*** (C-377/16, EU:C:2019:249), and ***Commission v Italy*** (C-621/16 P, EU:C:2019:251), concerning the use of languages by the institutions. Those judgments are presented in Section XXII 'European civil service'.

21| Immunities provided for in Article 343 TFEU and Article 9 of Protocol (No 7) on the privileges and immunities of the European Union (OJ 2012 C 326, p. 266) ('the Protocol').

22| Act concerning the election of the Members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ 1976 L 278, p. 1), as amended by Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002 (OJ 2002 L 283, p. 1).

23| Article 14(3) TEU.

of the official declaration of those results by the Member States. Moreover, it follows from Article 343 TFEU that the European Union, and thus its institutions and their members, must enjoy the immunities necessary for the performance of their tasks.

In the second place, the Court held that persons who, like Mr Junqueras Vies, have been elected Members of the European Parliament enjoy, from the moment the results are declared, the immunity as regards travel which is attached to their status as Member and provided for in the second paragraph of Article 9 of the Protocol. The purpose of that immunity is to allow such persons to, inter alia, travel to and take part in the constitutive session of the European Parliament's new legislative term. Unlike the immunity as regards sessions provided for in the first paragraph of that article, which they enjoy only from the time of that constitutive session and during the entire duration of the sessions of the European Parliament, the immunity as regards travel applies to the Members while they are travelling to the place of meeting of the European Parliament, including to that first meeting.

The Court pointed out, in that regard, that the objectives pursued by the immunities provided for in the Protocol consist in ensuring that the proper functioning and independence of the institutions are safeguarded. In that context, the immunity as regards travel referred to in the second paragraph of Article 9 of that Protocol serves to ensure the right to stand as a candidate at elections, guaranteed in Article 39(2) of the Charter, by enabling every Member — from the time the Member is declared elected and irrespective of whether or not possible formalities required by national law have been discharged — to participate in the constitutive session of the European Parliament without being impeded as regards travel.

In the third and last place, the Court held that the immunity as regards travel granted to every Member of the European Parliament entails lifting any measure of provisional detention imposed prior to the declaration of that Member's election, in order to allow that person to travel to and take part in the constitutive session of the European Parliament. Consequently, if the competent national court considers that the measure should be maintained, it must as soon as possible request the European Parliament to waive that immunity, on the basis of the third paragraph of Article 9 of the Protocol.

2. European citizens' initiative

In the judgment in ***Puppinck and Others* v *Commission*** (C-418/18 P, EU:C:2019:1113) of 19 December 2019, the Court, sitting as the Grand Chamber, *dismissed the appeal brought by the organisers of the European citizens' initiative (ECI) 'One of us' against the judgment of the General Court* [24] *whereby that court had dismissed their action for the annulment of the communication from the Commission of 28 May 2014 in relation to that ECI.* [25]

In accordance with the Treaty on European Union [26] and Regulation No 211/2011, [27] citizens of the Union, who number at least 1 000 000 and who come from at least one quarter of all Member States, may take the initiative of inviting the Commission, within the framework of its powers, to propose to the EU legislature

24| Judgment of the General Court of 23 April 2018, ***One of Us and Others* v *Commission*** (T-561/14, EU:T:2018:210).

25| Communication COM(2014) 355 final from the Commission of 28 May 2014 on the European citizens' initiative 'One of us'.

26| Article 11(4) TEU.

27| 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).

the adoption of a legal act for the purpose of implementing the Treaties. Before they can begin the collection of the required number of signatures, the organisers of the ECI must register it with the Commission, which has to examine in particular its subject matter and its objectives.

Mr Patrick Grégor Puppinck and six other individuals form the citizens' committee of the ECI 'One of us', registered with the Commission in 2012. [28] The objective of that ECI is to prohibit and put an end to the financing, by the European Union, of activities that involve the destruction of human embryos (in particular in the areas of research, development aid and public health), including the direct or indirect funding of abortion. After its registration, the ECI 'One of us' collected the 1 000 000 signatures required, and was then formally submitted to the Commission in early 2014. On 28 May 2014, the Commission stated in a communication that it did not intend to take any action in response to that ECI.

The organisers of the ECI then sought, before the General Court, annulment of the communication from the Commission, claiming, inter alia, that the Commission is obliged to submit a proposal for an EU legal act in response to a registered ECI. The General Court upheld the Commission's decision.

Hearing the appeal, the Court of Justice first observed that, under Article 11(4) TEU, an ECI is designed to 'invite' the Commission to submit an appropriate proposal for the purpose of implementing the Treaties, not to oblige the Commission to take the action or actions envisaged by the ECI. The Court of Justice added that it is clear from various provisions of Regulation No 211/2011 that, when the Commission receives an ECI, the former is to set out the action that it intends to take, if any, and its reasons for taking or not taking action, which confirms that the submission by the Commission of a proposal for an EU act in response to an ECI is optional.

The Court of Justice then stated that the power of legislative initiative conferred on the Commission by the Treaties means that it is for the Commission to decide whether or not to submit a proposal for a legislative act, except in the situation where it has an obligation under EU law to do so. That power of legislative initiative conferred on the Commission is one of the expressions of the principle of institutional balance, characteristic of the institutional structure of the European Union. That principle means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. In that regard, the Court of Justice observed that, under Regulation No 211/2011, an ECI is intended to confer on citizens of the Union a right comparable to that held, pursuant to Articles 225 and 241 TFEU, by the European Parliament and the Council, to request the Commission to submit any appropriate proposal for the purpose of implementing the Treaties. Since the right thus conferred on the European Parliament and the Council does not undermine the Commission's power of legislative initiative, the same must be true of an ECI.

The Court of Justice also emphasised that the fact that the Commission is not obliged to take any action in response to an ECI does not mean, contrary to what was claimed by the appellants, that such an initiative is deprived of effectiveness. First, the ECI mechanism constitutes one of the instruments of participatory democracy which complemented, on the adoption of the Treaty of Lisbon, the system of representative democracy on which the functioning of the European Union is based, with the objective of encouraging the participation of citizens in the democratic process and promoting dialogue between citizens and the EU institutions. Secondly, an ECI which has been registered in accordance with Regulation No 211/2011 and which complies with all the procedures and conditions laid down in that regulation imposes a series of specific obligations on the Commission, as set out in Articles 10 and 11 thereof. According to the Court of Justice, the

28| COM(2014) 355 final.

particular added value of the ECI mechanism resides not in certainty of outcome, but in the possibilities and opportunities that it creates for citizens of the Union to initiate debate on policy within the EU institutions without having to wait for the commencement of a legislative procedure.

Furthermore, the Court of Justice endorsed the approach of the General Court in holding that a communication in relation to an ECI, such as the contested communication, falls within the exercise by the Commission of its broad discretion and must, consequently, be subject to limited judicial review, with the aim of determining, inter alia, whether its statement of reasons is sufficient and whether there are any manifest errors of assessment.

In that context, the Court of Justice approved, in particular, the General Court's reasoning in holding that the Commission, relying on a World Health Organization publication, had not committed any manifest error of assessment in considering that EU funding of a number of safe and effective health services, including abortion services, contributed to a reduction in the number of unsafe abortions and, therefore, in the risk of maternal mortality and maternal illness.

IV. EU law and national law

In the judgment in ***Deutsche Umwelthilfe*** (C-752/18, EU:C:2019:1114), delivered on 19 December 2019, the Court, sitting as the Grand Chamber, ruled for the first time on whether *national courts are empowered, or even obliged, to order the coercive detention of persons in charge of national authorities who persistently refuse to comply with a judicial decision enjoining them to perform their obligations under EU law.*

The reference for a preliminary ruling was made to the Court in a dispute between Deutsche Umwelthilfe, a German environmental protection organisation, and the *Land* of Bavaria concerning the latter's persistent refusal to adopt, pursuant to Directive 2008/50 on ambient air quality, [29] the measures necessary to comply with the limit value set for nitrogen dioxide in the city of Munich. Following a first order in 2012 requiring it to amend its air quality action plan applicable in that city, then a second order in 2016 requiring it, subject to a penalty payment, to comply with its obligations, including by imposing traffic bans in respect of certain diesel vehicles in various urban zones, the *Land* of Bavaria nevertheless refused to obey those injunctions and, consequently, was required by a third order in 2017 to pay a penalty of EUR 4 000, which it did. As the *Land* of Bavaria continued to refuse to comply with those injunctions and publicly stated that it would not comply with its obligations, Deutsche Umwelthilfe brought a new action seeking, first, payment of a new penalty of EUR 4 000, a claim which was upheld by order of 28 January 2018 and, secondly, the coercive detention of the persons at the head of the *Land* of Bavaria (namely its Minister for the Environment and Consumer Protection or, failing that, its Minister-President), a claim which was dismissed by order of the same day. In proceedings brought by the *Land* of Bavaria, the referring court, the Higher Administrative Court of Bavaria, first, upheld payment of the penalty and, secondly, decided to request a preliminary ruling from the Court as to whether coercive detention might be ordered. Since the referring court found that the order to pay penalties was not likely to result in an alteration of the *Land* of Bavaria's conduct, since such penalties are credited as income of the *Land* and therefore do not result in any economic loss, and that the application of a measure of coercive detention was precluded for domestic constitutional reasons, it referred a question

29| Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

to the Court for a preliminary ruling seeking to ascertain, in essence, whether EU law, in particular the right to an effective remedy guaranteed by Article 47 of the Charter, had to be interpreted as empowering, or even obliging, the national courts to adopt such a measure.

The Court held that in circumstances in which a national authority persistently refuses to comply with a judicial decision enjoining it to perform a clear, precise and unconditional obligation flowing from EU law, in particular from Directive 2008/50, it is incumbent upon the competent national court to order the coercive detention of persons at the head of the *Land* provided that two conditions are met. First, domestic law must contain a legal basis for adopting such a measure which is sufficiently accessible, precise and foreseeable in its application. Secondly, the principle of proportionality must be observed.

In that regard, the Court first of all recalled that when Member States implement EU law, the onus is on them to ensure that the right to effective judicial protection is observed, a right which is guaranteed both by Article 47 of the Charter and, in the environmental field, by Article 9(4) of the Aarhus Convention. [30] That right is all the more important because failure to adopt the measures required by Directive 2008/50 would endanger human health. National legislation which results in a situation where the judgment of a court remains ineffective fails to comply with the essential content of that right and deprives it of all useful effect. The Court recalled that in such a situation, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives pursued by those provisions or, failing this, to disapply any provision of national law which is contrary to EU law having direct effect.

However, the Court also explained that compliance with the latter obligation cannot result in the infringement of another fundamental right, the right to liberty, which is guaranteed by Article 6 of the Charter and which coercive detention limits. As the right to effective judicial protection is not absolute and may be restricted, in accordance with Article 52(1) of the Charter, the fundamental rights at issue must be weighed against one another. In order to meet the requirements of that provision, a law empowering a court to deprive a person of his or her liberty must first of all be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness, a matter which is for the referring court to determine. Furthermore, since the ordering of coercive detention entails a deprivation of liberty, recourse may be had, in observance of the requirements stemming from the principle of proportionality, to such an order only where there are no less restrictive measures (such as, in particular, high penalty payments that are repeated after a short time and the payment of which does not ultimately benefit the budget from which they are funded), a matter which is also for the referring court to examine. It is only if it were concluded that the limitation on the right to liberty which would result from a coercive detention order complies with those conditions that EU law would not only authorise, but require, recourse to such a measure. The Court added, however, that an infringement of Directive 2008/50 may be found by the Court in an action for failure to fulfil obligations or give rise to the incurrence of State liability for the resulting loss or damage.

Attention should also be drawn under this heading to the judgment of 3 October 2019, ***Wasserleitungsverband Nördliches Burgenland and Others*** (C-197/18, EU:C:2019:824), on whether natural and legal persons directly concerned by the pollution of groundwaters can rely, before the national courts, on certain provisions of Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources. [31]

30| Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at 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).

31| That judgment is presented in Section XVIII.2 'Protection of waters against pollution caused by nitrates'.

In the field of competition, in the judgment in ***Cogeco Communications*** (C-637/17, EU:C:2019:263), concerning the compatibility with Article 102 TFEU of the Portuguese law on limitation periods applying to non-contractual liability in the context of actions for damages on account of an infringement of competition law, the Court held that that article and the principle of effectiveness precluded national legislation that provided for a limitation period liable to render the exercise of the right to bring actions for compensation based on a final decision establishing an infringement of EU competition rules practically impossible or excessively difficult. [32] Furthermore, in the judgment in ***Otis Gesellschaft and Others*** (C-435/18, EU:C:2019:1069), the Court held that Article 101(1) TFEU produces direct effects in relations between individuals and confers the right to request compensation in particular on any person who has suffered loss caused by a contract or conduct which is liable to restrict or distort competition, where there exists a causal connection between the harm and the infringement of the competition rules. [33]

V. Proceedings of the European Union

Two judgments establishing a failure to fulfil obligations in connection with the transposition of a directive are worthy of mention under this heading, together with a judgment delivered on appeal in an action for non-contractual liability of the European Union. In addition, reference is made to three judgments delivered by the Court in economic, monetary and banking proceedings. [34]

1. General proceedings

1.1. Actions for failure to fulfil obligations

In the judgment in ***Commission* v *Belgium (Article 260(3) TFEU — High-speed networks)*** (C-543/17, EU:C:2019:573), delivered on 8 July 2019, the Court, sitting as the Grand Chamber, *interpreted and applied for the first time Article 260(3) TFEU*. [35] The Court upheld the action for failure to fulfil obligations brought by the Commission against the Kingdom of Belgium and ordered that Member State to pay a penalty of EUR 5 000 per day, from delivery of the judgment, *for failure to transpose fully Directive 2014/61* [36] *on high-speed electronic communications networks and, a fortiori failure to notify the relevant transposing measures to the Commission.*

Member States were required to transpose Directive 2014/61 into national law by 1 January 2016 at the latest and to inform the Commission of the measures taken in that regard.

32| That judgment is presented in Section XI.2 'Article 102 TFEU'.

33| That judgment is presented in Section XI.1 'Article 101 TFEU'.

34| Also of note under this heading is the judgment of 29 July 2019, ***Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*** (C-654/17 P, EU:C:2019:634), concerning State aid, in which the Court confirmed that an order by which the General Court grants an application to intervene may not be the subject of either a main appeal or a cross-appeal. That judgment is presented in Section XI.3 'State aid'.

35| Article 260(3) TFEU allows the Court to impose a financial penalty (lump sum or penalty payment) on the Member State concerned for failure to fulfil its 'obligation to notify measures transposing a directive' to the Commission.

36| Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks (OJ 2014 L 155, p. 1).

On 15 September 2017, the Commission brought an action for failure to fulfil obligations before the Court on the ground that Belgium had failed, within the prescribed period, to transpose fully the directive and to notify the relevant transposing measures. Moreover, it asked the Court to order Belgium to pay a daily penalty from the date of delivery of the judgment for failure to fulfil its obligation to notify the measures transposing that directive. The amount of the penalty payment, initially fixed at EUR 54 639, was reduced to EUR 6 071, in the light of the progress made by Belgium in transposing the directive after the action was brought. The Commission stated that shortcomings persisted solely in the Brussels region.

In the first place, the Court found that on expiry of the period prescribed in the reasoned opinion, as extended by the Commission at Belgium's request, the latter had neither adopted the measures necessary to transpose Directive 2014/61 nor notified such measures to the Commission, with the result that it had failed to fulfil its obligations under that directive.

In the second place, in its examination of the scope of Article 260(3) TFEU, the Court recalled the wording and purpose of that provision, which was introduced by the Treaty of Lisbon not only to give a stronger incentive to Member States to transpose directives within the prescribed periods, but also to simplify and speed up the procedure for imposing pecuniary sanctions on Member States for failures to comply with the obligation to notify national measures transposing a directive.

Thus, the Court adopted an interpretation of that provision serving a dual purpose: on the one hand, to guarantee the prerogatives held by the Commission for the purpose of ensuring the effective application of EU law and protecting the rights of the defence and the procedural position enjoyed by Member States under Article 258 TFEU [37] read in conjunction with Article 260(2) TFEU [38] and, on the other, to put the Court in a position of being able to exercise its judicial function of determining, in a single set of proceedings, whether the Member State in question has fulfilled its notification obligations and, where appropriate, of assessing the seriousness of the failure thus established and imposing the pecuniary penalty which it considers to be most suited to the circumstances of the case.

Accordingly, the Court held that the 'obligation to notify measures transposing a directive', within the meaning of Article 260(3) TFEU, refers to the obligation of Member States to provide sufficiently clear and precise information on the measures transposing a directive. In order to satisfy the obligation of legal certainty and to ensure the transposition of the provisions of that directive in full throughout its territory, Member States are required to state, for each provision of the directive, the national provision or provisions ensuring its transposition. Once notified, it is for the Commission to establish, for the purposes of seeking the pecuniary penalty to be imposed on the Member State in question as laid down in that provision, whether certain transposing measures are clearly lacking or do not cover all of the territory of the Member State in question. However, it is not for the Court, in proceedings brought under Article 260(3) TFEU, to examine whether the national measures notified to the Commission correctly transpose the directive.

37| Article 258 TFEU lays down the procedure governing actions for failure to fulfil obligations brought by the Commission.

38| Article 260(2) TFEU lays down the procedure that applies when a Member State has not complied with a judgment establishing a failure to fulfil obligations. The Court may impose a pecuniary penalty (lump sum or penalty payment).

The Court took the view that that provision was applicable in that case in so far as Belgium had failed in part to fulfil its obligation to notify. Since it had not, at the time of the Court's examination of the facts, either adopted the necessary measures to transpose several provisions of Directive 2014/61 [39] into its domestic law, in respect of the Brussels region, or, a fortiori, notified such transposing measures to the Commission, Belgium had partly persisted in its failure.

Consequently, after finding that the imposition of a penalty payment on Belgium was an appropriate financial means of ensuring that Member State's compliance with its obligations under Directive 2014/61 and the Treaties, the Court — in exercising its discretion — assessed the seriousness and duration of the infringement at issue, in order to determine the amount of the penalty payment. Having carried out that analysis, the Court ordered Belgium to pay to the Commission, from the date of delivery of the judgment and until that Member State had put an end to the infringement found, a daily penalty of EUR 5 000.

In the judgment in ***Commission* v *Ireland (Derrybrien wind farm)*** (C-261/18, EU:C:2019:955), delivered on 12 November 2019, the Court, sitting as the Grand Chamber, *imposed pecuniary penalties on Ireland, on this occasion under Article 260(2) TFEU, for failing to give concrete effect to the judgment of 3 July 2008,* Commission *v* Ireland, [40] *in so far as the Court had held in that judgment that Ireland had infringed Directive 85/337* [41] *as a result of the construction of a wind farm at Derrybrien (Ireland) without a prior environmental impact assessment having been carried out*.

Following the delivery of the 2008 judgment, Ireland had introduced a regularisation procedure whereby it sought to enable the operator of the Derrybrien wind farm to comply with the requirements of Directive 85/337. However, since the wind farm operator had not undergone that procedure nor had that procedure been initiated by the Irish authorities of their own initiative, the Commission brought a second action for failure to fulfil obligations before the Court.

First of all, the Court examined Member States' obligations when a project has been authorised in breach of the obligation to carry out a prior environmental impact assessment under Directive 85/337. The Court pointed out that Member States are required, in accordance with the principle of sincere cooperation, to take all measures necessary to remedy the failure to carry out an environmental impact assessment. They are, in particular, under an obligation to carry out an assessment for regularisation purposes, also after a plant has entered into operation. Such an assessment must take into account not only the future impact of the plant at issue, but also the environmental impact from the time of its completion. The assessment may result in the consents which were granted in breach of the obligation to carry out a prior assessment being amended or withdrawn.

Notwithstanding the legislative reform introducing a regularisation procedure, Ireland had failed to carry out a new environmental impact assessment of the wind farm, thereby failing to have regard to the authority attaching to the 2008 judgment.

Next, the Court rejected the different arguments put forward by Ireland to justify itself. First, Ireland could not rely on national provisions limiting the possibilities of commencing the regularisation procedure introduced in order to ensure that the 2008 judgment was complied with. In that context, the Court pointed out that the national authorities were required to remedy the failure to carry out an impact assessment and that the

39| Namely Article 2(7) to (9) and (11), Article 4(5) and Article 8.

40| Judgment of the Court of 3 July 2008, ***Commission* v *Ireland*** (C-215/06, EU:C:2008:380).

41| Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

obligations stemming from Directive 85/337 also applied to the wind farm's operator, since it was controlled by Ireland. Secondly, although the consents for the construction of the wind farm at Derrybrien had become final, Ireland could not rely on legal certainty and legitimate expectations derived by the wind farm's operator from acquired rights in order to avoid the consequences stemming from the objective finding that there had been a failure to comply with Directive 85/337. In that regard, the Court stated that projects in respect of which the consent can no longer be subject to challenge before the courts cannot be purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment.

In the light of the seriousness and duration of the failure to fulfil obligations, with more than 11 years having elapsed since the 2008 judgment without the measures necessary to comply with that judgment having been adopted, and having regard to Ireland's ability to pay, the Court ordered Ireland to pay the European Commission a lump sum of EUR 5 000 000 as well as a penalty payment of EUR 15 000 per day from the date of delivery of the judgment until the date of compliance with the 2008 judgment.

1.2. Actions for non-contractual liability of the European Union

By its judgment of 10 September 2019, ***HTTS* v *Council*** (C-123/18 P, EU:C:2019:694), the Court of Justice, sitting as the Grand Chamber, *upheld the appeal brought by the company HTTS Hanseatic Trade Trust & Shipping GmbH ('the appellant') against the judgment of the General Court of 13 December 2017,* ***HTTS* v *Council*** (T-692/15, EU:T:2017:890; *'the judgment under appeal'). By that judgment, the General Court had dismissed the claim for compensation in respect of the damage which the appellant considered it had suffered because of its inclusion, by two Council regulations,* [42] *in the lists of persons and entities affected by the measures freezing funds and economic resources directed against Iran ('the lists at issue')*. Unlike the General Court, the Court of Justice held that the Council could not, in order to demonstrate that it had not committed a breach of EU law such as to give rise to non-contractual liability of the European Union, rely on matters that were not taken into account when the appellant was included in the lists at issue.

The appellant is a company incorporated under German law carrying on activities of shipping agents and technical managers of vessels. The proceedings between that company and the Council formed part of a series of cases concerning restrictive measures, adopted in the context of combating nuclear proliferation in Iran, against a shipping company and certain natural or legal persons connected with it, which included the appellant. The appellant's initial inclusion in the lists at issue, in July 2010, was not challenged. By contrast, its second listing, in October 2010, was annulled by the General Court (judgment of 7 December 2011, ***HTTS* v *Council***, T-562/10, EU:T:2011:716). By the judgment under appeal, the General Court, however, dismissed its claim for compensation in respect of the damage resulting from those listings.

The Court of Justice held, in that case, that the judgment under appeal was vitiated by several errors of law. It pointed out, in particular, that the condition relating to the existence of a sufficiently serious breach of a rule of EU law which must be met if the European Union is to incur non-contractual liability requires the striking of a balance — which is particularly important in the field of restrictive measures — between the protection of individuals against unlawful conduct of the institutions and the leeway that must be accorded to the institutions in order not to paralyse action by them. Taking account of those considerations, the Court of Justice stated that in an action for damages, as in other actions, the illegality of an act or illegality of conduct that is capable of giving rise to non-contractual liability of the European Union must be assessed on the basis of the facts and the law as they stood at the time when the act or conduct was adopted. It also held that the

42 | Council Implementing Regulation (EU) No 668/2010 of 26 July 2010 implementing Article 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2010 L 195, p. 25) and Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation No 423/2007 (OJ 2010 L 281, p. 1).

existence of a sufficiently serious breach of a rule of EU law must necessarily be assessed on the basis of the circumstances in which the institution acted on that particular date. It concluded that when disputing the existence of such a breach, the institution concerned can rely only on the matters which it took into account for the purpose of adopting the act concerned.

Consequently, the Court of Justice set aside the judgment of the General Court and left it to the latter to examine whether there was a sufficiently serious breach of a rule of EU law, without consideration being taken of the matters not taken into account by the Council when the appellant was included in the lists at issue, but relied upon in the action for damages.

2. Economic, monetary and banking proceedings

In the judgment in ***Rimšēvičs and ECB* v *Latvia*** (C-202/18 and C-238/18, EU:C:2019:139), delivered on 26 February 2019, the Grand Chamber of the Court *upheld two actions under the second subparagraph of Article 14.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank* ('the Statute of the ESCB and of the ECB'). Those actions, which were the first to be brought under that provision, had been initiated by the ECB and Mr Rimšēvičs against the decision by which the latter, suspected of having sought and accepted a bribe in his capacity as Governor of the Central Bank of Latvia, was suspended from his duties as Governor of that bank by the Latvian Anti-Corruption Office.

First of all, the Republic of Latvia raised the objection that the Court lacked jurisdiction to hear and determine the actions, arguing that the only decisions which may be the subject of such an action are those definitively severing the legal and institutional link between the governor of a national central bank and that bank. In that regard, the Court emphasised the objective of independence of the governors of the national central banks pursued by Article 14.2 of the Statute of the ESCB and of the ECB. If it were possible to decide, without grounds, to relieve the governors of the national central banks from office, their independence and, by extension, that of the ECB itself would be severely undermined. The temporary prohibition on a governor of a national central bank from performing his or her duties is likely to constitute a means of putting pressure on that person. First, such a prohibition may be especially serious for the governor on whom it is imposed where it is not accompanied by a specific end date. Secondly, it is capable, owing to the fact that it is temporary, of providing a form of pressure that is all the more effective where it may be withdrawn at any time depending not only on developments in the investigation, but also on the conduct of the governor concerned. Consequently, the Court declared that it had jurisdiction to hear and determine an action brought against a measure such as the temporary prohibition from performing the duties of governor of a national central bank.

Next, regarding the nature of the action provided for in the second subparagraph of Article 14.2 of the Statute of the ESCB and of the ECB, the Court classified it as an action for annulment of the decision to relieve a governor of a national central bank from office. In that regard, it noted, inter alia, that like the action provided for in Article 263 TFEU, that provided for in the second subparagraph of Article 14.2 of the Statute of the ESCB and of the ECB may be brought by an individual, in that case by the Governor relieved from office, against a decision of which he is the addressee, and that each of those two actions must be brought within the same period, namely two months.

It is true that the second subparagraph of Article 14.2 of that statute derogates from the general distribution of powers between the national courts and the EU judicature as laid down in the Treaties and in particular Article 263 TFEU, as an action under that article may concern only acts of EU law. However, that derogation can be explained by the particular institutional context of the ESCB within which it operates. The ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other,

and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails. Article 14.2 of the Statute of the ESCB and of the ECB reflects the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB and, in particular, of the dual professional role of the governor of a national central bank, who is certainly a national authority but who acts within the framework of the ESCB and sits, where he or she is the governor of a central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB. It is because of this hybrid status and in order to guarantee the functional independence of the governors of the national central banks within the ESCB that, by way of exception, a decision taken by a national authority relieving one of those governors from office may be referred to the Court.

Lastly, regarding the substance of the case, the Court made it clear from the outset that it was not for it to take the place of the national courts having jurisdiction to give a ruling on the criminal responsibility of the governor involved, nor even to interfere with the preliminary criminal investigation being conducted in respect of that person. By contrast, it is for the Court, in the context of the powers conferred on it by the second subparagraph of Article 14.2 of the Statute of the ESCB and of the ECB, to verify that a temporary prohibition on the governor concerned from performing his or her duties is taken only if there are sufficient indications that that governor has engaged in serious misconduct capable of justifying such a measure. In that case, the Court found that in the light of the evidence produced by the Republic of Latvia, the latter had not established that the relieving of Mr Rimšēvičs from office was based on such indications and, accordingly, annulled the decision at issue.

In the judgment of 5 November 2019 in ***ECB and Others* v *Trasta Komercbanka and Others*** (Joined Cases C-633/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923), the Court of Justice, sitting as the Grand Chamber, *set aside an order of the General Court* [43] *whereby that court had, first, held that since the appellant company was no longer represented by a lawyer having a properly conferred authority to act for the purposes of the Rules of Procedure,* [44] *there was no need to adjudicate on its action for annulment of the decision of the European Central Bank (ECB) to withdraw its authorisation* [45] and, secondly, partially rejected the plea of inadmissibility raised by the ECB, in so far as it concerned the action brought by the other appellants, namely several shareholders of that company.

The appellant company, Trasta Komercbanka, is a Latvian credit institution providing financial services by virtue of an authorisation granted to it by the Financial and Capital Market Commission (FCMC). After receiving a proposal from the FCMC to withdraw the appellant company's authorisation and after obtaining observations from that company, the ECB adopted the decision at issue on 3 March 2016. [46] On 14 March 2016, at the request of the FCMC, the Latvian court having jurisdiction adopted a decision ordering that liquidation proceedings be opened in respect of the appellant company and appointed a liquidator. By a judgment not amenable to appeal, that court also rejected the credit institution's request that the powers of representation of its decision-making body be maintained as regards the lodging of a request for review with the Administrative

43| Order of 12 September 2017, ***Fursin and Others* v *ECB*** (T-247/16, not published, EU:T:2017:623).

44| Article 51(3) of the Rules of Procedure of the General Court provides that lawyers are required, where the party they represent is a legal person governed by private law, to lodge at the Registry of the General Court an authority to act given by that person.

45| Decision ECB/SSM/2016 — 529900WIP0INFDAWTJ81/1 WOANCA-2016-0005 of the European Central Bank of 3 March 2016 withdrawing the authorisation granted to Trasta Komercbanka. That authorisation consists of a banking licence. The term 'authorisation' is used in 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).

46| The decision at issue was adopted on the basis of Article 4(1)(a) and Article 14(5) of Regulation No 1024/2013.

Board of Review of the ECB [47] and the bringing of an action against the decision at issue before the EU judicature. On 17 March 2016, a notice of the opening of liquidation proceedings in respect of the appellant company and the replacement of the management of the credit institution by the liquidator was published in the *Official Gazette of the Republic of Latvia*. On the same date, the liquidator adopted a decision revoking all the powers of attorney which had been issued by the appellant company. On 21 March 2016, a notary published in the Official Gazette a notice of revocation of all powers of attorney adopted before 17 March 2016. Following the rejection of its request for review of the decision at issue, the appellant company and several of its shareholders brought an action before the General Court on 13 May 2016 for annulment of the decision at issue. The ECB raised a plea of inadmissibility in respect of that action.

Regarding the appeal in Case C-669/17 P, in so far as it was lodged by the appellant company, the Court of Justice held that the General Court had erred in law in ruling that the application of Latvian law did not lead to an infringement of that company's right to effective judicial protection and in inferring that the lawyer who had brought the action before it on behalf of the appellant company no longer had a properly conferred authority to act, on behalf of that company, from a person qualified to confer it, given that the power of attorney initially issued to him had been revoked by the liquidator. In that regard, the Court of Justice emphasised the links between the FCMC and the liquidator, characterised by a relationship of trust, as well as the role played by the FCMC in the adoption of the decision at issue. Those elements, coupled with the power of the FCMC to request the discharge of the liquidator if it no longer has confidence in that liquidator, result in the liquidator having a conflict of interests, and the responsibility for any revocation of the power of attorney issued to the appellant company's lawyer for the purpose of bringing an action before the EU judicature against that decision cannot be given to that liquidator without infringing the company's right to effective judicial protection within the meaning of Article 47 of the Charter. As the appeal lodged by the appellant company was both admissible and well founded, the Court of Justice decided to refer the case back to the General Court so that it may give a ruling on the substance of the action brought by Trasta Komercbanka.

With regard to the appeals in Cases C-663/17 P and C-665/17 P, lodged by the ECB and the Commission respectively, the Court of Justice held that the General Court erred in law in finding that the shareholders of the appellant company were directly concerned by the decision at issue. First, by favouring an incorrect criterion, based on the 'intensity' of the effects of the decision at issue, the General Court did not, as it was required to do, determine whether that decision might have a direct effect on the legal situation of the shareholders of the appellant company. Secondly, the General Court was wrong to take account of the non-legal, economic effects of the decision at issue on the situation of the shareholders of that company. The shareholders' right to receive dividends and to participate in the management of the appellant company, as a company constituted under Latvian law, was not directly affected by the decision at issue, as the liquidation of Trasta Komercbanka resulted from a judicial decision taken on the basis of a provision of Latvian law not provided for in EU legislation. The Court of Justice therefore took the view that, as the shareholders of that company were not directly concerned by the decision at issue for the purposes of the fourth paragraph of Article 263 TFEU, it was necessary to uphold the ECB's plea of inadmissibility in so far as it related to the action brought by those shareholders and, consequently, to dismiss that action as inadmissible.

In the judgment in ***Iccrea Banca*** (C-414/18, EU:C:2019:1036), delivered on 3 December 2019, the Court, sitting as the Grand Chamber, emphasised the *exclusive jurisdiction of the EU judicature to assess the legality of the decisions of the Single Resolution Board (SRB)* and acts adopted by a national resolution authority that are preparatory to such decisions, in relation to contributions payable by a bank heading a network of credit institutions to the Single Resolution Fund (SRF). Furthermore, the Court held that a national court cannot annul a national decision notifying a decision of the SRB on the ground of an error having been committed

47| That board is provided for in Article 24 of Regulation No 1024/2013.

by the latter. In addition, the Court held that the liabilities between entities in a grouping of cooperative credit banks, such as that formed by Iccrea Banca with the cooperative banks to which it supplies various services but which it does not control, are not excluded from the calculation of contributions to national resolution funds.

Iccrea Banca, a bank which heads a network of credit institutions, a so-called 'second-tier bank', provides various services to cooperative credit banks in Italy and acts as a central funder for the cooperative credit system. In the latter respect, it supplies, in particular, to those banks a range of services for structured access to funding available from the ECB and on the market. By means of a number of successive decisions, the Bank of Italy sought from Iccrea Banca payment of ordinary, extraordinary and additional contributions to the Italian National Resolution Fund for 2015 and 2016. In addition, the Bank of Italy sought from it payment of an *ex ante* contribution to the SRF for 2016. That contribution had been determined by decisions of the SRB on the basis of information sent to it by the Bank of Italy.

Iccrea Banca challenged those decisions of the Bank of Italy before the Regional Administrative Court for Lazio (Italy) disputing the method of calculation of the contributions sought. Iccrea Banca claimed, inter alia, that the Bank of Italy was the source of an error in the calculation by the SRB of the *ex ante* contribution to the SRF in that it had not, when transferring information to the SRB, explained the special nature of the integrated system in which Iccrea Banca operated. The Regional Administrative Court for Lazio asked the Court to interpret the relevant EU legislation.

As regards, in the first place, the actions of the Bank of Italy in the stage of the procedure preceding the adoption of the decisions of the SRB on the calculation of *ex ante* contributions to the SRF, the Court recalled, first, that the Court of Justice of the European Union has exclusive jurisdiction to review the legality of acts adopted by the EU bodies, offices or agencies, one of which is the SRB. Secondly, the Court stated that as regards the calculation of *ex ante* contributions to the SRF, the SRB exclusively exercises the final decision-making power and that the role of the national resolution authorities is confined to providing operational support to the SRB. Consequently, the EU judicature alone has jurisdiction to determine, when reviewing the legality of a decision of the SRB setting the amount of the individual *ex ante* contribution of an institution to the SRF, whether an act adopted by a national resolution authority that is preparatory to such a decision is vitiated by defects capable of affecting that decision of the SRB, and no national court can review that national act. That approach was guided by the findings in the judgment of 19 December 2018, ***Berlusconi and Fininvest*** (C-219/17, EU:C:2018:1023).

EU law accordingly precludes the Regional Administrative Court for Lazio from giving a ruling on the legality of the actions of the Bank of Italy in the stage of the procedure preceding the adoption of the decisions of the SRB on the calculation of *ex ante* contributions to the SRF for 2016.

In the second place, as regards the stage following the adoption of decisions of the SRB, notified to Iccrea Banca by the Bank of Italy, the Court held that the national resolution authorities do not have the power to re-examine the calculations made by the SRB in order to alter the amount of those contributions and they cannot therefore, after the adoption of a decision of the SRB, review, to that end, the extent to which a given institution is exposed to risk. Likewise, according to the Court, if a national court were to be able to annul the notification, by a national resolution authority, of a decision of the SRB on the calculation of the *ex ante* contribution of an institution to the SRF, on the ground of an error in the evaluation of the exposure to risk of that institution on which that calculation is based, that would call into question a finding made by the SRB and would ultimately impede the execution of that decision of the SRB. Furthermore, the Court held that since decisions of the SRB are of direct and individual concern to Iccrea Banca, but given that it did not bring

or it brought out of time [48] an action for the annulment of those decisions before the General Court, Iccrea Banca cannot claim, as an ancillary matter in an action brought against national measures before a national court, that those decisions are invalid.

In the light of those considerations with respect to the jurisdiction of the Regional Administrative Court for Lazio, the Court held that that national court could refer to it a question for a preliminary ruling only in relation to the decisions of the Bank of Italy claiming from Iccrea Banca payment of contributions to the Italian National Resolution Fund.

In the third place, as regards those decisions, the Court interpreted Article 103(2) of Directive 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms [49] and Article 5(1)(a) and (f) of Delegated Regulation 2015/63 with regard to *ex ante* contributions to resolution financing arrangements. [50] It held, in that respect, that the liabilities that arise from transactions between a second-tier bank and the members of a grouping comprising it as well as the cooperative banks to which it supplies various services but which it does not control, and that do not match loans granted on a non-competitive, not-for-profit basis, in order to promote the public policy objectives of central or regional governments in a Member State, are not excluded from the calculation of the contributions to a national resolution fund.

VI. Agriculture and fisheries

Three judgments merit special attention under this heading: [51] the first concerns the marketing arrangements for beef certified as 'halal' from animals killed without prior stunning; the second deals with the common organisation of the markets in agricultural products; and the third relates to the obligations of Member States when handling grant applications under the European Maritime and Fisheries Fund (EMFF).

In the judgment in ***Œuvre d'assistance aux bêtes d'abattoirs*** (C-497/17, EU:C:2019:137), delivered on 26 February 2019, the Grand Chamber of the Court examined whether *the organic production logo of the European Union provided for in Regulations No 834/2007* [52] *and No 889/2008* [53] *may be placed on products derived from animals which have been slaughtered in accordance with religious rites without first being stunned*. That issue arose in the context of the French authorities' refusal to grant a request from the French association Œuvre d'assistance

48| See the order of the General Court of 19 November 2018, ***Iccrea Banca* v *Commission and SRB*** (T-494/17, EU:T:2018:804).

49| Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

50| Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

51| Reference should also be made to a fourth judgment, delivered on 1 October 2019, ***Blaise and Others*** (C-616/17, EU:C:2019:800), in which the Court ruled on EU law governing the placing on the market of plant protection products. That judgment is presented in Section XVIII.1 'Precautionary principle'.

52| Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1).

53| Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Regulation (EC) No 834/2007 (OJ 2008 L 250, p. 1), as amended by Regulation (EU) No 271/2010 of 24 March 2010 (OJ 2010 L 84, p. 19).

aux bêtes d'abattoirs seeking, inter alia, a ban on the advertising and marketing of certain beef products certified as 'halal' and showing the indication 'organic farming'. The association claimed that that indication could not be placed on meat from animals slaughtered without being stunned, as that slaughtering method does not comply with the 'high animal welfare standards' established by Regulation No 834/2007.

In that context, the Court held that Regulation No 834/2007, in particular Article 3 and Article 14(1)(b)(viii) thereof, read in the light of Article 13 TFEU, must be interpreted as not authorising the placing of the organic production logo of the European Union on products derived from animals which have been slaughtered in accordance with religious rites without first being stunned, where such slaughter is conducted in accordance with the requirements laid down by Regulation No 1099/2009, [54] in particular Article 4(4) thereof.

It follows from recitals 1 and 10 of Regulation No 834/2007 and from the provisions of that regulation referred to above that the organic method of production must be characterised by the observation of enhanced standards with regard to animal welfare, including at the time of slaughter. Moreover, in view of the objective of Regulation No 834/2007 to maintain and justify consumer confidence in products labelled as organic, it is important to ensure that consumers are reassured that products bearing the organic production logo of the European Union have actually been obtained in observance of the highest standards, in particular in the area of animal welfare.

Although no provision of Regulation No 834/2007 or Regulation No 889/2008 expressly defines the method or methods for the slaughtering of animals that would minimise animal suffering, Regulation No 834/2007 cannot be read without reference to Regulation No 1099/2009, which primarily pursues the objective of protecting animal welfare at the time of killing, in accordance with Article 13 TFEU.

In that regard, Article 4(1) of Regulation No 1099/2009, read in conjunction with recital 20 of that regulation, lays down the principle that an animal should be stunned prior to its death and goes so far as to establish this as an obligation. While it is true that Article 4(4) of Regulation No 1099/2009, read in the light of recital 18 thereof, permits the practice of ritual slaughter as part of which an animal may be killed without first being stunned, that form of slaughter, which is authorised only by way of derogation in the European Union and solely in order to ensure observance of the freedom of religion, is insufficient to remove all of the animal's pain, distress and suffering as effectively as slaughter with pre-stunning. Those particular methods of slaughter prescribed by religious rites are not tantamount, in terms of ensuring a high level of animal welfare at the time of killing, to the method of slaughter which is, in principle, required by Article 4(1) of that regulation. Therefore, the placing of the organic production logo of the European Union on products derived from animals that have been slaughtered without being stunned is not authorised.

By its judgment of 13 November 2019, ***Lietuvos Respublikos Seimo narių grupė*** (C-2/18, EU:C:2019:962), the Court held that *Regulation No 1308/2013 establishing a common organisation of the markets in agricultural products* [55] *does not preclude rules of national law which, in order to combat unfair commercial practices, prohibit buyers of raw milk from paying different purchase prices to producers who must be regarded as belonging to the same group on the basis of the daily quantity of raw milk sold that is of identical composition and quality and delivered via the same method*, in so far as those rules are appropriate for ensuring attainment of the objective pursued and do not go beyond what is necessary to achieve that objective. The Court also stated that Member

54| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1).

55| Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671), as amended by Regulation (EU) 2017/2393 of the European Parliament and of the Council of 13 December 2017 (OJ 2017 L 350, p. 15).

States, similarly in order to combat unfair commercial practices, may adopt rules of national law which prohibit a buyer of raw milk from reducing, without justification, the price agreed with the producer and which make all price reductions of more than 3% subject to authorisation by the competent national authority.

The dispute in the main proceedings forms part of an action brought by a group of Lithuanian parliamentarians for a review of the constitutionality of the law prohibiting unfair practices by Lithuanian operators when buying and selling raw milk. In addition to the provisions concerning the two prohibitions referred to above, that law provides that sellers of raw milk are to be divided into 10 groups formed according to the daily quantity of raw milk sold. The law also requires the operators concerned to draw up a written contract when purchasing raw milk, as provided for in Article 148(1) of Regulation No 1308/2013. All of those measures were primarily intended to combat unfair commercial practices by buyers of raw milk vis-à-vis the party considered to be the weaker party, namely milk producers, in the light of characteristics specific to the sector. The referring court was uncertain whether the two prohibitions referred to above complied with the principle of freedom to negotiate laid down in Article 148(4) of Regulation No 1308/2013.

The Court pointed out, first of all, that in accordance with Article 4(2)(d) TFEU, the common agricultural policy is a competence shared between the European Union and Member States, and the latter therefore have legislative powers which allow them to exercise their competence to the extent to which the European Union has not exercised its own. In that regard, it made clear that the establishment of a common market organisation does not prevent Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that organisation, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned. The Court stated, in that respect, that by adopting Regulation No 1308/2013 and, in particular, Article 148 thereof, the European Union did not exhaustively exercise its competence in the area of contractual relations between the parties to a contract for the delivery of raw milk and that the references to certain unfair commercial practices in that regulation do not establish that the objective of combating unfair practices is covered by that regulation. In addition, for the Court, interpreting that article as prohibiting Member States from adopting any measure to combat unfair practices in the milk sector would run counter to the objective pursued by Regulation No 1308/2013, which is to ensure the viable development of production and a resulting fair standard of living for dairy farmers, in accordance with the objectives of the common agricultural policy, and to the objective of ensuring the maintenance of effective competition in the markets in agricultural products. The Court thus recognised the residual competence of Member States to adopt measures to combat unfair commercial practices which have the effect of restricting the process of free negotiation of prices, even if those measures affect the principle of free negotiation of the price payable for the delivery of raw milk laid down in Article 148 of Regulation No 1308/2013.

However, the Court stated that such measures must be proportionate to the objective pursued. In that case, it held that the Lithuanian rules at issue appear appropriate for preventing the risk that the party considered to be the weaker contracting party — namely milk producers — may be compelled to accept unjustified price reductions, and, thus, for combating potential unfair commercial practices. Taking into account the objectives of the common agricultural policy and the proper functioning of the common organisation of the market concerned, those rules do not go beyond what is necessary to achieve the objectives which they pursue, this, however, being a matter for the referring court to determine.

In the judgment in ***Coöperatieve Producentenorganisatie en Beheersgroep Texel*** (C-386/18, EU:C:2019:1122), delivered on 19 December 2019, the Court clarified *the obligations of a Member State when handling a grant application under the European Maritime and Fisheries Fund (EMFF)* from a producer organisation for fishery products ('producer organisation') submitted before the Member State in question had made provision for the possibility for such an application to be processed and after the preparation and implementation by that organisation of its production and marketing plan.

In the case at hand, PO Texel, a producer organisation, filed a grant application with the Netherlands authorities on 19 May 2015 in order to be eligible for the financial support provided for under the EMFF for expenditure incurred in the preparation and implementation of its 2014 production and marketing plan. Even though the Commission had approved, on 25 February 2015, the operational programme for the period from 1 January 2014 to 31 December 2020 submitted by the Kingdom of the Netherlands, it was not until 25 August 2016 that the latter made provision for the possibility of submitting a grant application. PO Texel's application was therefore dismissed on the grounds that, at the time the grant application was filed, the Kingdom of the Netherlands had not yet provided for the possibility for such an application to be submitted and that, moreover, it was only after it had implemented its plan that PO Texel submitted the application. Hearing the case, the Netherlands Administrative Court of Appeal for Trade and Industry requested a ruling from the Court on the obligations of Member States when handling such a grant application.

First, the Court drew attention to the need to provide producer organisations with the financial support necessary to allow them to play a more meaningful role in the achievement of the objectives pursued by the most recent reform in the area of the common fisheries policy, which took effect on 1 January 2014. [56] The Court then held that in setting out, in mandatory terms, in Article 66(1) of Regulation No 508/2014 [57] ('the EMFF Regulation') that the EMFF is to 'support' the preparation and implementation of production and marketing plans, the EU legislature intended to impose an obligation on Member States to take the measures necessary to ensure that producer organisations can benefit from EMFF funding both for the preparation and for the implementation of production and marketing plans. In order to fulfil that obligation, Member States are required to provide in their internal legal orders that producer organisations may submit applications for EMFF grants and to adopt implementing measures as regards the eligibility of expenditure and, in particular, the criteria relating to the starting date of eligibility of such expenditure and the method for calculating the amount to be granted to each of those organisations.

In view of the fact that it was only on 25 August 2016 that the Kingdom of the Netherlands provided in its internal legal order for such a possibility, the Court considered that the inertia shown by the Netherlands authorities could not fall within the margin of discretion enjoyed by Member States in the implementation of their respective operational programmes. Accordingly, the Court held that Article 66(1) of the EMFF Regulation must be interpreted as precluding a Member State from refusing to act on a grant application from a producer organisation in respect of the expenditure it has incurred in preparing and implementing a production and marketing plan, on the ground that, at the date on which it submitted that application, that State had not yet provided, in its internal legal order, for the possibility for such an application to be handled.

Secondly, as regards the question whether Article 66(1) of the EMFF Regulation directly creates for producer organisations a right to financial support, the Court recalled that a provision of an EU regulation is capable of giving rise to rights of which parties may avail themselves in a court of law only if it is clear, precise and unconditional. In view of the conditional nature of Article 66 of the EMFF Regulation, however, that provision must be interpreted as not directly creating a right to financial support under the EMFF.

56| The EU legislature highlighted that need in recital 7 of Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 (OJ 2013 L 354, p. 1).

57| Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council (OJ 2014 L 149, p. 1).

Thirdly, as regards the interpretation of Article 65(6) of Regulation No 1303/2013 [58] ('the CSC Regulation'), providing for the impossibility of receiving financial support where an operation has been fully implemented before the funding application has been submitted to the managing authority, the Court pointed out that the preparation and implementation of production and marketing plans must not be regarded as a series of isolated actions implemented separately, but as a single continuous action with continuous operational costs. Therefore, the preparation and implementation of such a plan cannot be regarded as being 'fully implemented' before the end of the programming period, occurring on 31 December 2020. Accordingly, the Court held that Article 65(6) of the CSC Regulation must be interpreted as not precluding the issuance of a grant under the EMFF for the preparation and implementation of a production and marketing plan where the grant application has been submitted after the preparation and implementation of such a plan.

VII. Freedom of movement

1. Free movement of goods

In the judgment in ***Austria* v *Germany*** (C-591/17, EU:C:2019:504), delivered on 18 June 2019, the Grand Chamber of the Court, in an action for failure to fulfil obligations brought by the Republic of Austria under Article 259 TFEU, found *that the Federal Republic of Germany had infringed Articles 18, 34, 56 and 92 TFEU resulting from the introduction of an infrastructure use charge for passenger vehicles and the relief, for an amount at least equivalent to that charge, from motor vehicle tax for the owners of vehicles registered in Germany*. In support of its action, the Republic of Austria relied on four grounds of complaint. The first and second complaints alleged infringement of Article 18 TFEU resulting, on the one hand, from the combined effect of the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany, and, on the other, from the structuring and application of the infrastructure use charge. The third complaint alleged infringement of Articles 34 and 56 TFEU by the measures criticised within the first and second complaints, taken as a whole. The fourth complaint alleged infringement of Article 92 TFEU arising from the combined effect of the infrastructure use charge and the relief from motor vehicle tax for vehicles registered in Germany.

As regards the first complaint, alleging infringement of Article 18 TFEU resulting from the combined effect of the national measures at issue, the Court, having found a link — from both a temporal and a substantive point of view — between the national measures at issue justifying their joint assessment with regard to EU law, first found that there was a difference in treatment on grounds of nationality. In that regard, the Court observed that, admittedly, with respect to the collection of the charge at issue, all the users of German motorways are subject to the infrastructure use charge, irrespective of where their vehicles are registered. However, the owners of vehicles registered in Germany qualify for relief from motor vehicle tax in an amount that is at least equivalent to the amount of the charge that they have had to pay, so that the economic burden of that charge rests, de facto, only on the owners and drivers of vehicles registered in a Member State other than Germany. It is thus clear that, because of the combination of the national measures at issue, the treatment of the latter, who make use of German motorways, is less favourable than that of the owners of vehicles

58| Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

registered in Germany, with regard to the use of those motorways, notwithstanding that they are in comparable situations with respect to that use. According to the Court, that difference has the same outcome as a difference in treatment based on nationality.

The Court recalled that when they establish taxes on motor vehicles, Member States must have due regard for, inter alia, the principle of equal treatment, so that the arrangements made for the imposition of those taxes do not constitute a means of discrimination.

It is, admittedly, open to Member States, by virtue of their freedom of choice to define the means of financing their public infrastructure, to alter the system for the financing of their road infrastructure, provided that any such alteration complies with EU law, including the principle of non-discrimination enshrined in the first paragraph of Article 18 TFEU. However, the Court found that the mechanism for providing compensation by means of the relief at issue is discriminatory with respect to owners and drivers of vehicles registered in Member States other than Germany, since the Federal Republic of Germany was unable to establish that that mechanism corresponds to the objective, declared by that Member State, of moving from a system of financing infrastructure by means of taxation to a system of financing by all users, the consequence of the reduction in motor vehicle tax introduced by that Member State being, in practice, the grant of relief from the infrastructure use charge to the owners of vehicles registered in Germany.

With respect to the second complaint, alleging infringement of Article 18 TFEU resulting from the structuring and application of the infrastructure use charge, the Court observed that the fact that the constituent elements of certain offences, such as the incomplete payment of the charge or failure to provide correct information, can be imputed only to the owners and drivers of vehicles registered in Member States other than Germany, does not support the Republic of Austria's claim that those provisions principally affect those owners and drivers. The Court also found that the objective of ensuring the payment of the fines imposed on offenders using a vehicle registered in a Member State other than Germany, pursued by the possibility of requiring them to provide a security, justifies the consequent difference in treatment that arises between those offenders and offenders using a vehicle registered in Germany, and that that measure is proportionate with respect to that objective.

As regards the third complaint, alleging infringement of Articles 34 and 56 TFEU, the Court found that the national measures at issue are liable to restrict access to the German market of goods from other Member States. The infrastructure use charge to which, in reality, only the vehicles that carry those goods are subject is liable to increase the costs of transport and, as a consequence, the price of those goods, thereby affecting their competitiveness.

The Court also observed that the national measures at issue are liable to restrict access to the German market of service providers and service recipients from a Member State other than Germany. The infrastructure use charge is liable, because of the relief from motor vehicle tax that forms part of the national measures at issue, either to increase the cost of services supplied in Germany by those service providers, or to increase the cost for those service recipients inherent in travelling into that Member State in order to be supplied with a service there.

Lastly, with respect to the fourth complaint, alleging infringement of Article 92 TFEU, the Court stated that by offsetting in its entirety the new tax burden constituted by the infrastructure use charge, payable by all carriers, by means of a relief from motor vehicle tax in an amount at least equivalent to that of the charge paid — a relief to the benefit of German carriers from which foreign carriers are excluded — the effect of the national measures at issue is to alter, unfavourably, the situation of foreign carriers in respect of that of German carriers. The national measures at issue were therefore found to be contrary to Article 92 TFEU.

Mention should also be made under this heading of the judgment of 18 September 2019, ***VIPA*** (C-222/18, EU:C:2019:751), in which the Court ruled that a Member State may prohibit a pharmacy from dispensing prescription-only medicinal products on the basis of an order form issued by a healthcare professional authorised to prescribe medicinal products and practising in another Member State, where those order forms do not include the name of the patient concerned. [59]

2. Free movement of workers

In the judgment in ***Tarola*** (C-483/17, EU:C:2019:309), delivered on 11 April 2019, the Court, interpreting Directive 2004/38 on the right of citizens of the Union to move and reside within the territory of the Member States, [60] held that a national of a Member State who, having exercised his or her right to free movement, acquired the status of worker in another Member State on account of the activity he or she pursued there for a period of two weeks, otherwise than under a fixed-term employment contract, before becoming involuntarily unemployed, retains the status of worker for a further period of no less than six months. However, he or she must have registered as a jobseeker with the relevant employment office.

The dispute in the main proceedings concerned a Romanian national who had worked in Ireland on several occasions for short periods, including for two weeks in July 2014. He subsequently submitted to the Minister for Social Protection an application for jobseeker's allowance. The Minister refused that application, in essence, on the ground that the person concerned had not been able to demonstrate that his habitual residence was in Ireland, stating that his short period of work in July 2014 was not sufficient to call that finding into question. The person concerned argued before the Irish courts that, under Directive 2004/38, he had a right to reside in Ireland as a worker for the period of six months after the end of his occupational activity in July 2014.

That directive provides [61] that all citizens of the Union have the right of residence for a period of longer than three months on the territory of a Member State other than that of which they are a national, provided that they have the status of worker in the host Member State. In addition, it guarantees that all citizens of the Union in a position of temporary inactivity retain their status of worker and, consequently, their right to reside in the host Member State, in certain circumstances, including when they become involuntarily unemployed. The appellant in the main proceedings relied, specifically, on a provision of that directive which provides for the retention of the status of worker 'after having become involuntarily unemployed during the first twelve months'. [62]

The Court provided clarification on that provision, stating that it applies when a citizen of the Union is unemployed for reasons beyond his or her control before having been able to complete one year of activity. That is the case, inter alia, in all situations in which a worker has been obliged to stop working in the host

59| That judgment is presented in Section XVI 'Public health'.

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

61| Article 7(1)(a) of Directive 2004/38.

62| Article 7(3)(c) of Directive 2004/38.

Member State before one year has elapsed, regardless of the nature of the activity or the type of employment contract entered into for that purpose, that is to say, regardless of whether that person entered into a fixed-term contract of more than a year, an indefinite contract or any other type of contract.

Furthermore, the retention of the status of worker pursuant to that provision presupposes, first, that the citizen concerned, before his or her period of involuntary unemployment, did actually have the status of worker and, secondly, that that citizen has registered as a jobseeker with the relevant employment office. In addition, the citizen retains the status of worker only for a period of time which the host Member State may determine, provided it is no less than six months.

Lastly, the Court noted that, under Directive 2004/38, [63] all citizens of the Union residing in the territory of the host Member State enjoy equal treatment with the nationals of that Member State within the scope of the Treaty on the Functioning of the European Union. Accordingly, where national law excludes from the entitlement to social benefits persons who have worked only for a short period of time, that exclusion applies in the same way to workers from other Member States. As regards the case in the main proceedings, the Court entrusted the referring court with the task of determining whether, under national law and in accordance with the principle of equal treatment, the appellant in the main proceedings was entitled to the jobseeker's allowance he claimed.

In the judgment in ***Krah*** (C-703/17, EU:C:2019:850), delivered on 10 October 2019, the Court held that *rules of a university of a Member State which, for the purposes of grading the salaries of its postdoctoral senior lecturers, limit the account to be taken of previous periods of equivalent professional service completed by those lecturers in another Member State, constitute an obstacle to the free movement of workers, as guaranteed by Article 45 TFEU*. However, Article 45 TFEU and Article 7(1) of Regulation No 492/2011 on freedom of movement for workers [64] do not preclude such rules if the service completed in that other Member State was not equivalent, but merely beneficial to the performance of the duties of postdoctoral senior lecturer at the university in question.

In the case pending before the referring court, a German national, who holds a doctorate in history, worked for five years in a teaching post at the University of Munich. From the end of 2000, she worked at the University of Vienna, first of all in a teaching post, then as a senior lecturer and, from 1 October 2010, as a postdoctoral senior lecturer. By decision of 8 November 2011, the University of Vienna decided, for the purposes of establishing the salary grading for postdoctoral senior lecturers, to take into account a maximum of four years of previous periods of relevant professional service, without differentiating between the periods completed in other universities in Austria and those completed abroad. That four-year limit did not, however, apply to professional experience gained at the University of Vienna as a postdoctoral senior lecturer. Pursuant to that decision, the applicant's salary grading was established on the basis of four years of previous professional experience.

In response to the question concerning the compatibility of the decision of 8 November 2011 with the principle of non-discrimination on grounds of nationality, the Court found, first of all, that that decision does not constitute discrimination based directly on nationality or indirect discrimination in respect of workers who are nationals of other Member States. However, the Court took the view that it constitutes an obstacle to the free movement of workers, guaranteed by Article 45(1) TFEU, in so far as it is liable to render the exercise of that freedom less attractive.

63| Article 24(1) of Directive 2004/38.

64| Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1). Article 7(1) of that regulation constitutes the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU in the specific field of conditions of employment and work.

In that regard, the Court noted, as a preliminary point, that the decision of 8 November 2011 took into account a maximum of four years of previous periods of relevant professional service. That definition covered not only previous professional service that is equivalent or even identical to the performance of the duties of postdoctoral senior lecturers at the University of Vienna, but also any other type of professional service that is merely beneficial to the performance of those duties.

The Court ruled that limiting the taking into account of previous equivalent professional service to four years constitutes an obstacle to free circulation. That limitation is liable to deter postdoctoral senior lecturers who have accrued equivalent professional experience exceeding that period to leave their Member State of origin and to apply for such a position at the University of Vienna. Such senior lecturers would be subject to less advantageous salary conditions than those applicable to postdoctoral senior lecturers who have performed the same duties during periods of service of the same duration at the University of Vienna.

However, as regards the failure to take into account all of the experience which is merely beneficial, the Court found that there was no obstacle to the free movement of workers, since such a failure cannot produce effects that deter free movement.

As regards, finally, justification for the obstacle to free movement resulting from the taking into account, in part, of equivalent professional experience, the Court recalled that rewarding experience acquired which enables workers to improve the performance of their duties constitutes a legitimate objective of pay policy. Nevertheless, in the light of the specific circumstances of the case in the main proceedings, the decision of 8 November 2011 did not appear appropriate to ensure achievement of that objective, with the result that the Court found that it had infringed Article 45 TFEU.

In the judgment in ***Generálny riaditeľ Sociálnej poisťovne Bratislava*** (C-447/18, EU:C:2019:1098), delivered on 18 December 2019, the Court held that *Article 7(2) of Regulation No 492/2011 on freedom of movement for workers, which provides that a worker who is a national of one Member State is to enjoy, in the territory of another Member State, the same social advantages as national workers*, precludes legislation of a Member State which makes receipt of an additional benefit paid to certain high-level sportspersons who have represented that Member State, or its legal predecessors, in international sporting competitions conditional upon the person applying for the benefit having the nationality of that Member State.

In that case, a Czech national (having chosen that nationality upon the dissolution of the Czech and Slovak Federative Republic) residing in the territory which is now Slovakia, who had obtained gold and silver medals in the Ice Hockey European and World Championships, respectively, as a member of the national team of the Czechoslovak Socialist Republic, was refused an additional benefit introduced for certain high-level sportspersons who had represented Slovakia, because he did not have Slovak nationality. In addition, at the time of the accession of the Slovak Republic and the Czech Republic to the European Union, the person concerned was employed in a primary school and continued in that post following the accession.

First of all, the Court found that the additional benefit in question falls outside the scope of Regulation No 883/2004 on the coordination of social security systems. [65] According to the Court, the additional benefit is not covered by the 'old-age benefit' referred to in Article 3(1) of that regulation, which determines the branches of social security to which that regulation applies. The Court noted, in that regard, that the essential purpose of the additional benefit is to compensate its recipients for the feats they have accomplished while representing their country in the field of sport, which accounts for the fact that, first, that benefit is financed directly by the State, not using the national social security sources of financing and regardless of the

65| Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrigendum OJ 2004 L 200, p. 1).

contributions paid by its recipients and, secondly, it is paid only to a very limited number of sportspersons. It also added that payment of the additional benefit is not conditional upon the right of the recipient to receive a retirement pension, but only upon an application to that effect being made by that recipient.

Next, having explained that the worker concerned, without having moved from his place of residence, found himself, because of the accession to the European Union of the State of which he is a national and the State in whose territory he is resident, in the same situation as a migrant worker, the Court held that the additional benefit at issue in that case is covered by the concept of a 'social advantage' for the purposes of Article 7(2) of Regulation No 492/2011. Against that background, it found that the possibility of a migrant worker being compensated in the same way as workers who are nationals of the host Member State for exceptional sporting results which he or she has obtained while representing that Member State or its legal predecessors may contribute to the integration of that worker into that Member State and thus to achieving the objective of freedom of movement for workers. The Court emphasised that the additional benefit at issue in the main proceedings has the effect not only of providing its recipients with financial security intended, inter alia, to compensate for the fact that they were unable to fully integrate into the labour market during the years dedicated to practising a sport at a high level, but also, chiefly, of conferring on those recipients a particular level of social prestige because of the sporting results which they obtained in the context of that representation.

Consequently, the Court held that a Member State that grants such a benefit to its national workers cannot refuse to grant it to workers who are nationals of other Member States without discriminating on the basis of nationality.

3. Freedom of establishment

In its judgments in ***Memira Holding*** (C-607/17, EU:C:2019:510) and ***Holmen*** (C-608/17, EU:C:2019:511), delivered on 19 June 2019, the Court was required to clarify the case-law arising from the judgment of the Grand Chamber of 13 December 2005, ***Marks & Spencer*** (C-446/03, EU:C:2005:763). It was called upon to interpret Article 49 TFEU, read in conjunction with *Article 54 TFEU, in two disputes concerning the possibility for a parent company established in one Member State of deducting from its corporation tax the losses of subsidiaries or sub-subsidiaries established in other Member States*.

The Swedish tax legislation at issue provided for two schemes, one for 'qualifying' mergers of undertakings and the other for intragroup financial transfers, allowing a company to take into account losses incurred by companies other than itself. In both cases, Swedish parent companies had applied for a preliminary decision by the Swedish Revenue Law Commission in order to determine the tax consequences of the cessation of the activity carried on by their non-resident subsidiaries. *Memira Holding* concerned a merger involving a subsidiary being dissolved without liquidation, while *Holmen* concerned either the liquidation of a subsidiary, or the absorption of that subsidiary by a sub-subsidiary in a reverse merger, followed by the liquidation of the new grouping.

In that regard, the scheme applicable to 'qualifying' mergers makes the right of deduction of losses conditional on the subsidiary which sustained the losses at issue being liable for tax in Sweden. For its part, the scheme applicable to intragroup transfers requires that the subsidiary sustaining the losses be directly owned by the parent company. As the preliminary decisions were the subject of appeals before the Swedish Supreme Administrative Court, that court submitted questions to the Court for a preliminary ruling, with reference to the judgment in *A*, [66] while taking the view that that judgment does not specify whether the right to deduct

66| Judgment of the Court of 21 February 2013, ***A*** (C-123/11, EU:C:2013:84).

'final losses', within the meaning of the case-law arising from the judgment in *Marks & Spencer*, [67] requires the subsidiary to be directly owned by the parent company or whether, in order to assess the finality of a subsidiary's losses, account should be taken of the possibilities, afforded by the legislation of the subsidiary's State of establishment to other legal entities, of taking into account those losses and, if so, how that legislation should be taken into account.

In *Memira Holding*, the appellant company owned a loss-making subsidiary in Germany which, upon cessation of its activity, maintained only debts and certain liquid assets on its balance sheet. That company considered absorbing its subsidiary in a cross-border merger which would have led to that subsidiary being dissolved without liquidation, thus putting an end to all activities carried on by the appellant company in Germany. However, under German law, it is not possible to transfer such losses to an undertaking which is liable for tax in Germany in the event of a merger.

The Court recalled that, according to its case-law, the restriction at issue may indeed be justified. However, it will be disproportionate if the loss is final and the non-resident subsidiary has exhausted the possibilities, available in its State of establishment, of having the losses taken into account. In that regard, the Court explained that the losses at issue will not be classified as 'final' if there is a possibility of deducting those losses economically by transferring them to a third party. Thus, it cannot be excluded that a third party may take into account for tax purposes the losses of the subsidiary in that subsidiary's State of establishment by including in the selling price of the subsidiary the tax advantage represented by the deductibility of losses for the future. Consequently, it is for the appellant company to demonstrate that that possibility is precluded, as the mere fact that the law of that State does not allow the transfer of losses in the event of a merger cannot, in itself, be sufficient to regard the losses of the subsidiary as final.

In *Holmen*, the appellant company owned several sub-subsidiaries in Spain, one of which had accumulated significant losses and intended to liquidate its Spanish activity. Those losses were not deductible either in Spain, because of the impossibility in law to transfer the losses of a liquidated company in the year of liquidation, or in Sweden, because of the requirement of direct ownership of the subsidiary sustaining final losses.

The Court recalled that a condition which leads to the exclusion of cross-border group relief in certain circumstances may be justified by the overriding reasons in the public interest referred to in the judgment in *Marks & Spencer*, but that that condition must be apt to ensure the attainment of the objectives pursued and not go beyond what is necessary to attain them. In that regard, the Court distinguished two alternatives.

Under the first alternative, the intermediate subsidiary or intermediate subsidiaries between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are not established in the same Member State. In that case, it cannot be excluded that a group may choose in which Member State the final losses are used, opting either for the Member State of the ultimate parent company or for the Member State of any potential intermediate subsidiary. Such an option would permit the adoption of strategies for the optimisation of the group tax rate, which could jeopardise both the preservation of the balanced allocation of the power to impose taxes between Member States and give rise to a risk that the losses could be used multiple times.

Under the second alternative, the intermediate subsidiary or intermediate subsidiaries between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are established in the same Member State. In those circumstances, the risk of optimisation of the group tax rate by choosing in which Member State the losses are set off and that of the use of losses multiple times by

67| Judgment of the Court of 13 December 2005, ***Marks & Spencer*** (C-446/03, EU:C:2005:763).

several Member States correspond to those noted by the Court in its judgment in *Marks & Spencer*. It would therefore be disproportionate for a Member State to impose a requirement of direct ownership such as that at issue in the main proceedings where the conditions in paragraph 55 of that judgment have been met. [68]

In the judgment in ***Comune di Bernareggio*** (C-465/18, EU:C:2019:1125), delivered on 19 December 2019, the Court held *that Article 49 TFEU, which guarantees freedom of establishment, precludes a national measure that grants an unconditional right of pre-emption to the pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender.*

In 2014, the Municipality of Bernareggio in Italy launched a tendering procedure with a view to the sale of a municipal pharmacy. The tender submitted by two of the tenderers was the most economically advantageous bid and, accordingly, they were provisionally awarded the contract. However, the contract was ultimately awarded to a pharmacist employed by the municipal undertaking managing the pharmacies in Vimercate (Italy). That pharmacist, even without having participated in the call for tenders, was accorded precedence under a provision of Italian law whereby, in the event of a transfer of ownership of a municipal pharmacy, pharmacist employees enjoy a right of pre-emption. The two tenderers referred to above therefore brought an action before the Italian courts seeking annulment of the award decision.

In the first place, the Court pointed out that the unconditional right of pre-emption granted to pharmacists employed by a municipal pharmacy, in the event of the sale of that pharmacy by tender, confers an advantage on such pharmacists and thus tends to discourage or even prevent pharmacists from other Member States from acquiring a fixed place of business for the practice of their profession in Italy. The Court therefore concluded that such a right of pre-emption constitutes a restriction on the freedom of establishment guaranteed by Article 49 TFEU.

In the second place, the Court examined whether that restriction may be justified. As regards the objective pursued by the right of pre-emption at issue in the main proceedings, the Court noted that that right seeks to ensure that pharmacies are managed more effectively, first, by ensuring continuity in the employment relationship of pharmacist employees and, secondly, by capitalising on the experience gained by those pharmacists in managing a pharmacy. Such an objective, inasmuch as it is akin to the objective of protecting public health, expressly referred to in Article 52(1) TFEU, may justify a restriction on freedom of establishment.

However, the Court held that assuming that it does in fact pursue an objective related to the protection of public health, such an unconditional right of pre-emption is not appropriate for securing the attainment of that objective. First, as regards the objective of ensuring continuity in the employment relationship of pharmacist employees, the Court stated that that objective is not appropriate for securing attainment of the public health objective. Secondly, as regards capitalising on experience gained by the pharmacists in managing a pharmacy, the Court pointed out that the right of pre-emption at issue in the main proceedings is not based on any real assessment of experience actually gained, the quality of service provided or duties actually performed within the municipal pharmacy, and is not, therefore, appropriate for attaining the objective pursued. Furthermore, the Court stated that, in any event, the right of pre-emption goes beyond what is

68| Paragraph 55 of the judgment in ***Marks & Spencer*** is worded as follows: 'In that regard, the Court considers that the restrictive measure at issue in the main proceedings goes beyond what is necessary to attain the essential part of the objectives pursued where: the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.'

necessary to attain the objective of capitalising on the professional experience gained. That objective may be attained through less restrictive measures such as the award of additional points under the tendering procedure to tenderers who provide proof of experience in managing a pharmacy.

4. Freedom to provide services

In the judgment in ***Commission* v *Germany*** (C-377/17, EU:C:2019:562), delivered on 4 July 2019, the Court held that *the Federal Republic of Germany had failed to fulfil its obligations under Directive 2006/123* [69] *by maintaining fixed tariffs for architects and engineers for planning services.*

The case concerned a piece of German legislation which introduced a system of minimum and maximum tariffs for architects and engineers for planning services. According to the Federal Republic of Germany, the aim of the minimum tariffs was, inter alia, to achieve an objective of quality planning services and consumer protection, while the aim of the maximum tariffs was to ensure that protection by guaranteeing that fees are transparent and by preventing excessive tariffs.

According to the Court, the tariffs at issue are covered by the provision of Directive 2006/123 under which Member States have to examine whether their legal system imposes any requirements making the exercise of an activity subject to compliance by the provider with fixed minimum and/or maximum tariffs. [70] In order to be compatible with the objectives of that directive, those requirements must be non-discriminatory, necessary and proportionate to the achievement of an overriding reason relating to the public interest. [71]

Since the objectives relied on by the Federal Republic of Germany are recognised in the Court's case-law as overriding reasons relating to the public interest, the Court carried out an analysis of the suitability and proportionality of the German system of tariffs.

In the first place, as regards minimum tariffs, the Court stated first of all that, in the light of the judgment of 5 December 2006, *Cipolla and Others* (C-94/04 and C-202/04), the existence of minimum tariffs for planning services is, in principle, having regard to the characteristics of the German market, appropriate for the purpose of helping to ensure a high level of quality of those services. With respect to the very high number of operators active in the planning services market and the fact that the information available to planning service providers and consumers is highly asymmetric on that market, there may be a risk that the service providers engage in competition that may result in the offer of services at a discount, or the elimination of operators offering quality services as a consequence of adverse selection. In such a context, the imposition of minimum tariffs may be such as to help to limit that risk, by ensuring that services are not offered at prices that are inadequate to ensure, in the long term, the quality of those services.

However, the Court then held that those minimum tariffs are not suitable for securing the attainment of the objectives pursued. According to the Court, the fact that planning services are not restricted to certain professions subject to obligatory surveillance under legislation relating to the professions or through professional bodies indicates a lack of consistency in the German legislation in relation to the objective of

69| 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).

70| Article 15(2)(g) of Directive 2006/123.

71| Article 15(3) of Directive 2006/123.

preserving a high level of quality. The minimum tariffs are not suitable for attaining such an objective if the provision of the services subject to those tariffs is not itself circumscribed by minimal safeguards that ensure the quality of those services.

In the second place, as regards maximum tariffs, the Court observed that although such tariffs are such as to contribute to the protection of consumers, the Federal Republic of Germany had failed to demonstrate why making available to clients guidance as to prices for the various categories of services would, as a less restrictive measure, not suffice to achieve that objective adequately. It follows that the requirement consisting of setting maximum tariffs cannot be regarded as being proportionate to that objective.

In its judgment of 4 July 2019, ***Baltic Media Alliance*** (C-622/17, EU:C:2019:566), the Court held that a *measure imposing, on grounds of public policy, the obligation temporarily to distribute or retransmit a television channel from another Member State only in pay-to-view packages is not covered by Article 3 of Directive 2010/13.* [72] That provision requires Member States to ensure freedom of reception and not to restrict retransmissions in their territory of television programmes from other Member States for reasons which fall within the fields coordinated by that directive, which include measures against incitement to hatred.

NTV Mir Lithuania is a television channel aimed at the Lithuanian public and whose programmes are mainly in Russian. The Lithuanian Radio and Television Commission had adopted a decision requiring media service providers, for 12 months, to distribute or retransmit that channel in Lithuania only in pay-to-view packages. That decision had been adopted on the ground that one of that channel's programmes contained false information which incited hostility and hatred towards the Baltic countries on grounds of nationality. Baltic Media Alliance, a company registered in the United Kingdom and holder of a British licence to broadcast NTV Mir Lithuania, considered that that decision had been adopted in breach of Directive 2010/13, as it restricted the retransmission of a television channel from another Member State.

As regards the prohibition of restrictions on retransmission laid down in Article 3 of Directive 2010/13, the Court first pointed out, on the basis of the context, the objectives and the origin of that prohibition, that the term 'restriction' has, within the framework of that directive, a specific meaning that is narrower than the concept of restriction used in Article 56 TFEU. It does not refer to all restrictions, by the receiving Member State, on the freedom of reception and retransmission. Thus, Directive 2010/13 does not in principle preclude the application of national rules with the general aim of pursuing an objective of general interest, provided that they do not involve a second control of broadcasts in addition to that which the broadcasting Member State is required to carry out.

Clarifying its earlier case-law, [73] the Court went on to find that a national measure which, in general, pursues a public policy objective and regulates the methods of distribution of a television channel to consumers of the receiving Member State does not constitute a restriction within the meaning of Article 3 of Directive 2010/13, where those rules do not prevent the retransmission as such of that channel. Such a measure does not introduce a second control of broadcasts.

In light of those findings, the Court concluded that a measure such as that at issue in the main proceedings is not covered by Article 3 of Directive 2010/13. First, the decision in question pursues an objective of general interest in so far as it contributes to combating the distribution of information discrediting the Lithuanian State and aims to protect the security of the Lithuanian information space and to guarantee and preserve

72| Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).

73| Judgment of the Court of 22 September 2011, ***Mesopotamia Broadcast and Roj TV*** (C-244/10 and C-245/10, EU:C:2011:607).

the public interest in being informed correctly. Secondly, it does not restrict the retransmission as such in Lithuania of television programmes from another Member State, because the television channel in question can still be distributed legally in that territory and Lithuanian consumers can still view it if they subscribe to a pay-to-view package.

In the field of freedom to provide services, reference should also be made to the judgment of 19 December 2019, ***Dobersberger*** (C-16/18, EU:C:2019:1110), concerning an undertaking established in a Member State that provides services on board international trains in several Member States. [74]

5. Free movement of capital

In the judgment in ***X (Controlled companies established in third countries)*** (C-135/17, EU:C:2019:136), delivered on 26 February 2019, the Grand Chamber of the Court held that *Article 63(1) TFEU on the free movement of capital* does not preclude legislation of a Member State under which income obtained by a company established in a third country and which does not come from an activity of that company, such as income classified as 'controlled-company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, into the tax base of a taxable person residing in that Member State where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than the rate prevailing in the Member State concerned, unless there is a legal framework providing, in particular, treaty obligations that empower the national tax authorities of that Member State to verify, if necessary, the accuracy of information provided in respect of that company with a view to demonstrating that that taxable person's shareholding in that company is not the result of an artificial scheme.

Noting that that legislation applies only to cross-border situations, the Court held, first, that that legislation is such as to discourage investors with unlimited tax liability in the Member State concerned from investing in companies established in certain third countries and therefore constitutes a restriction on the free movement of capital, which is prohibited, in principle, by Article 63(1) TFEU.

Next, the Court examined whether that restriction can be justified in the light of Article 65 TFEU, under which a difference in tax treatment may be considered compatible with the free movement of capital when it concerns situations which are not objectively comparable. In that regard, the Court stated that the purpose of the legislation at issue in the main proceedings is, so far as possible, to treat the situation of resident companies which have invested capital in a company established in a third country with a 'low' tax rate in the same way as that of resident companies which have invested their capital in another company resident in the Member State concerned, with a view, inter alia, to offsetting any tax advantages which the former might obtain from investing their capital in a third country, which is why the difference in treatment at issue is not justified by an objective difference in circumstances.

Against that background, the Court examined whether the difference in tax treatment can be justified by an overriding reason in the public interest. Stating that the objective of that national legislation is the prevention of tax evasion and avoidance, the Court held that that legislation is suitable for securing the attainment of that objective. By providing that the income of a company established in a third country with a 'low' tax rate

74| That judgment is presented in Section XV.5 'Posting of workers'.

is to be incorporated into the tax base of a company with unlimited tax liability in the Member State concerned, the legislation at issue in the main proceedings is such as to offset the effects of any artificial transfer of income to such a third country.

However, according to the Court, that legislation, in so far as it presumes that conduct is artificial on the sole ground that the conditions laid down by that legislation are met, while affording the taxable person concerned no opportunity whatsoever to rebut that presumption, goes, in principle, beyond what is necessary in order to attain its objective.

Pointing out, nonetheless, that the legislation at issue in the main proceedings relates not to Member States but to third countries, the Court stated that a Member State's obligation to give a taxable person the opportunity to produce evidence demonstrating any commercial justification for its shareholding in a company established in a third country must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be verified. It is therefore for the national court to examine whether there are, in particular, treaty obligations between the Member State and the third country at issue, establishing a legal framework of cooperation and procedures for the exchange of information between the national authorities concerned, which are genuinely such as to empower the tax authorities of that Member State to verify, if necessary, the accuracy of the information provided on the company established in the third country in order to demonstrate that that taxable person's shareholding in that company is not the result of an artificial scheme.

The referring court had also submitted preliminary questions to the Court on the scope of the standstill clause provided for in Article 64(1) TFEU, under which a Member State, in its relations with third countries, may apply restrictions on movements of capital including, inter alia, direct investments, even though those restrictions contravene the principle of the free movement of capital laid down in Article 63(1) TFEU, provided that those restrictions already existed on 31 December 1993. In the case in the main proceedings, the tax legislation laying down the restriction at issue in the main proceedings had been substantially amended after 31 December 1993, on account of the adoption of a law which entered into force but was replaced, before ever being applied in practice, by legislation essentially identical to that applicable on 31 December 1993. The Court held that, in such a situation, the prohibition in Article 63(1) TFEU is applicable, unless the applicability of that amendment was deferred in accordance with national law, so that, despite its entry into force, that amendment was not applicable to cross-border movements of capital covered by Article 64(1) TFEU, which it is for the referring court to determine.

In the judgment in ***Commission* v *Hungary (Rights of usufruct over agricultural land)*** (C-235/17, EU:C:2019:432), delivered on 21 May 2019, the Grand Chamber of the Court held that Hungary had *failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter in extinguishing, by operation of law, the rights of usufruct over agricultural and forestry land located in Hungary in so far as those rights are held, directly or indirectly, by nationals of other Member States.*

In 2013, Hungary adopted a law ('the Law of 2013') under which the rights of usufruct over agricultural and forestry land previously acquired by legal persons or by natural persons who are unable to demonstrate a close family tie with the owner of that land had to be extinguished, by operation of law, without providing for any arrangements for compensating those persons. In support of that law, Hungary submitted that the usufruct contracts in question had circumvented the prohibitions on acquiring ownership of agricultural land that were in force before Hungary acceded to the European Union and that they had also infringed the national legislation concerning exchange controls applicable at that time, so that they were, on that account, void *ab initio* even before that accession. Hungary also relied on various agricultural policy objectives, namely ensuring that productive agricultural land can be owned only by the natural persons who work it and not for the purposes of speculation, preventing the fragmentation of land, preserving a population in rural areas, maintaining sustainable agriculture and creating farms that are viable in size and are competitive.

After finding that it was not necessary to consider the Law of 2013 in the light of Article 49 TFEU, the Court held that, by providing for the extinguishment, by operation of law, of the rights of usufruct held over agricultural land by persons unable to demonstrate a close family tie with the owner of that land — which include a great many nationals of Member States other than Hungary — that law restricts, by virtue of its very subject matter and by reason of that fact alone, the right of the persons concerned to the free movement of capital guaranteed by Article 63 TFEU. Indeed, that national legislation deprives those persons both of the possibility of continuing to enjoy their rights of usufruct and of any possibility of alienating that right. That legislation is, moreover, liable to deter non-residents from making investments in Hungary in the future.

In those circumstances, the Court held that it was necessary to examine whether that restriction could be justified by overriding reasons in the public interest or by the reasons mentioned in Article 65 TFEU, and whether it was consistent with the principle of proportionality, in particular, in pursuing the objectives relied on in a consistent and systematic manner.

In that context, the Court also pointed out that the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with where national legislation falls within the scope of EU law. That is inter alia the case where national legislation is such as to obstruct one or more of the fundamental freedoms guaranteed by the TFEU and the Member State concerned relies on grounds envisaged in Article 65 TFEU, or on overriding reasons in the public interest that are recognised by EU law, in order to justify such an obstacle. In such a situation, the national legislation concerned can fall within the exceptions thus provided for only if it complies with the fundamental rights the observance of which is ensured by the Court. In that regard, the use by a Member State of the exceptions provided for by EU law in order to justify an impediment to a fundamental freedom guaranteed by the Treaty must be regarded as 'implementing Union law' within the meaning of Article 51(1) of the Charter.

Consequently, the Court examined whether the Law of 2013 was compatible with EU law in the light of the exceptions thus provided for by the Treaties and the Court's case-law, as well as the fundamental rights guaranteed by the Charter, one of which is the right to property safeguarded by Article 17 thereof, which the Commission claimed had been infringed in that case.

As regards Article 17 of the Charter, the Court stated, first, that the protection afforded by paragraph 1 of that article concerns rights with an asset value creating an established legal position under the legal system concerned, enabling the holder to exercise those rights autonomously and for his or her own benefit. According to the Court, it is evident that the rights of usufruct at issue have an asset value and confer on the usufructuary an established legal position, even if the possibility of transferring such rights is limited or precluded under the applicable national law. Indeed, where such rights of usufruct over agricultural land are acquired contractually, a price will, as a rule, be paid. Those rights enable their holders to make use of such land, in particular for economic purposes, or even, depending on the circumstances, to lease the land to third parties; such rights therefore fall within the scope of Article 17(1) of the Charter.

Secondly, the Court held that the rights of usufruct that were cancelled by the Law of 2013 must be regarded as having been 'lawfully acquired' within the meaning of Article 17(1) of the Charter. Those rights had been created at a time when the creation of such rights was not prohibited by the legislation in force and it has not been established by Hungary that those rights were invalid as a result of an infringement of the national legislation at the time concerning exchange controls. In addition, those same rights were entered as a matter of course in the land registries by the competent national authorities and their existence was confirmed by a law adopted in 2012.

Thirdly, the Court held that the Law of 2013 does not involve restrictions on the use of possessions, but rather entails a person being deprived of his or her possessions within the meaning of Article 17(1) of the Charter, notwithstanding the fact that the rights of usufruct concerned are not acquired by a public authority and that their extinction results in full ownership of the land concerned being restored to the owners.

At the conclusion of that analysis, the Court made clear, however, that the exercise of the rights guaranteed by the Charter may be limited, as long as the limitation is provided for by law, respects the essence of those rights and, subject to the principle of proportionality, is necessary and genuinely meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. In that regard, it follows from a combined reading of Article 17(1) and Article 52(1) of the Charter that when the public interest is invoked in order to justify a person being deprived of his or her possessions, observance of the principle of proportionality as required by Article 52(1) of the Charter must be ensured with regard to the public interest concerned and the objectives of general interest which the latter encompasses. Such a reading also implies that, if there is no such public interest capable of justifying a deprivation of property, or — even if such a public interest is established — the conditions laid down in the second sentence of Article 17(1) of the Charter are not satisfied, there will be an infringement of the right to property guaranteed by that provision.

In that regard, while the Court accepted that national legislation may restrict the free movement of capital, on the ground of objectives such as those relied on by Hungary in support of the Law of 2013, it held nonetheless that that law could not be regarded, in the absence of evidence, as in fact pursuing such objectives, or as being appropriate for ensuring the attainment of those objectives. The Court added that that law, in any event, goes beyond what is necessary in order to attain them. For those same reasons, the Court concluded that there were no public-interest grounds capable of justifying the deprivation of property arising from the extinction of the rights of usufruct in question.

As regards that deprivation of property, the Court added that, in any event, the Law of 2013 does not satisfy the requirement to pay fair compensation in good time, provided for in the second sentence of Article 17(1) of the Charter. Indeed, that law does not contain any terms ensuring that the usufructuaries who have been deprived of their property will receive compensation, and Hungary's simply referring to the general rules of civil law cannot satisfy that requirement. In that case, a reference of that kind would place on the usufructuaries the burden of having to pursue the recovery, by means of procedures that may prove lengthy and expensive, of any compensation which might be payable to them by the landowner. Such rules of civil law do not make it possible to determine easily and in a sufficiently precise and foreseeable manner whether compensation will in fact be able to be obtained at the end of such procedures, nor do they disclose the nature and amount of any such compensation.

VIII. Border controls, asylum and immigration

1. Asylum policy

Against the backdrop of the European migration crisis which has been holding sway for some years now and, in consequence, the arrival of a high number of applicants for international protection in the European Union, the Court continues to hear numerous cases relating to EU asylum policy. Eight of them merit special attention: two cases dealing with refugee status, five concerning the handling of applications for international protection and one involving return decisions.

1.1. Refugee status

In the judgment in ***M and Others (Revocation of refugee status)*** (C-391/16, C-77/17 and C-78/17, EU:C:2019:403), delivered on 14 May 2019, the Grand Chamber of the Court gave a ruling on *the validity of Article 14(4) to (6) of Directive 2011/95* [75] *('the Qualification Directive'), which specifies the circumstances in which Member States may revoke or refuse to grant refugee status, in the light of Article 78(1) TFEU and Article 18 of the Charter, which refer to the Geneva Convention relating to the Status of Refugees ('the Geneva Convention')*. [76] The judgment was delivered in connection with three sets of proceedings between third-country nationals and the respective competent national authorities concerning either the revocation of the former's refugee status or the refusal by the latter to grant such status on the ground that the former had been convicted of particularly serious crimes and that they represented a danger to the security or the community of the Member State concerned. More specifically, the Court gave a ruling on whether the effect of Article 14(4) to (6) of the directive is to preclude such third-country nationals, who satisfy the material conditions laid down in Article 2(d) thereof, from being 'refugees' and whether, as a result, it infringes Article 1 of the Geneva Convention.

First of all, the Court held that it had jurisdiction to give a ruling on the three requests for a preliminary ruling. It noted that although the European Union is not a contracting party to the Geneva Convention, Article 78(1) TFEU and Article 18 of the Charter require it nonetheless to comply with the rules of that convention, with the result that the Qualification Directive, pursuant to those provisions of primary law, must comply with those rules. It also noted that it had jurisdiction to examine the validity of Article 14(4) to (6) of that directive in the light of those provisions.

Next, the Court ruled that the provisions of Article 14(4) to (6) of that directive lend themselves to an interpretation that ensures that the minimum level of protection provided for by the Geneva Convention is observed, as required by Article 78(1) TFEU and Article 18 of the Charter, and thus concluded that those provisions were valid.

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

76| Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 137, No 2545 (1954)), which entered into force on 22 April 1954 and was supplemented and amended by the Protocol relating to the Status of Refugees, done at New York on 31 January 1967, which entered into force on 4 October 1967.

In that regard, the Court specified, in the first place, that although the Qualification Directive establishes a system of rules including concepts and criteria common to the Member States and thus peculiar to the European Union, it is nonetheless based on the Geneva Convention and its purpose is, inter alia, to ensure that Article 1 of that convention is complied with in full. Thus, the definition of 'refugee' contained in Article 2(d) of the Qualification Directive reproduces, in essence, the definition set out in Article 1(A) of the Geneva Convention. For its part, 'refugee status', as defined in Article 2(e) of that directive, corresponds to the formal recognition of the fact of being a 'refugee', which is declaratory and not constitutive of that fact, which means that, under Article 13 of that directive, a third-country national or stateless person who satisfies the material conditions set out in Chapter III of that same directive is, on that basis alone, a refugee within the meaning of Article 2(d) thereof and Article 1(A) of that convention, without Member States having any discretion in that regard. Furthermore, the Court noted that the result of granting refugee status is that the refugee concerned is, under Article 2(b) of the Qualification Directive, the beneficiary of international protection for the purposes of that directive, so that he or she is entitled to all the rights and benefits laid down in Chapter VII of that directive, which contains rights equivalent to those set out in the Geneva Convention, as well as rights providing greater protection that have no equivalent in that convention. Having regard to those various elements, it considered that being a 'refugee' within the meaning of Article 2(d) of the Qualification Directive and Article 1(A) of the Geneva Convention is not dependent on the formal recognition thereof by the grant of 'refugee status' as defined in Article 2(e) of that directive, read in conjunction with Article 13 thereof.

In the second place, having pointed out that EU law provides more extensive protection than that guaranteed by the Geneva Convention for refugees in one of the scenarios referred to in Article 14(4) and (5) of the Qualification Directive, the Court noted that Article 14(4) and (5) of that directive cannot be interpreted as meaning that, in the context of the system introduced by that directive, the effect of the revocation of refugee status or the refusal to grant that status is that the third-country national or stateless person concerned who satisfies the conditions set out in Article 2(d) of the Qualification Directive, read in conjunction with the provisions of Chapter III thereof, is no longer a refugee within the meaning of Article 2(d) of that directive and Article 1(A) of the Geneva Convention. Indeed, the fact that the person concerned is covered by one of the scenarios referred to in Article 14(4) and (5) of the directive in no way means that that person ceases to satisfy the material conditions, relating to a well-founded fear of persecution in his or her country of origin, on which his or her being a refugee depends. In that case, it is true that that person will be denied that status and thus will not, or will no longer, be entitled to all the rights and benefits set out in Chapter VII of the Qualification Directive. However, as is explicitly stated in Article 14(6) of that directive, that person is, or continues to be, entitled to a certain number of rights laid down in the Geneva Convention, which confirms that that person is, or continues to be, a refugee for the purposes of, inter alia, Article 1(A) of that convention, in spite of the revocation of or refusal to grant refugee status.

Regarding Article 14(6) of the Qualification Directive, the Court ruled, in the last place, that that provision lays down an obligation for a Member State which uses the powers provided for in Article 14(4) and (5) thereof to grant the refugee concerned, who is present in the territory of that Member State, as a minimum, the rights enshrined in the Geneva Convention and expressly referred to in Article 14(6) of that directive, as well as the rights provided for by that convention which do not require a lawful stay. In addition, the Court emphasised that there is no way of interpreting the latter provision as having the effect of encouraging Member States to shirk their international obligations resulting from the Geneva Convention by restricting the rights that those persons derive from that convention. The Court added that the application of Article 14(4) to (6) of the Qualification Directive is without prejudice to the obligation of the Member State concerned to comply with the relevant provisions of the Charter.

The Court concluded its examination by emphasising that while, under the Geneva Convention, the persons covered by one of the scenarios described in Article 14(4) and (5) of the Qualification Directive are liable, under Article 33(2) of that convention, to being subject to a measure whereby they are refouled or expelled to their country of origin, even though their life or freedom would be threatened in that country, such persons

may not, by contrast, under that directive, be refouled if this would expose them to the risk of their fundamental rights, as enshrined in Article 4 and Article 19(2) of the Charter, being infringed. It is true that those persons may, in the Member State concerned, be the subject of a decision revoking their refugee status as defined in Article 2(e) of the Qualification Directive, or of a decision refusing to grant that status, but the adoption of such decisions cannot alter the fact of their being refugees where they satisfy the material conditions necessary to be regarded as being refugees within the meaning of Article 2(d) of that directive, read in conjunction with the provisions of Chapter III thereof and, accordingly, Article 1(A) of the Geneva Convention.

In the judgment in ***Bilali*** (C-720/17, EU:C:2019:448), delivered on 23 May 2019, the Court ruled that *Article 19(1) of the Qualification Directive, read in conjunction with Article 16 thereof, must be interpreted as meaning that a Member State must revoke subsidiary protection status if it granted that status when the conditions for granting it were not met, in reliance on facts which have subsequently been revealed to be incorrect, and notwithstanding the fact that the person concerned cannot be accused of having misled the Member State on that occasion.*

In that case, the subsidiary protection status and the temporary right of residence awarded to the person concerned had been subsequently revoked of the relevant authority's own motion, since a mistake had been made in the determination of what was assumed to be that person's nationality and, moreover, he had never been exposed to a real risk of suffering serious harm, within the meaning of Article 15 of the Qualification Directive, in the event of his being returned to his country of origin or the country of his former habitual residence.

In that context, the Court first of all noted that Article 19(3)(b) of the Qualification Directive provides for the loss of subsidiary protection status only where there has been a misrepresentation or omission by the person concerned that was decisive for the grant of that status. Furthermore, no other provision expressly states that that status must or may be withdrawn if the decision granting it was taken on the basis of incorrect information, without any misrepresentation or omission by the person concerned.

However, the Court also found that that status is also not expressly precluded from being lost where the host Member State realises that it has granted it on the basis of incorrect information that is not attributable to the person concerned. In that regard, the Court indicated, first, that the situation of an individual who has obtained subsidiary protection status on the basis of incorrect information without ever having met the conditions for obtaining that status has no connection with the rationale of international protection. Consequently, the loss of subsidiary protection status in such circumstances is consistent with the purpose and general scheme of the Qualification Directive, and in particular with Article 18 thereof, which provides for subsidiary protection status to be granted only to persons who meet those conditions. If the Member State concerned was not entitled legally to grant that status, it must, a fortiori, be obliged to withdraw it when its mistake is discovered.

Secondly, the Court pointed out that Article 19(1) of the Qualification Directive provides that, concerning applications for international protection filed, as in that case, after the entry into force of Directive 2004/83, [77] Member States must revoke, end or refuse to renew the subsidiary protection status of a third-country national or stateless person if that person has ceased to be eligible for subsidiary protection in accordance with Article 16 of the Qualification Directive, namely when the circumstances which led to the grant of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required. In that regard, a change in the host Member State's state of knowledge of the personal situation of the individual concerned can, in the same way as a change in the factual circumstances in the

77| 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).

third country, result in that individual's original fear of serious harm no longer appearing to be well founded, provided that that change in the host Member State's state of knowledge is sufficiently significant and definitive as to whether the person concerned qualifies for the grant of subsidiary protection status. Therefore, where the host Member State has new information which establishes that, contrary to its initial assessment, based on incorrect information, of the situation of a third-country national or stateless person to whom it granted subsidiary protection, that person never faced a risk of serious harm, the Member State in question must conclude from this that the circumstances underlying the grant of subsidiary protection status have changed in such a way that retention of that status is no longer justified. Moreover, the fact that the error made by the host Member State is not attributable to the person concerned cannot alter the finding that that person never in fact met the conditions for the grant of subsidiary protection status.

According to the Court, support for that interpretation of the Qualification Directive is to be found in the Geneva Convention, the requirements of which must be taken into account for the purpose of interpreting Article 19 of that directive. In that context, the Court noted that documents from the United Nations High Commissioner for Refugees (UNHCR) are particularly relevant in the light of the role conferred on the UNHCR by the Geneva Convention. Although there is nothing in that convention that expressly provides for loss of refugee status if it subsequently emerges that that status should never have been conferred, the UNHCR nevertheless considers that, in such a situation, the decision granting refugee status must, in principle, be annulled.

Moreover, the Court stated that the loss of subsidiary protection status, pursuant to Article 19(1) of the Qualification Directive, is without prejudice to the separate question whether the person concerned loses any right of residence in the Member State concerned and can be deported to his country of origin. First, unlike the loss of subsidiary protection status pursuant to Article 19(3)(b) of the Qualification Directive, the loss of that status pursuant to Article 19(1) thereof covers neither those cases in which Member States must refuse, in accordance with Article 4(1a) of Directive 2003/109, [78] to grant long-term resident status to beneficiaries of international protection, nor those cases in which, under Article 9(3a) of the latter directive, Member States may withdraw long-term resident status from those beneficiaries. Furthermore, the Qualification Directive allows for host Member States to be allowed to grant, in accordance with their national law, national protection which includes rights enabling individuals who do not enjoy subsidiary protection status to remain in the territory of the Member State concerned.

The Court added that, in that context, the Member State concerned is obliged to observe, in particular, the fundamental right of the person concerned to respect for private and family life, as guaranteed by Article 7 of the Charter. The fact that, unlike the person in the situation envisaged in Article 19(3) of the Qualification Directive, a person whose subsidiary protection status has been revoked on the basis of Article 19(1) of that directive, in conjunction with Article 16 thereof, did not wilfully mislead the competent national authority when that status was granted is a relevant circumstance in that respect.

78| Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

1.2. Handling of applications for international protection

The judgments delivered by the Court on the handling of applications for international protection, which are set out in this report, concern: the procedures for examining, assessing and reviewing such applications; their admissibility; the conditions for transferring applicants to the Member State responsible for examining their application and the determination of that Member State; and the sanctions that may be imposed on an applicant for international protection who is guilty of violent behaviour.

In its judgment in ***Jawo*** (C-163/17, EU:C:2019:218), delivered on 19 March 2019, the Grand Chamber of the Court ruled, with regard to Regulation No 604/2013 [79] ('the Dublin III Regulation') and the Charter, on *the conditions under which it may be considered that an applicant for international protection has absconded, with the result that the time limit for that person's transfer to the Member State normally responsible for examining his or her application may be extended, and on the lawfulness of such a transfer where there is a risk that the person concerned may be subject to inhuman or degrading treatment upon completion of the asylum procedure on account of the living conditions of beneficiaries of international protection in that Member State.*

In that case, a Gambian national had entered the European Union via Italy and had lodged an application for asylum there, before travelling on to Germany where he made a new application. Having requested the Italian authorities to take back the person concerned, the German authorities rejected his application for asylum and ordered his removal to Italy. A first transfer attempt failed because the applicant was not present at the accommodation centre allocated to him. The German authorities, having therefore considered that he had absconded, informed the Italian authorities that it was not possible to carry out the transfer and that the time limit had been extended, in accordance with Article 29(2) of the Dublin III Regulation. That article provides that the time limit for carrying out the transfer is 6 months, but that it may be extended up to a maximum of 18 months if the applicant absconds. Subsequently, the person concerned stated that he had visited a friend and that he did not know that it was necessary to report his absences. At the same time, he brought an action against the transfer decision and, after that action was dismissed, he brought an appeal before the referring court. In that appeal, he claimed that since he had not absconded, the German authorities were not entitled to extend the time limit for his transfer to Italy. He also relied on the existence, in Italy, of systemic flaws in the asylum system that impeded his transfer to that State.

In the first place, the Court clarified that the concept of 'absconding', within the meaning of Article 29(2) of the Dublin III Regulation, implies, inter alia, that there is an intentional element, with the result that that provision is, in principle, applicable only where the applicant deliberately evades the reach of the national authorities, in order to prevent his or her transfer. However, the Court added that in order to ensure the effective functioning of the Dublin III Regulation and have regard to the considerable difficulties likely to be encountered by those authorities in providing proof of the applicant's intentions, it may be assumed that that person has absconded where the transfer cannot be carried out due to the fact that that person has left the accommodation allocated to him or her without informing the national authorities or requesting, as the case may be, prior authorisation. Nevertheless, that assumption is applicable only if the applicant has been duly informed of his or her obligations in that regard, in accordance with Article 5 of Directive 2013/33 [80]

79| 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).

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

('the Reception Directive'). Moreover, the applicant must retain the possibility of demonstrating that the fact that he or she did not inform the competent authorities of his or her absence is due to valid reasons and not the intention to evade the reach of those authorities.

In the second place, the Court stated that in accordance with what it previously held in the judgment in *Shiri*, [81] the applicant may claim, in proceedings brought against a transfer decision, that since he has not absconded, the time limit of six months laid down by Article 29(1) and (2) of the Dublin III Regulation has expired.

In the third place, as regards the modalities of extending the time limit for transfer, the Court considered that no prior consultation was necessary between the requesting Member State and the Member State responsible. Thus, in order to extend that time limit up to a maximum of 18 months, it suffices that the first Member State informs the second, before the expiry of the 6-month time limit, that the applicant has absconded, while specifying the new transfer time limit.

In the fourth and last place, the Court examined the question whether Article 4 of the Charter precludes the transfer of an applicant for international protection where the living conditions of beneficiaries of such protection, in the Member State normally responsible for examining the application, are likely to constitute inhuman or degrading treatment.

First of all, the Court clarified that that question falls within the scope of EU law. Next, it emphasised that in the context of the Common European Asylum System, and in particular the Dublin III Regulation, based on the principle of mutual trust, it must be presumed that the treatment of applicants respects their fundamental rights. However, as the Court previously held in its judgment in *N.S. and Others* [82] and as codified in Article 3(2) of the Dublin III Regulation, it is not inconceivable that the applicant risks, on account of, inter alia, systemic or generalised flaws or flaws affecting certain groups of people in the Member State to which the transfer is envisaged, suffering inhuman or degrading treatment in that Member State, which thus impedes that transfer. In that regard, although Article 3(2) of the Dublin III Regulation envisages only the situation underlying the judgment in *N.S. and Others*, in which that risk stemmed from systemic flaws during the asylum procedure, a transfer is nonetheless ruled out where there are substantial grounds for believing that such a risk is run, whether it is at the very moment of the transfer, during the asylum procedure or following it.

Lastly, the Court indicated that the existence of the alleged flaws must be assessed, by the national court or tribunal hearing an action challenging a transfer decision, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law. Those flaws must attain a particularly high level of severity. As regards the living conditions of beneficiaries of international protection, that level is attained where the indifference of the national authorities would result in a person finding himself or herself, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that does not allow him or her to meet the most basic needs and that undermines his or her physical and mental health or human dignity. By contrast, the fact that forms of support in family structures, available to the nationals of the Member State concerned to deal with the inadequacies of the social system, are generally lacking for the beneficiaries of international protection is not sufficient ground for finding that the applicant, in the event of transfer to that Member State, would be faced with such a situation. Likewise, the existence of shortcomings in the implementation of programmes to integrate those beneficiaries is not sufficient ground for such a finding. In any event, the

81| Judgment of the Court of 25 October 2017, ***Shiri*** (C-201/16, EU:C:2017:805).

82| Judgment of the Court of 21 December 2011, ***N.S. and Others*** (C-411/10 and C-493/10, EU:C:2011:865).

mere fact that social protection and/or living conditions are more favourable in the requesting Member State than the Member State normally responsible for examining the application is not sufficient to conclude that there is a risk of inhuman or degrading treatment in the second Member State.

In the judgment in ***Ibrahim and Others*** (C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219), delivered on 19 March 2019, the Grand Chamber of the Court provided *clarification on the additional ground of inadmissibility of an application for international protection set out in Article 33(2)(a) of Directive 2013/32* [83] ('the Procedures Directive'). That provision extends the option, previously provided for by Directive 2005/85, [84] to reject an application as being inadmissible where another Member State has previously granted refugee status by also allowing such rejection where subsidiary protection has been granted. In the cases in the main proceedings, that protection had been granted to a number of third-country nationals in Poland and Bulgaria respectively. Subsequently, those persons travelled to Germany, where they submitted applications for asylum between 2012 and 2013. After unsuccessfully requesting the competent Polish and Bulgarian authorities to take back those persons, the German authorities rejected the applications for asylum without examining their substance, which the parties concerned challenged by court proceedings.

Against that background, the Court gave a ruling, first, on the scope, *ratione temporis*, of the Procedures Directive. In that regard, the transitional provisions in the first paragraph of Article 52 thereof provide, on the one hand, that the national provisions transposing that directive are to apply to applications for international protection lodged 'after 20 July 2015 or an earlier date' and, on the other hand, that applications lodged 'before 20 July 2015' are to be governed by the national provisions adopted pursuant to Directive 2005/85. The Court held that notwithstanding the tension between those two rules, a Member State may provide for the immediate application of the national provisions transposing the additional ground of inadmissibility to applications for asylum on which no final decision has been made and which were lodged before 20 July 2015 and before the entry into force of that national provision. For reasons of legal certainty and equality before the law, it is, however, necessary that applications lodged within the same period in that Member State be examined in a predictable and uniform manner. However, the Court stated that such an immediate application is not permitted in a situation where both the application for asylum and the take back request were lodged before the entry into force of the Procedures Directive. In such a situation, at issue in one of the cases in the main proceedings, that application and that request, in accordance with Article 49 of the Dublin III Regulation, still fall fully within the scope of Regulation No 343/2003, [85] whereas Article 33 of the Procedures Directive covers only situations falling within the scope of the Dublin III Regulation.

Secondly, the Court held that where a third-country national has been granted subsidiary protection and subsequently lodges an application for asylum in another Member State, that State can dismiss that application as being inadmissible, without being obliged or being able to have recourse, as the first resort, to the take charge or take back procedures provided for by the Dublin III Regulation.

83| Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

84| Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

85| Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

Finally, the Court examined the conditions under which a Member State could be precluded, pursuant to the Charter, from exercising the option granted by Article 33(2)(a) of the Procedures Directive. In that regard, making reference to its judgment in *Jawo* [86] of the same day, the Court stated that when an applicant faces, in a Member State, a risk of suffering inhuman or degrading treatment in breach of Article 4 of the Charter, that precludes that applicant's transfer to that State, regardless of whether that risk exists at the very time of transfer, in the course of the asylum procedure or on the conclusion of that procedure. By analogy, the Court held that a Member State may not rely on the additional ground of inadmissibility where the expected living conditions of the applicant in the Member State that had granted subsidiary protection to that applicant would expose the latter, as a beneficiary of that protection, to a serious risk of inhuman or degrading treatment. The deficiencies concerned must, however, attain a particularly high level of severity, characterised by the exposure of the person concerned to a situation of extreme material poverty.

In that regard, infringements of the Qualification Directive that do not go so far as to contravene Article 4 of the Charter are not sufficient. Likewise, the fact that, in the Member State which granted subsidiary protection to the party concerned, the beneficiaries of such protection do not receive any subsistence allowance, or the allowance they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of the Member State concerned, does not allow a finding of a breach of Article 4, unless the applicant is, because of his or her particular vulnerability and irrespective of his or her wishes and personal choices, in a situation of extreme material poverty.

Moreover, the Court stated that where the Member State which granted subsidiary protection systematically refuses, without real examination, to grant refugee status to applicants who nevertheless fulfil the conditions laid down in the Qualification Directive, the treatment of applicants cannot be considered to comply with the obligations arising from Article 18 of the Charter concerning the right to asylum. However, it is for that Member State to resume the procedure for the obtaining of refugee status; the Member State to which the new application has been lodged may, for its part, reject it on the basis of Article 33(2)(a) of the Procedures Directive, read in the light of the principle of mutual trust.

In the judgment in ***H. and R.*** (C-582/17 and C-583/17, EU:C:2019:280), delivered on 2 April 2019, the Grand Chamber of the Court considered *whether, before lodging a request to take back an applicant for international protection, the competent authorities are required to determine the Member State responsible for examining that person's application, in particular on the basis of the criterion for determining responsibility laid down in Article 9 of the Dublin III Regulation*. Under that article, where the applicant has a family member who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State is to be responsible for examining the application. In that case, the Netherlands authorities requested the German authorities to take back two Syrian nationals who had made a first application for international protection in Germany, before leaving that State and submitting a new application in the Netherlands. The persons concerned relied on the presence of their respective spouses in the Netherlands, who were beneficiaries of international protection, but the Netherlands authorities refused to examine those claims and, consequently, to examine their applications, on the ground that, in the context of a take back procedure, an applicant is not entitled to rely on Article 9 of the Dublin III Regulation.

Against that background, the Court recalled that the take back procedure is applicable to the persons referred to in Article 20(5) or Article 18(1)(b) to (d) of the Dublin III Regulation, before stating that the situation in which a third-country national lodges an application for international protection in a first Member State, then leaves that Member State and submits a new application in a second Member State, falls within the scope of that

86| Judgment of the Court of 19 March 2019, ***Jawo*** (C-163/17, EU:C:2019:218).

procedure, irrespective of whether the application lodged in the first Member State has been withdrawn or whether the examination of that application in accordance with the Procedures Directive has already started in that Member State.

The Court then pointed out that although the fact that a transfer decision has been adopted at the end of a take charge or take back procedure is not capable of influencing the scope of the right to an effective remedy against such a decision, which is guaranteed by Article 27(1) of the Dublin III Regulation, those two procedures are nevertheless subject to different schemes, that difference being reflected in the provisions of that regulation which may be invoked in support of such an action. In the framework of the take charge procedure, the process of determining the Member State responsible for examining the application for international protection on the basis of the criteria set out in Chapter III of the Dublin III Regulation is of crucial importance and the Member State in which such an application has been lodged may send a take charge request to another Member State only if it considers that the latter is responsible for examining that application. However, in the framework of the take back procedure, those criteria for determining responsibility are not relevant, since all that is necessary is that the requested Member State fulfils the conditions laid down in Article 20(5) (that is to say, it is the Member State with which the application was first lodged and in which the process of determining the Member State responsible for examining that application is ongoing), or in Article 18(1)(b) to (d) of the Dublin III Regulation (that is to say, it is the Member State which received the first request and which, at the end of the process of determining the Member State responsible, has accepted its own responsibility for examining that application).

The Court added that the lack of relevance, in the framework of a take back procedure, of the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation is supported by the fact that, while Article 22 thereof sets out in detail how those criteria must be applied in the framework of a take charge procedure, Article 25 of that regulation, which concerns the take back procedure, does not for its part contain any similar provision and merely requires the requested Member State to make the necessary checks in order to give a decision on the take back request.

The Court further pointed out that any interpretation to the contrary, according to which such a request may be made only if the requested Member State can be designated as the Member State responsible pursuant to the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation, is at variance with the general scheme of that regulation, which was intended to establish two separate procedures (namely the take charge procedure and the take back procedure), applicable to different situations and governed by different provisions. That interpretation to the contrary would moreover be liable to undermine the achievement of the objective of the Dublin III Regulation which is to prevent secondary movements of applicants for international protection, in that it would imply that the competent authorities of the Member State in which the second application has been lodged could, de facto, re-examine the conclusion reached, at the end of the process for determining the Member State responsible for examining the application, by the competent authorities of the first Member State regarding the latter's own responsibility. It could, moreover, have the consequence of undermining the essential principle of the Dublin III Regulation, set out in Article 3(1) thereof, that an application for international protection must be examined by a single Member State only.

In conclusion, the Court considered that the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation cannot be relied on in support of an action against a transfer decision taken in the framework of a take back procedure.

However, since the criteria for determining responsibility set out in Articles 8 to 10 of the Dublin III Regulation are intended to promote the best interests of the child and the family life of the persons concerned, when the person concerned has provided the competent authority of the second Member State with information clearly establishing that that Member State must be regarded as the Member State responsible, in accordance with the criterion set out in Article 9 of the Dublin III Regulation, it is then for that Member State, in accordance

with the principle of sincere cooperation, to accept its own responsibility, in a situation covered by Article 20(5) of the Dublin III Regulation (namely where the process of determining the Member State responsible has not yet been completed in the first Member State). Therefore, in such a situation, the third-country national may, by way of exception, rely on that criterion in an appeal against a decision to transfer him or her.

In the judgment in ***Torubarov*** (C-556/17, EU:C:2019:626) of 29 July 2019, the Court, sitting as the Grand Chamber, was required to interpret *the provision of the Procedures Directive defining the scope of the right to an effective remedy which applicants for international protection (refugee status or subsidiary protection) must have, inter alia, against decisions rejecting their applications*. [87] The Court held that where a court has found, following a full and *ex nunc* examination of all the relevant matters of fact and law submitted by the applicant for international protection, that, in accordance with the criteria laid down in the Qualification Directive, that applicant must be granted such protection on the ground upon which he or she relies in support of that application, but an administrative or quasi-judicial body subsequently adopts a contrary decision, without establishing, for that purpose, that new elements have arisen that justify a new assessment of the applicant's international protection needs, that court must vary that decision which does not comply with its previous judgment and substitute it with its own decision on the application for international protection, disapplying as necessary the national law that would prohibit it from doing so.

In that case, an action was brought before the referring court for the third time in the same case by a Russian national prosecuted in his country of origin, who had submitted an application for international protection in Hungary on the ground that he feared persecution or serious harm in Russia for his political opinions. The Hungarian authority responsible for examining that application rejected it on three occasions, despite the fact that, on two occasions, the referring court had annulled its decisions rejecting that application and, in the context of the person concerned's second action, had concluded, after an assessment of all the material in the file, that his application for international protection was well founded. In those circumstances, the person concerned, in the context of his third action, asked the national court to substitute its own decision, as to the international protection from which he should benefit, for the contested decisions. However, a law dating from 2015, aimed at managing mass immigration, abolished the power of the courts to vary administrative decisions relating to the grant of international protection.

On the basis of the judgment in *Alheto*, [88] the Court first recalled that the purpose of the Procedures Directive is not to render uniform the procedural rules to be applied within Member States when adopting a new decision on an application for international protection after the annulment of the original administrative decision rejecting such an application. However, it follows from the purpose of that directive, which is to ensure the fastest possible processing of applications of that nature, from the obligation to ensure that the relevant provision of that directive is effective, and from the need, arising from Article 47 of the Charter, to ensure an effective remedy, that each Member State must order its national law in such a way that, following annulment of that initial decision and in the event of referral of the file to the quasi-judicial or administrative body responsible for examining that request, a new decision is adopted within a short period of time and that it complies with the assessment contained in the judgment annulling the initial decision.

The Court emphasised in particular that by providing that the court with jurisdiction to rule on an appeal against a decision rejecting an application for international protection is required to examine, where applicable, the 'international protection needs' of the applicant, the EU legislature intended to confer on that court, where it considers that it has available to it all the elements of fact and law necessary in that regard, the power to give a binding ruling — following a full and *ex nunc*, that is to say, exhaustive and up-to-date,

87| Article 46(3).

88| Judgment of the Court of 25 July 2018, ***Alheto*** (C-585/16, EU:C:2018:584).

examination of those elements — as to whether the applicant concerned satisfies the conditions laid down in the Qualification Directive to be granted international protection. In such an event, where that court reaches the conclusion that the application for international protection should be granted and annuls the decision of the competent national authority rejecting the application before returning the file to it, that authority, subject to matters of fact or law arising that objectively require a new updated assessment, no longer has discretion as to whether or not to grant the protection requested in the light of the same grounds as those that were submitted to the court concerned.

Therefore, a national law that results in a situation in which the national court has no means of enforcing its judgment could in practice deprive the applicant for international protection of an effective remedy, since a final and binding judicial decision concerning the applicant could remain ineffective.

In the judgment in ***Haqbin*** (C-233/18, EU:C:2019:956), delivered on 12 November 2019, the Grand Chamber of the Court ruled *for the first time on the scope of the right conferred on Member States by Article 20(4) of the Reception Directive to determine the sanctions applicable when an applicant for international protection is guilty of serious breaches of the rules of the accommodation centre in which he or she is hosted or of seriously violent behaviour*. The Court held that that provision, read in the light of Article 1 of the Charter, does not allow Member States to impose in such cases a sanction consisting in the withdrawal, even temporary, of material reception conditions relating to housing, food or clothing in respect of the applicant.

Mr Haqbin is an Afghan national who arrived in Belgium as an unaccompanied minor. Having lodged an application for international protection, he was hosted in a reception centre. In that centre, he was involved in a brawl with other residents of various ethnic origins. Following that brawl, the director of the reception centre decided to exclude him, for a period of 15 days, from material support in a reception facility. During that period of exclusion, Mr Haqbin, according to his own statements, spent his nights in a park in Brussels and stayed with friends.

Against that background, the referring court before which Mr Haqbin lodged an appeal against the first-instance ruling dismissing his action against the exclusion decision asked the Court whether it was possible for the Belgian authorities to withdraw or reduce material reception conditions in respect of an applicant for international protection in Mr Haqbin's situation. Moreover, with regard to his particular situation, the question arose as to the conditions under which such a sanction may be imposed on an unaccompanied minor.

The Court first clarified that the sanctions referred to in Article 20(4) of the Reception Directive may, in principle, concern material reception conditions. However, such sanctions must, in accordance with Article 20(5) of that directive, be objective, impartial, motivated and proportionate to the particular situation of the applicant and must, under all circumstances, ensure a dignified standard of living.

However, the withdrawal, even temporary, of the full set of material reception conditions or of material reception conditions relating to housing, food or clothing would be irreconcilable with the requirement to ensure a dignified standard of living for the applicant. Indeed, such a sanction would preclude the applicant from being allowed to meet his or her most basic needs. In addition, it would amount to a failure to comply with the proportionality requirement.

The Court added that Member States are required to guarantee continuously and without interruption a dignified standard of living and that the authorities responsible for the reception of applicants for international protection must ensure, under their guidance and responsibility, the provision of material reception conditions guaranteeing that standard of living. Accordingly, they cannot simply provide an applicant who has been excluded with a list of private centres for the homeless likely to host him or her, as envisaged by the competent Belgian authorities.

In the case of a sanction consisting in the reduction of material reception conditions, such as the withdrawal or reduction of the daily expenses allowance, the Court made clear that it is for the competent authorities to ensure under all circumstances that such a sanction, having regard to the particular situation of the applicant as well as all the facts of the case, observes the principle of proportionality and does not undermine the dignity of the applicant. In that regard, it recalled that Member States may, in the cases referred to in Article 20(4) of the Reception Directive, provide for measures other than those relating to material reception conditions, such as holding the applicant in a separate part of the accommodation centre or transferring the applicant to another accommodation centre. Furthermore, the competent authorities may decide to hold the applicant in detention, in compliance with the conditions specified by the directive.

Where the applicant is an unaccompanied minor and, therefore, a vulnerable person within the meaning of the Reception Directive, the national authorities must, when imposing sanctions pursuant to Article 20(4) thereof, take increased account of the particular situation of the minor and of the principle of proportionality. Those sanctions must, in the light, inter alia, of Article 24 of the Charter, be determined by taking particular account of the best interests of the child. Moreover, the Reception Directive does not preclude those authorities from deciding to entrust the care of such a minor to child protection services or the judicial authorities responsible therefor.

1.3. Return decisions

In its judgment in ***Arib and Others*** (C-444/17, EU:C:2019:220), delivered on 19 March 2019, the Grand Chamber of the Court ruled on the interpretation of *Article 2(2)(a) of Directive 2008/115* [89] *('the Return Directive'), which permits Member States, in the two situations covered by that article, to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the directive, in order to be able to remove more swiftly third-country nationals intercepted in connection with the crossing of one such border.* The Court held that that provision, read in conjunction with Article 32 of Regulation 2016/399, [90] does not apply to the situation of an illegally staying third-country national who has been apprehended in the immediate vicinity of an internal border of a Member State, even where that Member State has reintroduced border control at that border, pursuant to Article 25 of that regulation, on account of a serious threat to public policy or internal security in that Member State.

After finding that Article 2(2)(a) of the Return Directive does not permit Member States to exclude certain illegally staying third-country nationals from the directive's scope on the ground of illegal entry across an internal border, the Court examined whether the reintroduction by a Member State of border control at its internal borders, pursuant to Article 25 of Regulation 2016/399, is such as to cause the situation of a third-country national who is staying illegally on the territory of that Member State and has been apprehended in the vicinity of that internal border to fall within Article 2(2)(a) of the Return Directive.

In that regard, the Court noted, first, that as a derogation from the scope of the Return Directive, the exception set out in the abovementioned provision of that directive must be interpreted strictly. According to its own terms, which are unambiguous in that respect, that provision concerns the situation of a third-country national who finds himself or herself at the 'external border' of a Member State or in the immediate vicinity of one such border. There is thus no mention of the fact that that situation may be equated with the situation

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

90| Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1).

of a third-country national who finds himself or herself at an internal border at which border control has been reintroduced pursuant to Article 25 of Regulation 2016/399, or in the immediate vicinity of one such internal border, even though on the day on which the directive was adopted, Articles 23 and 28 of Regulation No 562/2006 [91] already provided that (i) Member States could exceptionally reintroduce border control at their internal borders where there was a serious threat to their public policy and internal security, and (ii) in such a case the relevant provisions of that regulation relating to external borders were to apply *mutatis mutandis*.

Secondly, as regards the objective pursued by Article 2(2)(a) of the Return Directive, the Court held that, in the light of that objective, there is no need to treat differently the situation of an illegally staying third-country national, apprehended in the immediate vicinity of an internal border, depending on whether or not border control has been reintroduced at that border, since the mere reintroduction of border control at the internal borders of a Member State does not mean that an illegally staying third-country national apprehended in connection with the crossing of that border, or in the immediate vicinity thereof, may be removed more swiftly or more easily from the territory of the Schengen area by being returned immediately to an external border than if he or she had been apprehended in connection with a police check for the purposes of Article 23(a) of Regulation 2016/399, in the same place, without border control having been reintroduced at those borders.

Thirdly, the Court stated that the need for the scope of Article 2(2)(a) of the Return Directive to be interpreted restrictively is further supported by an analysis of the context of which that provision forms part and, specifically, a systematic reading of Regulation 2016/399. Under Article 2 of that regulation, the concepts of 'internal borders' and 'external borders' are mutually exclusive and Article 32 of that regulation merely provides that, where border control at internal borders is reintroduced by a Member State, only the relevant provisions of the regulation relating to external borders are to apply *mutatis mutandis*. However, Article 32 of the regulation does not provide that Article 2(2)(a) of the Return Directive is to be applied in such a case.

2. Immigration policy

In the judgment in ***X (Long-term residents — Stable, regular and sufficient resources)*** (C-302/18, EU:C:2019:830), delivered on 3 October 2019, the Court interpreted Directive 2003/109 in so far as it provides that Member States are to require third-country nationals, in order to obtain long-term resident status, to provide evidence that they have, for themselves and for dependent family members, stable and regular resources which are sufficient to provide for their own needs and those of their family members, without recourse to the social assistance system of the Member State concerned. [92] The Court held that *the concept of 'resources' does not concern solely the own resources of the applicant for long-term resident status, but may also cover the resources made available to that applicant by a third party on condition that, in the light of the individual circumstances of that applicant, they are stable, regular and sufficient.*

The judgment was delivered in the context of proceedings between X, a Cameroonian national, and the Belgian State concerning the rejection of an application for authorisation to settle and to obtain long-term resident status. In his application, X relied on his brother's resources and had submitted a written undertaking signed by his brother stating that he would ensure that X, as well as his dependent family members, had

91| Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

92| Article 5(1)(a).

stable, regular and sufficient means of subsistence. The application was rejected on the ground that X did not have his own resources and that the mere fact that his costs would be borne by his brother did not imply that he had a regular and stable income.

After finding that the concept of 'resources', referred to in the provision at issue, is an autonomous concept of EU law, the Court observed that the wording of that provision does not, on its own, make it possible to determine the nature and origin of the resources in question. Certain language versions of Directive 2003/109 use a term equivalent to the word 'resources', whereas other language versions use terms equivalent to the concept of 'income'. Thus, the Court gave an interpretation based on both the objective of that directive and the context of which the provision at issue forms part and concluded, inter alia, that the directive does not, in principle, allow additional conditions to be laid down relating to the origin of the resources referred to by that provision.

Next, the Court held that it also follows from the examination of the wording, objective and context of that provision, in the light of the comparable provisions of Directives 2004/38 [93] and 2003/86, [94] that the origin of the resources referred to in that first provision is not a decisive criterion for the Member State concerned for the purpose of ascertaining whether they are stable, regular and sufficient. Even though they have a different scope, the conditions of 'resources' referred to in Directive 2003/109 and Directive 2004/38 may be interpreted in an analogous manner as not precluding the person concerned from relying on resources from a third party who is a family member. Moreover, it follows from Directive 2003/86 that it is not the origin of the resources, but the stable and sufficient nature thereof, in view of the individual situation of the person concerned, that is decisive.

Lastly, the Court added that it is for the competent national authority to analyse whether resources from a third party or a member of the applicant's family must be considered to be stable, regular and sufficient. In that regard, it is permissible to take into account the legally binding nature of a commitment of cost bearing by such a third party or a family member, the family relationship between the applicant and the family member or members prepared to bear his or her costs, as well as the nature and permanence of the resources of that family member or those family members.

In the judgment in ***Bevándorlási és Menekültügyi Hivatal (Family reunification — Sister of a refugee)*** (C-519/18, EU:C:2019:1070), delivered on 12 December 2019, the Court *held that a Member State may, in order to authorise the family reunification of a refugee's sister, require her to be unable to provide for her own needs on account of her state of health*. However, that inability must be assessed having regard to the particular situation of refugees and at the end of a case-by-case examination. In addition, such family reunification may be authorised only if it is ascertained, in the same way, that the material support of the person concerned is actually provided by the refugee, or that the refugee appears as the most able to provide that support.

In the case in the main proceedings, the sister of an Iranian national, that national having obtained refugee status in Hungary, had applied for a residence permit for the purposes of family reunification. Although the refugee's sister suffered from depression which required regular medical supervision, her application had been rejected on the ground, in particular, that she had not demonstrated that she was unable to provide for her own needs on account of her state of health, a prerequisite under Hungarian legislation.

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

94| Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

Asked whether that legislation was compatible with Directive 2003/86, the Court found, first of all, that as regards refugees, more favourable conditions are provided for in order to exercise the right to family reunification. In particular, Member States may choose to confer that right on members of a refugee's family, such as siblings, who are not expressly listed in Directive 2003/86 as having to be, or being capable of being, granted such a right. The Court then emphasised Member States' significant latitude both to decide to give effect to that extension of the personal scope of the directive and to determine the family members concerned.

That latitude is, however, limited by the obligation to ensure that the family member concerned is 'dependent' on the refugee. In that connection, the Court stated that the meaning to be given to that condition, expressly laid down by Directive 2003/86, must ensure an independent and uniform interpretation throughout the European Union. In that respect, regard must be had to the clarification already provided by the Court regarding a comparable condition in the context of Directive 2004/38, while taking into account the special nature of the situation of refugees. Thus, a refugee cannot be automatically required to provide, as at the date of the application for family reunification, material support for his or her family member. That refugee may indeed have been faced with the physical impossibility of supplying the necessary funds or the fear of endangering his or her family by contacting them. Consequently, the Court found that in order for a refugee's family member to be considered dependent on the refugee, two criteria must be met. First, the family member must not be in a position to provide for his or her own needs, having regard to that person's financial and social conditions, and that must be the case as at the date on which that person seeks to join the refugee. Secondly, it must be ascertained that the family member's material support is actually provided by the refugee, or that, having regard to all the relevant circumstances, such as the degree of relationship of the family member with the refugee, the nature and solidity of the family member's other family relationships, and the age and financial situation of his or her other relatives, the refugee appears as the most able to provide that material support.

The Court also stated that, having regard to their latitude in the matter, Member States may lay down additional requirements relating to the nature of the relationship of dependence between the refugee and the family members concerned. Member States may, in particular, require those family members to be dependent on the refugee on certain precise grounds, such as their state of health. That possibility is, however, qualified in two respects. First, such national legislation must observe both the fundamental rights enshrined in the Charter and the principle of proportionality. Secondly, the competent national authorities are required to carry out an examination on a case-by-case basis of the application for family reunification and of the condition that the family member must be dependent on the refugee, taking into account all the relevant factors. In addition, those authorities must take account of the fact that the extent of needs can vary greatly depending on the individual, and also of the particular situation of refugees, in particular in the light of the difficulty in obtaining evidence in their country of origin.

IX. Judicial cooperation in criminal matters: European arrest warrant

In the field of judicial cooperation in criminal matters, the Court delivered eight noteworthy judgments in 2019 concerning the European arrest warrant, four of which were dealt with under the urgent preliminary ruling procedure (PPU). Five judgments deal with, in particular, the concept of 'issuing judicial authority' within the meaning of Framework Decision 2002/584/JHA [95] on the European arrest warrant.

In the joined cases giving rise to the judgment in ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456), delivered on 27 May 2019, the Court, sitting as the Grand Chamber, held that *the concept of 'issuing judicial authority', within the meaning of Article 6(1) of the Framework Decision on the European arrest warrant, that is, the authority which is competent to issue a European arrest warrant, does not include public prosecutor's offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue such a warrant*. By contrast, in the judgment in ***PF (Prosecutor General of Lithuania)*** (C-509/18, EU:C:2019:457), also delivered on the same day by the Grand Chamber, the Court held that *that concept includes the prosecutor general of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose position, in that Member State, affords him or her a guarantee of independence from the executive in connection with the issue of a European arrest warrant*.

These various cases concerned the execution, in Ireland, of European arrest warrants issued by public prosecutor's offices in Germany for the purposes of the prosecution, respectively, of a Lithuanian national (*OG*) and a Romanian national (*PI*), and a European arrest warrant issued by the Prosecutor General of Lithuania for the purposes of the prosecution of a Lithuanian national (*PF*).

In each judgment, the Court first of all stated that the concept of 'judicial authority', within the meaning of Article 6(1) of the Framework Decision on the European arrest warrant, requires an autonomous interpretation and that that concept is not limited to designating solely the judges or courts of a Member State; it must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive. Thus, that concept is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State. In that regard, in so far as the European arrest warrant facilitates free movement of judicial decisions, prior to judgment, in relation to the conduct of criminal prosecutions, authorities which, under national law, are competent to adopt such decisions are capable of falling within the scope of the Framework Decision on the European arrest warrant. Therefore, an authority, such as a public prosecutor's office or a prosecutor, which is competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that that person may be brought before a court, must be regarded as participating in the administration of justice in the relevant Member State, which the Court considered to be the case of the public prosecutor's offices in Germany (*OG* and *PI*) and the Prosecutor General of Lithuania (*PF*).

95| 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).

Next, the Court stated that the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued. As regards a measure, such as the issue of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection.

Therefore, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the national judicial decision, such as a national arrest warrant, on which the European arrest warrant is based, must, itself, meet those requirements. The Court considered that such a solution allows the executing judicial authority to be satisfied that the decision to issue a European arrest warrant for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom the national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision.

As far as the second level of protection is concerned, the judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issue of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant. In addition, the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the carrying out of those of its responsibilities which are inherent in the issue of a European arrest warrant. Specifically, that independence requires there to be statutory rules and an institutional framework capable of guaranteeing that that authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive. Lastly, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject of court proceedings in the Member State, which meet in full the requirements inherent in effective judicial protection.

In the judgments in ***Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)*** (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077), ***Openbaar Ministerie (Swedish Public Prosecutor's Office)*** (C-625/19 PPU, EU:C:2019:1078) and ***Openbaar Ministerie (Public Prosecutor of Brussels)*** (C-627/19 PPU, EU:C:2019:1079), delivered on 12 December 2019 under the urgent preliminary ruling procedure, the Court *supplemented its recent case-law* [96] *on the Framework Decision on the European Arrest warrant, providing guidance on the requirement that the 'issuing judicial authority' for a European arrest warrant be independent and the requirement that persons subject to such a warrant be afforded effective judicial protection*.

96| See, in particular, the judgments of the Court of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456); of 27 May 2019, ***PF (Prosecutor General of Lithuania)*** (C-509/18, EU:C:2019:457); and of 9 October 2019, ***NJ (Public Prosecutor's Office in Vienna)*** (C-489/19 PPU, EU:C:2019:849).

In the main proceedings, European arrest warrants had been issued by public prosecutor's offices in France (C-566/19 PPU and C-626/19 PPU), Sweden (C-625/19 PPU) and Belgium (C-627/19 PPU) for the purpose, in the first three cases, of criminal prosecution and, in the fourth case, of enforcing of a sentence. At issue was the execution of those European arrest warrants, which was dependent, among other things, on the classification of the different public prosecutor's offices as 'issuing judicial authorities'.

First of all, the Court considered whether the status of the French Public Prosecutor's Office afforded it a sufficient guarantee of independence to issue European arrest warrants and ruled that that was the case.

It pointed out that, according to the information submitted to it, public prosecutors at the French Public Prosecutor's Office have the power independently to assess, particularly in relation to the executive, whether the issue of a European arrest warrant is necessary and proportionate, and exercise that power objectively, taking into account all of the inculpatory and exculpatory evidence. Their independence is not called into question by the fact that they are responsible for criminal prosecutions, or by the fact that the Minister for Justice may issue them with general criminal justice policy instructions, or by the fact that they are under the direction and control of their hierarchical superiors, themselves part of the Public Prosecutor's Office, and thus obliged to comply with the instructions of those hierarchical superiors.

Secondly, the Court clarified the requirement laid down in recent case-law that the decision to issue a European arrest warrant must, when it is taken by an authority which is not a court but participates in the administration of justice, be capable of being the subject of court proceedings in the issuing Member State which meet the requirements of effective judicial protection.

In the first place, the Court made clear that the existence of such court proceedings is not a condition for classification of the authority as an 'issuing judicial authority' within the meaning of the Framework Decision on the European arrest warrant.

In the second place, the Court stated that it is for Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of the procedural rules that they implement and which may vary from one system to another. Introducing a separate right of appeal against the decision to issue a European arrest warrant is just one possibility. Thus, the Court held that the requirements inherent in effective judicial protection, which must be afforded to a person subject to a European arrest warrant issued by an authority other than a court for the purposes of criminal prosecution, are satisfied where the conditions for the issue of that warrant, and in particular its proportionality, are subject to judicial review in the issuing Member State.

In that case, the French and Swedish systems satisfy those requirements, since national procedural rules allow for the proportionality of the decision of the Public Prosecutor's Office to issue a European arrest warrant to be judicially reviewed before, or practically at the same time as, that decision is adopted, and also subsequently. In particular, such a proportionality assessment is also made in advance by the court adopting the national decision that may subsequently constitute the basis of the European arrest warrant.

Where a European arrest warrant has been issued by a public prosecutor's office not for the purposes of criminal prosecution, but for the purposes of executing a custodial sentence imposed by a final judgment, the Court found that the requirements of effective judicial protection also do not mean that there must be provision for a separate appeal against the public prosecutor's decision. Therefore, the fact that the Belgian system does not provide for such an appeal does not mean that it does not satisfy those requirements. In that regard, the Court stated that where a European arrest warrant is issued with a view to executing a sentence, the judicial review is carried out by the enforceable judgment on which that arrest warrant is based. The executing judicial authority can presume that the decision to issue such an arrest warrant resulted from judicial proceedings in which the requested person had the benefit of safeguards in respect of the protection

of his or her fundamental rights. Furthermore, the proportionality of that arrest warrant also follows from the sentence imposed, since the Framework Decision on the European arrest warrant provides that that sentence must be a custodial sentence or a detention order of at least four months.

On 24 June 2019, in the judgment in ***Popławski*** (C-573/17, EU:C:2019:530), the Court, sitting as the Grand Chamber, examined *whether the judicial authority executing a European arrest warrant must, in accordance with the principle of primacy of EU law, disapply national provisions which are incompatible with a framework decision.* It also provided guidance on *the legal effects of a declaration made by a Member State pursuant to Article 28(2) of Framework Decision 2008/909* [97] *after the adoption of that framework decision.* Under that provision, a Member State 'may, on the adoption of [that] Framework Decision, make a declaration indicating that, in cases where the final judgment [to be enforced] has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011'.

The main proceedings concerned the execution, in the Netherlands, of a European arrest warrant issued in October 2013 by a Polish court against a Polish national residing in the Netherlands for the purpose of enforcing a custodial sentence in Poland. In October 2015, in the context of the execution of that European arrest warrant, a first request for a preliminary ruling was made by the referring court, to which the Court replied by judgment of 29 June 2017, *Popławski*. [98] In that judgment, the Court held, inter alia, that Article 4(6) of the Framework Decision on the European arrest warrant, which lays down a ground for optional non-execution of a European arrest warrant, must be interpreted as precluding legislation of a Member State implementing that provision which, in a situation where the surrender of a foreign national in possession of a residence permit of indefinite duration in the territory of that Member State is sought by another Member State in order to enforce a custodial sentence imposed on that national by a decision which has become final, (i) does not authorise such a surrender, and (ii) merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of that judgment, where, on the date of the refusal to surrender, the enforcement has not in fact been taken over and where, furthermore, in the event that taking over that enforcement subsequently proves to be impossible, such a refusal may not be challenged.

In the second *Popławski* judgment, the Court first of all held, referring inter alia to the wording of Article 28(2) of Framework Decision 2008/909 and to its general scheme, that a declaration made pursuant to that provision by a Member State after the adoption of that framework decision is not capable of producing legal effects.

Next, it recalled the scope of the obligation that the principle of primacy of EU law places on a national court in a situation in which a provision of its national law contravenes provisions of EU law that, like the Framework Decision on the European arrest warrant and Framework Decision 2008/909, do not have direct effect. In such a situation, that court is not required, solely on the basis of EU law, to disapply the provision of its national law which is contrary to the provision of EU law concerned.

However, the Court also observed that although framework decisions cannot have direct effect, their binding character nevertheless places on national authorities an obligation to interpret national law in conformity with EU law as from the date of expiry of the period for their transposition, provided that that interpretation is not *contra legem* and complies with the general principles of law, in particular, the principles of legal certainty and non-retroactivity. With regard to the obligation to interpret Netherlands law in conformity with the

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

98| Judgment of the Court of 29 June 2017, ***Popławski*** (C-579/15, EU:C:2017:503).

Framework Decision on the European arrest warrant, the Court observed that in its previous judgment of 29 June 2017, *Popławski*, it had found that the national court's obligation to ensure the full effectiveness of that framework decision brought with it the obligation for the Kingdom of the Netherlands to execute the European arrest warrant at issue or, in the event of a refusal, the obligation to ensure that the sentence pronounced in Poland against Mr Popławski was actually executed in the Netherlands.

In the second place, the Court also set out the correct interpretation of Article 4(6) of the Framework Decision on the European arrest warrant. In that respect, it observed that, in relation to, first, the obligation imposed by that provision on the executing Member State to ensure, in the event of a refusal to execute the European arrest warrant, that the custodial sentence against the requested person is actually enforced, that obligation presupposes an actual undertaking on the part of that Member State to execute the sentence. Thus, the mere fact that that Member State declares itself 'willing' to have that sentence enforced cannot be regarded as justifying such a refusal. Consequently, any refusal to execute a European arrest warrant must be preceded by the executing judicial authority's examination of whether it is actually possible to enforce the sentence in accordance with its domestic law. In those circumstances, it falls to the referring court to assess, in that case, whether Netherlands law may be interpreted, without resorting to an interpretation *contra legem*, meaning that the Framework Decision on the European arrest warrant may be treated as a formal legal basis for the purposes of applying the national provision at issue. In that regard, the Court made it clear that the referring court cannot, in the main proceedings, validly claim that it is impossible for it to interpret that provision of national law in a manner that is compatible with EU law, for the sole reason that that national provision has been interpreted, by a minister called on to intervene where surrender is refused, in a way that is not compatible with that law. As a consequence, although the referring court concluded that the Framework Decision on the European arrest warrant, in accordance with the methods of construction recognised by Netherlands law, may be treated as a convention for the purposes of the application of the national provision concerned, it is required to apply that provision, as interpreted, to the dispute in the main proceedings, without having regard to the fact that the Minister is opposed to that interpretation.

Secondly, with regard to the margin of discretion laid down in Article 4(6) of the Framework Decision on the European arrest warrant and enjoyed by the executing judicial authority in the implementation of the ground for optional non-execution of a European arrest warrant provided for in that provision, the Court recalled that that authority must be able to take into consideration the objective pursued by that ground for optional non-execution, which means enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on that person expires. Thus, the option conferred on the executing judicial authority to refuse, on the basis of that provision, to surrender the requested person may be exercised only if that authority — having ascertained that (i) that the person is staying in or is a national or a resident of the executing Member State and (ii) the custodial sentence passed in the issuing Member State against that person can actually be enforced in the executing Member State — considers that there is a legitimate interest which would justify the sentence imposed in the issuing Member State being enforced in the executing Member State. Therefore, it falls primarily to the referring court to interpret its national law, to the greatest extent possible, in conformity with EU law, which enables it to ensure an outcome that is compatible with the objective pursued by the Framework Decision on the European arrest warrant. If that proves to be impossible, that court should at the very least interpret its national law in a way that makes it possible for it to reach a solution which is not contrary to the objective of that framework decision and which therefore makes it possible to avoid Mr Popławski's impunity. That would be the case if the court were to interpret that law as meaning that the refusal to execute the European arrest warrant issued against Mr Popławski is subject to the guarantee that the custodial sentence which he received in Poland will actually be enforced in the Netherlands, even if that refusal occurs automatically.

In the judgment in ***Dorobantu*** (C-128/18, EU:C:2019:857), delivered on 15 October 2019, the Court, sitting as the Grand Chamber, interpreted, in the light of the prohibition of torture and inhuman or degrading treatment or punishment referred to in Article 4 of the Charter, *the provision of the Framework Decision on the European arrest warrant* [99] *according to which that instrument is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.*

The dispute in the main proceedings concerned the execution, in Germany, of a European arrest warrant issued by a Romanian court in respect of a Romanian national. A German court, as the authority executing that European arrest warrant, queried the criteria to be applied when assessing whether the conditions of detention to which that individual would be exposed in the event of his being surrendered to the Romanian authorities complied with the requirements arising under Article 4 of the Charter. This case enabled the Court to clarify the case-law resulting, in particular, from its judgments in *Aranyosi and Căldăraru* [100] and *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*. [101]

In the first place, the Court adjudicated on the extent and scope of the review by the executing judicial authority of detention conditions in the issuing Member State. In that regard, it ruled that when that authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised flaws in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained. In view of the fact that the prohibition of inhuman or degrading treatment is absolute, that review is not limited to obvious inadequacies.

Furthermore, in the light, on the one hand, of the specific and precise nature of such a review and, on the other, of the time limits set by the framework decision, the executing judicial authority cannot make an assessment of conditions of detention in all the prisons in the issuing Member State in which the individual concerned might be detained. For the purpose of reviewing the conditions of detention in the prison in which it is actually intended that that individual will be detained, the executing judicial authority must request from the issuing judicial authority the information it deems necessary and must rely, in principle, on the assurances given by the latter, in the absence of any specific indications that the detention conditions are in breach of Article 4 of the Charter.

The physical aspects which the executing judicial authority must assess include the personal space available per detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison.

In the second place, as regards, in particular, the personal space available per detainee, the Court noted that the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), [102] in so far as the right contained in that provision corresponds to the right guaranteed by Article 4 of the Charter. Referring to the case-law of the

99| Article 1(3) of the Framework Decision on the European arrest warrant.

100| Judgment of the Court of 5 April 2016, ***Aranyosi and Căldăraru*** (C-404/15 and C-659/15 PPU, EU:C:2016:198).

101| Judgment of the Court of 25 July 2018, ***Generalstaatsanwaltschaft (Conditions of detention in Hungary)*** (C-220/18 PPU, EU:C:2018:589).

102| Convention signed in Rome on 4 November 1950.

European Court of Human Rights, the Court considered, in particular, that a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee falls below 3 m^2 in multi-occupancy cell, a presumption which can normally be rebutted only if the reductions in that personal space are short, occasional and minor, if they are accompanied by freedom of movement outside the cell and out-of-cell activities, and if the general conditions of detention at the facility concerned are appropriate. The Court also stated that in calculating the available space, the area occupied by sanitary facilities should not be taken into account, but space occupied by furniture should, although detainees must still have the possibility of moving around normally within the cell.

In the third place, the Court held that the existence of monitoring measures including subsequent judicial review of detention conditions in the issuing Member State may be taken into account by the executing judicial authorities when they make an overall assessment of the conditions in which it is intended that a person who is the subject of a European arrest warrant will be held. However, the executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling him or her to challenge the conditions of his or her detention or because there are legislative or structural measures that are intended to reinforce the monitoring of detention conditions.

Lastly, in the fourth place, the Court ruled that a finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that that person will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition. The fact that the prohibition of inhuman or degrading treatment is absolute precludes the fundamental right not to be subjected to such treatment from being in any way limited by such considerations. Thus, the need to guarantee that the person concerned will not be subjected to any inhuman or degrading treatment justifies, exceptionally, a limitation of the principles of mutual trust and recognition.

X. Transport

Two judgments are worthy of mention under this heading. The first concerns the interpretation of the concept of 'extraordinary circumstance' within the meaning of Regulation No 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. The second deals with the interpretation of the concept of 'transport contract' within the meaning of Regulation No 1371/2007 on rail passengers' rights and obligations.

In the judgment in ***Germanwings*** (C-501/17, EU:C:2019:288), delivered on 4 April 2019, the Court *interpreted the concept of 'extraordinary circumstance' within the meaning of Regulation No 261/2004* [103] and found that damage to an aircraft tyre by a screw lying on the runway is one such circumstance. Where a delay in arrival of a flight of three hours or more is caused by that circumstance, an air carrier is nevertheless required to pay compensation to passengers if it has not deployed all the resources at its disposal to limit the long delay.

The main proceedings concerned a dispute between a passenger and the air carrier Germanwings over the latter's refusal to compensate that passenger for a long delay to his flight. The air carrier had refused to pay compensation on the ground that the delay to the flight was due to damage to an aircraft tyre caused by a screw lying on the runway, a circumstance that it claimed should be classified as 'extraordinary' [104] within the meaning of Regulation 261/2004, thus releasing it from its compensation obligation under that regulation. [105]

The regional court before which proceedings were brought sought to ascertain whether the damage at issue amounts to an 'extraordinary circumstance' within the meaning of Regulation No 261/2004.

First of all, the Court stated that the air carrier is not required to pay passengers compensation if it can prove that the cancellation of the flight or its delay in arrival of three hours or more is caused by 'extraordinary circumstances' that could not have been avoided even if all reasonable measures had been taken and, where such circumstances do arise, that it adopted measures appropriate to the situation, deploying all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid that situation from resulting in the cancellation or long delay of the flight in question, without the air carrier being required to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time.

Thus, the Court recalled that events may be classified as 'extraordinary circumstances', within the meaning of Regulation No 261/2004, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control.

The Court found that even though air carriers are regularly faced with damage to the tyres of their aircraft, the malfunctioning of a tyre that is the sole result of impact with a foreign object lying on the airport runway cannot be regarded as inherent, by its nature or origin, in the normal exercise of the activity of the air carrier concerned. In addition, that circumstance is outside the carrier's actual control and, consequently, must be classified as an 'extraordinary circumstance' within the meaning of Regulation No 261/2004.

103| 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).

104| Article 5(3) of Regulation No 261/2004.

105| Article 5(1) and Article 7 of Regulation No 261/2004.

However, in order to be released from its compensation obligation under Regulation No 261/2004, it is for the air carrier to prove that it deployed all the resources at its disposal in order to avoid the changing of the tyre damaged by a foreign object lying on the airport runway from leading to a long delay to the flight in question, which is for the referring court to ascertain. In that regard, specifically in respect of damage to tyres, the Court noted that air carriers are able to have at their disposal, in the airports from which they operate, contracts for changing tyres under which they are afforded priority treatment.

In the judgment in ***Kanyeba and Others*** (C-349/18 to C-351/18, EU:C:2019:936), delivered on 7 November 2019, the Court considered, first, *the interpretation of the concept of 'transport contract', within the meaning of Article 3(8) of Regulation No 1371/2007 on rail passengers' rights and obligations* [106] *and, secondly, the powers of the national court where it establishes that a contractual term is unfair, within the meaning of Directive 93/13 on unfair terms*. [107]

This judgment arose out of three disputes between the Belgian national railway company — Société nationale des chemins de fer belges (SNCB) — and three passengers concerning additional surcharges claimed from the latter for having travelled by train without a transport ticket. Following those passengers' refusal to regularise their situation by paying either immediately the price of the journey, plus surcharges, or, subsequently, a fixed amount, the SNCB sued them and sought an order that they pay it the sums due as a result of those breaches of its conditions of carriage. The SNCB claimed that the relationship between it and those passengers was not contractual, but administrative, given that they did not buy a ticket. Ruling on those disputes, the referring court asked the Court, first, about the nature of the legal relationship between a transport company and a passenger using the services of that company without a ticket and, secondly, whether the surcharges claimed by the SNCB could be overridden by the protection afforded by the regulation on unfair terms to such passengers.

As a first step, the Court clarified the concept of 'transport contract' within the meaning of Article 3(8) of Regulation No 1371/2007. Thus, it first of all noted, in the light of the wording of that provision, that such a contract essentially imposes the obligation for the rail undertaking to provide to the passenger one or more transport services and the obligation for the passenger to pay the price, unless the service is provided free of charge. It follows that, on the one hand, by allowing free access to its train and, on the other hand, by boarding that train with an intention to travel, both the rail undertaking and the passenger demonstrate their agreement to enter into a contractual relationship, so that the conditions necessary for establishing the existence of a transport contract are, in principle, satisfied. Next, the Court examined the context of that provision and found that, in the light of that wording and context, the concept of 'transport contract' is independent from the possession, by the passenger, of a ticket and, consequently, it covers a situation in which a passenger boards a freely accessible train for the purposes of travel without having obtained a ticket. Finally, the Court noted that it would be contrary to the objective of protecting rail passengers, pursued by Regulation No 1371/2007, to consider that such a passenger can, on the sole ground that the passenger does not have a ticket when boarding a train, be regarded as not being a party to a contractual relationship with the rail undertaking which grants free access to its trains, given that, in such a situation, that passenger could, in circumstances beyond his or her control, be deprived of the rights that that regulation attaches to the conclusion of a transport contract. Moreover, the Court added that in the absence of provisions in that regard in Regulation No 1371/2007, that interpretation of the concept of 'transport contract', within the meaning of

106| Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (OJ 2007 L 315, p. 14).

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

Article 3(8) of that regulation, is without prejudice to the validity of that contract or the consequences which could result from the non-performance, by one of the parties, of its contractual obligations, which remain governed by the applicable national law.

As a second step, the Court, at the outset, noted that, in accordance with Article 1(2) of Directive 93/13, contractual terms which reflect, in particular, mandatory statutory or regulatory provisions are not subject to the provisions of that directive and that it is for the national court to verify whether the term at issue is covered by that exclusion from the scope of that directive. Relying, however, on the assumption that that term is covered by that scope, the Court examined the powers of the national court [108] where the latter has established that a contractual term is unfair, within the meaning of Directive 93/13. Therefore, as regards a penalty clause provided for in a contract concluded between a seller or supplier and a consumer, the Court held, first, that Article 6(1) of that directive precludes a national court which establishes that a penalty clause in a contract concluded between a seller or supplier and a consumer is unfair from moderating the amount of the penalty imposed on the consumer. Secondly, the Court ruled that that provision also precludes a national court from replacing that term, in accordance with the principles of its contract law, with a supplementary provision of national law, except where the contract at issue cannot continue in existence in the event that the unfair term is removed and where the cancellation of the contract in its entirety exposes consumers to particularly unfavourable consequences.

It should also be mentioned under this heading that, in its judgment in ***Austria* v *Germany*** (C-591/17), the Court ruled on the introduction by the Federal Republic of Germany of a charge for the use of motorways and an exemption only for vehicles registered in Germany. That judgment is presented in Section VII.1 'Free movement of goods'.

XI. Competition

1. Article 101 TFEU

In the judgment in ***Skanska Industrial Solutions and Others*** (C-724/17, EU:C:2019:204), delivered on 14 March 2019, the Court ruled on a request for a preliminary ruling concerning the provisions of the Treaty relating to cartels and held that, in a case in which all the shares in the companies that participated in a cartel have been acquired by other companies, which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question.

In that case, a cartel operated in Finland between 1994 and 2002. That cartel agreed on dividing up contracts, prices and tendering for contracts, covered the whole of that Member State and was also liable to affect trade between Member States. Between 2000 and 2003, the defendant companies acquired all the shares in several cartel participants, which they then wound up following voluntary liquidation procedures. By judgment of 29 September 2009, the Finnish Supreme Administrative Court imposed fines on the cartel participants for infringement of the Finnish legislation on restrictions of competition and of the provisions of the Treaty relating to cartels. On the basis of that judgment, the Finnish city of Vantaa sought damages

108| Which result from Article 6(1) of Directive 93/13.

from the acquiring companies for the damage caused by the cartel. However, it was denied those damages on the ground that the rules on civil liability in Finnish law provide that only the legal entity that caused the damage is liable.

By its first and second questions, the referring court asked, in essence, whether the provisions of the Treaty relating to cartels must be interpreted as meaning that, in a case such as that at issue in the main proceedings, the acquiring companies may be held liable for the damage caused by that cartel.

The Court held that the determination of the entity which is required to provide compensation for damage caused by a cartel is directly governed by EU law. Since the liability for damage caused by infringements of EU competition rules is personal in nature, the undertaking which infringes those rules must answer for the damage caused by the infringement. The entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or practice.

The concept of an 'undertaking', within the meaning of Article 101 TFEU, covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed, and designates an economic unit even if in law that unit consists of several persons, natural or legal.

Therefore, when an entity that has infringed EU competition rules is subject to a legal or organisational change, that change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed those rules, when, from an economic point of view, the two are identical. If the undertakings responsible for damage caused by such an infringement could escape liability by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective pursued by that system and the effectiveness of those rules would be jeopardised.

In that case, it appears that there is economic continuity between the acquiring companies, on the one hand, and the companies which participated in the cartel in question, on the other. The acquiring companies have therefore assumed the liability of those latter companies for the damage caused by the cartel in question.

In the preliminary ruling in ***Otis Gesellschaft and Others*** (C-435/18, EU:C:2019:1069), delivered on 12 December 2019, the Court also provided *important clarification concerning the link between provisions of EU law and those of national law governing actions for compensation for loss caused by a cartel by holding that Article 101 TFEU must be interpreted as meaning that a public body which has granted promotional loans to purchasers of products covered by a cartel may request compensation for loss caused by the cartel.*

The case pending before the Austrian Supreme Court followed an action for compensation brought inter alia by the Province of Upper Austria ('the applicant') against five companies active on the market for the installation and maintenance of lifts and escalators, whose participation in anticompetitive conduct in the context of a cartel had already been established. The applicant had not suffered loss as a purchaser of the products covered by the cartel. By contrast, increased construction costs caused by the cartel led it to grant subsidies, in the form of promotional loans for the purpose of financing construction projects affected by the cartel, in a higher amount than would have been the case in the absence of that cartel, depriving the applicant of the possibility to use that difference more profitably. According to the Supreme Court, the principles governing, under national law, compensation for purely material losses restrict compensation to losses which the rule infringed was intended to prevent, which is likely to exclude compensation for losses suffered by persons who do not operate as suppliers or customers on the market affected by the cartel.

Asked by the Supreme Court about the compatibility of such a restriction with Article 101 TFEU, the Court, first of all, noted that Article 101(1) TFEU produces direct effects in relations between individuals and confers the right to request compensation in particular on any person who has suffered loss caused by a contract or conduct which is liable to restrict or distort competition, where there exists a causal connection between

the loss and the infringement of the competition rules. Moreover, the Court also stated that the national rules relating to procedures for exercising that right to compensation must not undermine the effective application of Article 101 TFEU.

The Court considered that effective protection against the negative consequences of an infringement of EU competition rules would be seriously undermined if the right to compensation for losses caused by a cartel was from the outset restricted to suppliers and customers on the market affected by the cartel. In the case in the main proceedings, the restriction provided for by national law relating to compensable loss results precisely in excluding compensation for the loss alleged by the applicant, since it is not a supplier or customer on the market affected by the cartel. In that regard, the Court pointed out that subject to the possibility of the participants to a cartel not being held liable to compensate all the losses they could have caused, it is not necessary that the loss suffered by the person affected present a specific connection with the objective of protection pursued by Article 101 TFEU.

According to the Court, Article 101 TFEU therefore implies that any person who does not operate as a supplier or as a customer on the market affected by a cartel, but who has granted subsidies, in the form of promotional loans, to purchasers of products offered on that market, may request compensation for loss it has suffered as a result of the fact that, since the amount of those subsidies was higher than it would have been in the absence of that cartel, it was unable to use that difference more profitably. Finally, the Court pointed out that it is for the national court to determine whether the applicant had the possibility to make more profitable investments and whether the applicant had established the existence of a causal connection between that loss and the cartel at issue.

2. Article 102 TFEU

In the area of abuse of a dominant position, one judgment concerning the rules governing actions for damages for infringements of competition law is worthy of note.

In the judgment in ***Cogeco Communications*** (C-637/17, EU:C:2019:263), delivered on 28 March 2019, the Court ruled on a request for a preliminary ruling concerning *Directive 2014/104* [109] *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Article 102 TFEU and the principles equivalence and effectiveness.*

The dispute in the main proceedings concerned an action for compensation for the harm that Cogeco Communications Inc. allegedly suffered as a result of anticompetitive practices by the company Sport TV Portugal SA. The action was brought on 27 February 2015 following a decision of the competition authority by which Sport TV Portugal was ordered to pay a fine for abusing its dominant position on the premium sports TV channels market between 2006 and 2011.

The Portuguese law on non-contractual liability applicable to the dispute in the main proceedings provides, however, for a limitation period of three years which, according to Sport TV Portugal, began to run as soon as Cogeco Communications had available to it all the necessary information to assess whether or not it had a right to compensation, in which case the action in that case would be time-barred. Although Directive 2014/104 contains, inter alia, provisions on limitation in the context of actions for damages on account of an

109| Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

infringement of competition law, it had not yet been transposed into the Portuguese legal order when the action was brought. The outcome of the dispute thus depending on the applicability of Directive 2014/104, the referring court formulated a request for a preliminary ruling in that regard.

As regards the application *ratione temporis* of Directive 2014/104, the Court held that where Member States have decided that the provisions of their domestic legal system transposing the procedural provisions of that directive are not applicable to actions for damages brought before the date of entry into force of those national provisions, actions brought after 26 December 2014 but before the date of expiry of the period prescribed for the transposition of that directive remain governed solely by the national procedural rules that were already in force before the transposition of the directive. The same applies a fortiori to the national provisions adopted by Member States pursuant to Article 21 of Directive 2014/104 in order to comply with the substantive provisions thereof, in so far as, as is apparent from the wording of Article 22(1) of that directive, such national provisions must not apply retroactively. In those circumstances, the Court held that Directive 2014/104 must be interpreted as not applying to the dispute in the main proceedings.

Thus, in the absence of EU rules governing actions for damages on account of an infringement of competition law, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an abuse of a dominant position, including those on limitation periods, provided that the principles of equivalence and effectiveness are observed. Those rules must not jeopardise the effective application of Article 102 TFEU.

In that regard, account must be taken of the specificities of competition law cases and in particular of the fact that the bringing of actions for damages on account of infringements of EU competition law requires, in principle, a complex factual and economic analysis.

Applying the principle of effectiveness, the Court held that if the limitation period, which starts to run before the completion of the proceedings following which a final decision is made by the national competition authority or by a review court, is too short in relation to the duration of those proceedings and cannot be suspended or interrupted during such proceedings, it is not inconceivable that that limitation period may expire even before those proceedings are completed. Thus, such a limitation period may render the exercise of the right to bring actions for compensation based on a final decision finding an infringement of EU competition rules practically impossible or excessively difficult. Therefore, the Court held that Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party became aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority.

Reference should also be made to one other judgment, delivered in ***Powszechny Zakład Ubezpieczeń na Życie*** (C-617/17), concerning the interpretation of the principle *ne bis in idem* in proceedings brought, under national law and EU law, for infringement of competition law. That judgment is presented in Section I.2 'Principle *ne bis in idem*'.

3. State aid

Three judgments merit particular attention in the field of State aid. The first concerns measures adopted by Germany to support producers of electricity from renewable energy sources, the second deals with regional investment aid for large projects, and the third relates to measures adopted by the State in response to the financial difficulties of a public railway undertaking.

In the judgment in ***Germany* v *Commission*** (C-405/16 P, EU:C:2019:268), delivered on 28 March 2019, the Court of Justice, on the one hand, upheld Germany's appeal against the judgment of the General Court of 10 May 2016, ***Germany* v *Commission*** (T-47/15, EU:T:2016:281), in which the General Court had rejected as unfounded its action for annulment of Commission Decision (EU) 2015/1585 of 25 November 2014 [110] and, on the other hand, annulled the decision at issue. Unlike the Commission and the General Court, the Court of Justice held that *the measures adopted by the Federal Republic of Germany to support producers of electricity from renewable energy sources and mine gas (EEG electricity)* [111] *could not be categorised as State aid, since no State resources were involved*.

The EEG 2012, which was aimed at ensuring a price above the market price for EEG electricity producers, included in particular an obligation for all network operators to purchase EEG electricity at rates laid down by law and to sell it on the spot market of the electricity exchange. If the price obtained did not enable those operators to cover the financial burden of the purchase at the rates determined by law, a mechanism called the 'EEG surcharge' allowed them to require the suppliers to the final customers to pay them the difference on the basis of the quantities sold. Those suppliers in turn had the option, but no obligation, to pass on the EEG surcharge to the final customers.

In the contested decision, the Commission, inter alia, considered that the measures thus adopted, which were unlawful in so far as they had not been notified to it, [112] constituted State aid, but that they were nevertheless compatible with the internal market, subject to the implementation of a commitment by the Federal Republic of Germany. In its judgment, the General Court, inter alia, held that the Commission had, rightly, considered that the EEG 2012 involved State resources. According to the General Court, the mechanisms of the EEG 2012 derived, principally, from the implementation of a public policy to support producers of EEG electricity. In addition, the funds generated by the EEG surcharge, which remained under the dominant influence of the public authorities and could be assimilated to a levy, involved a State resource. Finally, the entities required to administer those mechanisms did not act freely and on their own behalf, but as administrators of aid granted through State funds.

The Court of Justice considered, in that case, that both the General Court in the judgment under appeal and the Commission in the contested decision had erred in law in considering that the measures at issue involved State resources.

110| Commission Decision (EU) 2015/1585 of 25 November 2014 on State aid proceedings SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and energy-intensive users) (OJ 2015 L 250, p. 122; 'the contested decision').

111| Gesetz zur Neuregelung des Rechtsrahmens für die Förderung der Stromerzeugung aus erneuerbaren Energien (Law revising the legal framework for the promotion of electricity production from renewable energy) (BGBl. 2011 I, p. 1634; 'the EEG 2012'). That law was applied only from 1 January 2012 to 31 July 2014, before being replaced by the EEG 2014, approved by the Commission decision of 27 July 2014.

112| Article 108(3) TFEU.

It found, first of all, that since the EEG 2012 did not encompass any obligation to pass on the EEG surcharge to final customers, the General Court was not entitled to consider that it could 'be assimilated, from the point of view of its effects, to a levy on electricity consumption'. Next, the Court of Justice held that it had not been established that the State held a power of disposal over the funds generated by the EEG surcharge or that it exercised public control over the entities responsible for managing those funds. Indeed, the General Court merely demonstrated that public authorities exercised a dominant influence over the funds generated by the surcharge without being able to conclude that the State was entitled to dispose of those funds, that it is say, to decide on an allocation which differs from that laid down in the EEG 2012. While the General Court's findings of fact permitted the conclusion that the public authorities monitored the proper implementation of the EEG 2012, they could not, however, permit the conclusion that there was public control over the funds generated by the EEG surcharge themselves.

For the same reasons, the Court of Justice held that the Commission had failed to establish that the advantages provided for by the EEG 2012 involved State resources and therefore constituted State aid, in consequence of which it annulled the contested decision.

In its judgment of 29 July 2019, ***Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*** (C-654/17 P, EU:C:2019:634), the Court of Justice, in upholding the judgment under appeal, [113] clarified *the procedure and criteria for assessing the compatibility with the internal market of regional investment aid for large projects.* In dismissing the Commission's cross-appeal, the Court of Justice also confirmed that *an order by which the General Court grants an application to intervene may not be the subject of either a main appeal or a cross-appeal.*

On 30 November 2010, the Federal Republic of Germany had notified, pursuant to Article 6(2) of Regulation No 800/2008, [114] aid in the nominal amount of EUR 49 million that it intended to grant with a view to the construction in Leipzig (Germany) of a production site for the manufacture of electric vehicles by Bayerische Motoren Werke AG ('BMW'). Following a formal investigation procedure opened under Article 108(2) TFEU, the Commission adopted a decision declaring that the notified aid would be compatible with the internal market only if it was limited to EUR 17 million (at 2009 prices), any amount above that being incompatible with the internal market. BMW's action for annulment of that decision was dismissed by the judgment forming the subject of the main appeal.

The main appeal brought by BMW was followed by a cross-appeal by which the Commission sought to have set aside the General Court's order allowing Freistaat Sachsen to intervene in support of the form of order sought by BMW. [115] The Court of Justice nevertheless dismissed that cross-appeal as inadmissible on the ground that there is no legal basis in EU law for a party to bring an appeal before the Court of Justice against a decision of the General Court to grant leave to intervene. In that context, the Court of Justice also pointed out that EU law, in particular Article 47 of the Charter, read in the light of the safeguards set out in Article 18 and Article 19(2) thereof, does not require there to be two levels of jurisdiction. The only requirement is that there must be a remedy before a judicial body. The principle of effective judicial protection therefore affords

113| Judgment of the General Court of 12 September 2017, ***Bayerische Motoren Werke* v *Commission*** (T-671/14, EU:T:2017:599).

114| Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the [internal] market in application of Articles [107 and 108 TFEU] (General block exemption Regulation) (OJ 2008 L 214, p. 3).

115| Order of the President of the Fifth Chamber of the General Court of 11 May 2015, ***Bayerische Motoren Werke* v *Commission*** (T-671/14, not published, EU:T:2015:322).

an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction. In that case, the Commission had been able to put forward its arguments on the admissibility of the application to intervene in the proceedings before the General Court.

As regards the substance of the case and, more particularly, the assessment of the compatibility with the internal market of the aid notified by the Federal Republic of Germany, the Court went on to find that that aid exceeds the relevant individual notification threshold provided for in Article 6(2) of Regulation No 800/2008, which was EUR 22.5 million, and that, therefore, for that reason alone, such aid, which does not come within the scope of that regulation, is excluded from the exemption from the individual notification requirement provided for, inter alia, in Article 3 and Article 13(1) of that regulation. It also clarified that aid exceeding the individual notification threshold must be assessed, in its entirety, including the portion not exceeding that threshold, as new aid, within the meaning of Article 1(c) of Regulation No 659/1999, [116] in the context of an individual examination pursuant to Article 107(3) TFEU. In particular, the Court pointed out in that respect that that part of the aid could not be regarded as being authorised by Regulation No 800/2008 as aid compatible with the internal market. In addition to the fact that Regulation No 800/2008 does not carry out a specific assessment of the compatibility of particular aid measures in the light of the conditions which it lays down, the individual notification threshold provided for in Article 6(2) thereof is purely procedural in nature. The Commission's assessment of the compatibility of aid with the internal market in the context of an individual investigation cannot in any way vary depending on whether the assessment refers to the conditions laid down in Regulation No 800/2008 or to those set out in the 2009 Communication from the Commission concerning the criteria for an in-depth assessment of regional aid to large investment projects, [117] if it is not to infringe Article 107(3) TFEU, which constitutes the legal basis for both the regulation and the 2009 Communication.

Recalling that the Commission has exclusive competence to assess, under Article 107(3) TFEU, the compatibility of aid measures with the internal market, the Court also stressed that that exclusive competence is not prejudiced by Regulation No 800/2008. Therefore, the Commission alone may declare aid granted under Regulation No 800/2008 to be compatible with the internal market under that provision, whether or not the amount of aid exceeds the individual notification threshold laid down in Article 6(2) of that regulation.

In the preliminary ruling in ***Arriva Italia and Others*** (C-385/18, EU:C:2019:1121), delivered on 19 December 2019, the Court provided guidance on *the application of EU State aid rules on State measures adopted and implemented with a view to addressing the financial difficulties of a public railway undertaking.*

The case pending before the Italian Council of State relates to two measures adopted by the Italian State in 2015/2016 in response to the financial difficulties of a public operator of local railway infrastructure, which also provided passenger transport services. Those measures consisted, first, in an authorisation of a budgetary allocation of EUR 70 million, intended to cover the financial needs of that operator ('the financial measure') and, secondly, in a transfer, to the public group operating the national rail infrastructure and providing passenger transport services, of the capital of the operator in difficulties, previously held only by the State, for no financial consideration and without a tender procedure but in exchange for an obligation on the part of that public group to remedy the financial imbalance of the operator in question ('the measure of transfer of the share capital').

116| 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).

117| OJ 2009 C 223, p. 3.

The Council of State was called upon to rule on the merits of a judgment dismissing an action brought by various railway operators against the ministerial decree providing for the measure of transfer of the share capital. The applicants relied on the unlawfulness of the decree in the absence of prior notification to the Commission of the two measures as State aid.

In answer to the question of the Council of State regarding the application of the criteria for classifying national measures as State aid within the meaning of Article 107(1) TFEU, the Court recalled, in respect of the financial measure, that a finding of use of State resources must be made where a right to the sum in question has been conferred on the beneficiary, without an actual transfer of the resources in question being required in that regard. According to the Court, it is nevertheless for the referring court to carry out the respective verifications. Furthermore, the Court noted that the selectivity of the advantage conferred in that manner could be overridden only by proof that the Italian State had acted as shareholder of the operator in difficulties, after a proper assessment of the profitability of the financial measure. Finally, the Court held that ensuring the survival of the beneficiary company, made possible by the adoption of the financial measure, was sufficient to establish the existence of a risk of distortion of competition, even if the activities carried out by the beneficiary undertaking had not been subject to a tender procedure in the past.

In the second place, as regards the classification to be made in relation to the measure of transfer of the share capital, the Court noted that, in the light of its precise characteristics, it cannot be ruled out that such a measure could benefit either the public company to which the shareholding is transferred or the operator in difficulties, or even both companies. The Court stated that compliance with the systems of property ownership, as laid down in Article 345 TFEU, does not exempt systems of public property ownership and, consequently, changes such as those resulting from the measure in question, from State aid rules. As regards the question whether the transfer of the share capital constituted a selective advantage, the Court pointed out that the Italian State had not carried out an assessment of its profitability before proceeding with the transfer. Thus, it was not evident from the file submitted to the Court that, under the private investor test, the beneficiary public undertaking could have obtained the same advantage as that made available through State resources in circumstances which correspond to normal market conditions. The Court nevertheless entrusted the task of carrying out the necessary verifications to the referring court.

Finally, the Court addressed the inferences to be drawn from the classification as State aid, which were the subject of the second question of the Council of State. In that regard, the Court recalled that if the measures in question were classified as State aid, it would be for the referring court to draw all necessary inferences from the lack of prior notification of those measures to the Commission, in breach of Article 108(3) TFEU and, consequently, from their unlawfulness.

XII. Fiscal provisions

In the judgments in ***N Luxembourg 1 and Others*** (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134) and ***T Danmark and Y Denmark*** (C-116/16 and C-117/16, EU:C:2019:135), delivered on 26 February 2019, the Court was asked to rule, essentially, on *the interpretation of the general principle of EU law that EU law cannot be relied on by individuals for abusive or fraudulent ends,* and on the concept of 'beneficial owner' of (i) interest or royalty payments and (ii) dividends within the meaning of, respectively, Directive 2003/49 [118] and Directive 90/435, [119] as amended by Directive 2003/123. [120]

In those cases, the Court was requested to examine the scope of the prohibition on abuse of rights in relation to a tax exemption provided for by those two directives with regard to withholding tax, in respect of cross-border payments of dividends or interest between related companies established in different Member States. In that regard, it must be pointed out that in order to benefit from the system of exemption, the entity receiving the dividends or interest must satisfy certain conditions, including being the 'beneficial owner' of those payments. However, the disputes in the main proceedings raised the question of how to treat payments made within groups of companies where the distributing company does indeed pay dividends or interest to one or more companies which formally meet the conditions required by the relevant directives, but those companies themselves transfer all or almost all of the sums received to a beneficial owner who is not covered by the system of exemption since it is established outside the territory of the European Union.

At the material time, Denmark had not adopted specific transposition provisions to combat abuse of rights, but only provisions transposing the rules on exemption laid down by the directives in question. Those national rules thus provided that withholding tax should not be applied in respect of cross-border payments between companies meeting the conditions laid down by those directives. However, in the cases in the main proceedings, the Danish tax authority had refused to apply that exemption to the tax on dividends or interest in question. It claimed that the companies established in Member States other than Denmark which received interest or dividends from Danish companies were not, in actual fact, the beneficial owners of those payments within the meaning of Directives 2003/49 and 90/435. In view of that finding, the Danish tax authority obliged the Danish companies making the payments to withhold tax. The legal challenges to that taxation raised various questions relating to the concept of 'beneficial owner', the need for a legal basis under national law to refuse entitlement to the exemption on the basis of an abuse of rights and, in so far as such a legal basis exists, the constituent elements of any abuse of rights and the conditions for proving it.

As regards the concept of 'beneficial owner', used in particular in Directive 2003/49, the Court — referring not only to the objective thereof but also to the commentaries in the OECD Model Tax Convention for the avoidance of double taxation with respect to taxes on income and capital — ruled that that concept concerns not a formally identified recipient, but rather the entity which benefits economically from the interest received and accordingly has the power freely to determine the use to which it is put. While Directive 90/435 does not

118| Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

119| Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6).

120| Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2004 L 7, p. 41).

formally refer to the concept of 'beneficial owner', the Court nonetheless ruled that the exemption from withholding tax, provided for in that directive, was also reserved for the beneficial owners of dividends established in a Member State of the European Union.

Next, as regards the conditions under which entitlement to the exemptions in question could be refused on the ground of a finding of an abuse of rights, the Court observed that there is, in EU law, a general legal principle which must be complied with by individuals and according to which they cannot rely on EU law for abusive or fraudulent ends. A Member State must therefore refuse to grant the benefit of such provisions where they are relied upon not with a view to achieving the objectives thereof, but with the aim of benefiting from an advantage in EU law although the relevant conditions are fulfilled only formally and the application of those provisions would be inconsistent with the objectives thereof.

Noting that the transactions in question — which, according to the Danish tax authorities, constitute an abuse of rights and, therefore, may be incompatible with the objective pursued by the directives in question — fall within the scope of EU law, the Court stated that to authorise financial arrangements the sole or essential aim of which is to benefit from the tax advantages resulting from the application of Directive 2003/49 or Directive 90/435 would not be consistent with such objectives. The right to take advantage of competition engaged in by Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of that general principle. Admittedly, the pursuit of the most favourable tax regime cannot, as such, set up a general presumption of fraud or abuse. However, a right or an advantage arising from EU law should not be granted where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned. In that regard, it is incumbent upon the national authorities and courts to refuse to grant entitlement to the rights provided for by the directives concerned where they are invoked for fraudulent or abusive ends, and the absence of domestic or agreement-based anti-abuse provisions has no effect on that obligation to refuse.

The Court concluded from this that entitlement to the exemption from withholding tax on interest or dividends paid by a subsidiary to its parent company, provided for in Directives 2003/49 and 90/435, is, where there is a fraudulent or abusive practice, to be refused by the national authorities and courts to a taxpayer, in accordance with the general principle prohibiting such practices, even if there are no domestic or agreement-based provisions providing for such a refusal.

The Court also examined the question of what the constituent elements of an abuse of rights are and how those elements may be established. Making reference to its settled case-law, the Court noted that proof of an abuse requires, first, a combination of objective circumstances and, secondly, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. A group of companies may therefore be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so, inter alia, where, on account of a conduit entity interposed in the structure of the group between the company that pays interest or dividends and the company in the group which is their beneficial owner, payment of tax on that interest or those dividends is avoided. It is thus an indication of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 1(1) of Directive 2003/49 and Article 5 of Directive 90/435 that the entirety or almost the entirety of that interest or those dividends is, very soon after receipt thereof, passed on by the receiving company to entities which do not fulfil the conditions for the application of Directive 2003/49 or Directive 90/435.

Finally, the Court examined the rules relating to the burden of proving an abuse of rights. In that context, the Court found, in its judgment relating to Directive 2003/49, that it is clear from that directive that the source Member State may require the company which has received interest to establish that it is the beneficial owner thereof. In that regard, there is no reason why the tax authorities concerned should not request from

the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied. In its judgment relating to Directive 90/435, the Court stated that that directive does not contain rules relating to the burden of proving an abuse of rights. However, the Court concluded that it is for the tax authority of the source Member State which, on a ground relating to the existence of an abusive practice, seeks to refuse to grant the exemption provided for in Directive 90/435 to establish the existence of elements constituting such a practice. While such an authority does not have to identify the beneficial owners, it does have the task of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed.

Reference should also be made under this heading to the judgment of 26 February 2019, ***X (Controlled companies established in third countries)*** (C-135/17, EU:C:2019:136), concerning the legislation of a Member State under which income obtained by a company established in a third country and which does not come from an activity of that company is incorporated, under certain conditions, into the tax base of a taxable person residing in that Member State, [121] and the judgments of 19 June 2019, ***Memira Holding*** (C-607/17, EU:C:2019:510) and ***Holmen*** (C-608/17, EU:C:2019:511), on the possibility for a parent company of deducting from its corporation tax the losses of subsidiaries established in other Member States. [122]

XIII. Approximation of laws

1. Copyright

In the area of copyright, mention must be made of three judgments delivered by the Grand Chamber of the Court on the same day. The first two concern the exclusive rights of authors to reproduce and communicate to the public their works, particularly via the internet, and the exceptions and limitations to those rights. The third judgment deals with the exclusive rights of phonogram producers to reproduce and distribute their phonograms and the exceptions and limitations to those rights. A fourth judgment considers whether the supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' within the meaning of Directive 2001/29 [123] ('the Copyright Directive').

By its judgment of 29 July 2019, ***Funke Medien NRW*** (C-469/17, EU:C:2019:623), the Court, sitting as the Grand Chamber, interpreted *the exclusive rights of authors to reproduce and communicate to the public their works and the exceptions and limitations to those rights, as provided for in the Copyright Directive, in a case involving the publication on the website of a daily newspaper of classified military status reports drawn up by a Member State.*

The main proceedings involved a dispute between the company Funke Medien, which operates the website of the German daily newspaper *Westdeutsche Allgemeine Zeitung*, and the Federal Republic of Germany concerning the publication by Funke Medien of a number of military status reports 'classified for restricted access' drawn up by the German Government. The Federal Republic of Germany took the view that, by doing

121| That judgment is presented in Section VII.5 'Free movement of capital'.

122| Those judgments are presented in Section VII.3 'Freedom of establishment'.

123| 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).

so, Funke Medien had infringed its copyright over those reports and therefore brought an action for an injunction against Funke Medien, which was upheld by the regional court and subsequently confirmed by a higher regional court. In its appeal on a point of law (*Revision*), brought before the German Federal Court of Justice, Funke Medien maintained its contention that the action for an injunction should be dismissed.

As a preliminary point, the Court recalled that military status reports can be protected by copyright only if they are an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by that author in drafting the reports. It is for the national court to verify whether that condition is met in each case.

Asked, first of all, whether the provisions of the Copyright Directive leave Member States discretion as to their transposition into national law, the Court found that the provisions laying down the exclusive rights of authors to reproduce [124] and communicate to the public their works [125] constitute measures of full harmonisation of the corresponding substantive law. By contrast, the Court considered that the provisions of the Copyright Directive which allow for derogation from those rights in respect of the reporting of current events and quotations [126] do not constitute measures of full harmonisation of the scope of the exceptions or limitations which they contain. However, Member States' discretion in the implementation of those provisions must be exercised within the limits imposed by EU law, in order to safeguard a fair balance between, on the one hand, the interest of the holders of rights in the protection of their intellectual property rights [127] guaranteed by the Charter and, on the other hand, the rights and interests of users of works or protected subject matter, in particular their freedom of expression and information [128] also guaranteed by the Charter, as well as the public interest.

Next, the Court stated that the freedom of expression and information is not capable of justifying, beyond the exceptions and limitations provided for in the Copyright Directive, [129] a derogation from the authors' exclusive rights to reproduce and communicate their works to the public, other than the derogation set out in that directive. In that regard, the Court noted that the list of exceptions and limitations contained in that directive is exhaustive.

Lastly, according to the Court, in striking the balance which is incumbent on a national court between, on the one hand, the exclusive rights of authors to reproduce and communicate to the public their works and, on the other, the rights of the users of protected subject matter set out in the Copyright Directive in respect of the reporting of current events, the latter of which derogate from the former, a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.

124| Article 2(a) of the Copyright Directive.

125| Article 3(1) of the Copyright Directive.

126| Article 5(3)(c), second case, and (d) of the Copyright Directive.

127| Article 17(2) of the Charter.

128| Article 11 of the Charter.

129| Article 5(2) and (3) of the Copyright Directive.

By the judgment of 29 July 2019, ***Spiegel Online*** (C-516/17, EU:C:2019:625), the Court, sitting as the Grand Chamber, also interpreted *the exclusive rights of authors to reproduce and communicate to the public their works and the exceptions and limitations to those rights, as provided for in the Copyright Directive, on this occasion in a case where a manuscript and an article published in a book had been published on an internet news portal, available to the public for download by means of hyperlinks.*

The dispute in the main proceedings between the company Spiegel Online, an internet news portal operator, and Mr Volker Beck, a member of the German Federal Parliament, concerned Spiegel Online's publication on its website of a manuscript by Mr Beck and an article published by him in a book. Mr Beck brought an action before a regional court, challenging the fact that complete texts of the manuscript and article were made available on Spiegel Online's website, which he considered to be an infringement of copyright. That court upheld Mr Beck's action. After its appeal was dismissed, Spiegel Online brought an appeal on a point of law before the referring court.

Asked whether the provisions of the Copyright Directive which allow for derogation from authors' exclusive rights in respect of the reporting of current events [130] and quotations [131] leave Member States discretion in their transposition into national law, the Court held that those provisions constitute measures of full harmonisation. However, Member States' discretion in the implementation of those provisions must be exercised within the limits imposed by EU law, in order to safeguard a fair balance between, on the one hand, the interest of the holders of rights in the protection of their intellectual property rights [132] guaranteed by the Charter and, on the other, the rights and interests of users of works or protected subject matter, in particular their freedom of expression and information [133] also guaranteed by the Charter, as well as the public interest.

The Court added that the freedom of expression and information is not capable of justifying, beyond the exceptions and limitations provided for in the Copyright Directive, [134] a derogation from the authors' exclusive rights to reproduce and communicate their works to the public, other than the derogation set out in that directive. In that regard, the Court noted that the list of exceptions and limitations contained in that directive is exhaustive.

Furthermore, according to the Court, in striking the balance which is incumbent on a national court between, on the one hand, the exclusive rights of authors to reproduce [135] and communicate to the public their works [136] and, on the other, the rights of the users of protected subject matter set out in the Copyright Directive in respect of the reporting of current events and quotations, the latter of which derogate from the former, a

130| Article 5(3)(c), second case, of the Copyright Directive.

131| Article 5(3)(d) of the Copyright Directive.

132| Article 17(2) of the Charter.

133| Article 11 of the Charter.

134| Article 5(2) and (3) of the Copyright Directive.

135| Article 2(a) of the Copyright Directive.

136| Article 3(1) of the Copyright Directive.

national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.

In the first place, the Court ruled on the provision of the Copyright Directive on the reporting of current events which derogates from the general rule, holding that that provision precludes a national rule restricting the application of the exception or limitation set out in that provision to cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events. When a current event occurs, it is necessary, as a general rule, particularly in the information society, for the information relating to that event to be diffused rapidly, which is difficult to reconcile with a requirement for the author's prior consent, which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion, and might even prevent it altogether.

In the second place, the Court ruled on the provision of the Copyright Directive on quotations which derogates from the general rule, holding, first, that the concept of 'quotations' referred to in that provision covers a reference made by means of a hyperlink to a file which can be downloaded independently. In that context, the Court set out its case-law according to which hyperlinks contribute to the sound operation of the internet, which is of particular importance to freedom of expression and information, enshrined in the Charter, as well as to the exchange of opinions and information in that network characterised by the availability of incalculable amounts of information. Secondly, the Court held that a work has already been lawfully made available to the public where that work, in its specific form, was previously made available to the public with the rightholder's authorisation or in accordance with a non-contractual licence or statutory authorisation. It is for the national court to decide whether a work has been lawfully made available to the public, in the light of the particular case before it and by taking into account all the circumstances of the case.

By its judgment of 29 July 2019, ***Pelham and Others*** (C-476/17, EU:C:2019:624), the Court, sitting as the Grand Chamber, had a further opportunity to interpret the *exclusive rights of phonogram producers to reproduce and distribute their phonograms and the exceptions and limitations to those rights, as laid down in the Copyright Directive and Directive 2006/115*, [137] *on this occasion in the context of the sampling of a song to create another song.*

Messrs R. Hütter and F. Schneider-Esleben ('Hütter and another') are members of the group 'Kraftwerk'. In 1977, that group published a phonogram featuring the song 'Metall auf Metall'. Messrs Pelham and Haas composed the song 'Nur mir', which was released on phonograms recorded by Pelham GmbH in 1997. Hütter and another claimed that Pelham had electronically copied ('sampled') approximately two seconds of a rhythm sequence from the song 'Metall auf Metall' and used that sample in a continuous loop in the song 'Nur mir'. Hütter and another, as the phonogram producers, argued that Pelham had thereby infringed their copyright-related right.

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

Against that background, the Court first of all pointed out that the reproduction by a user of a sound sample, even if very short, of a phonogram must, in principle, be regarded as a reproduction 'in part' of that phonogram, which falls within the exclusive right of the producer of such a phonogram laid down in the Copyright Directive.

The Court nevertheless recalled that a balance must be struck between intellectual property rights, [138] enshrined in the Charter, and the other fundamental rights also protected by the Charter, including freedom of the arts, [139] which, in so far as it falls within the scope of freedom of expression, [140] affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Accordingly, the Court held that in the light of the Charter, the phonogram producer's exclusive right to authorise or prohibit the reproduction of his or her phonogram [141] allows that producer to prevent another person from using a sound sample, even if very short, from his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the new work *in a modified form unrecognisable* to the ear.

Next, as regards that exclusive right, the Court also made clear that Article 2(c) of the Copyright Directive constitutes a measure of full harmonisation of the corresponding substantive law. The exclusive right of reproduction enjoyed by phonogram producers in the European Union is defined in that directive in unequivocal terms and, moreover, is not qualified by any condition or subject, in its implementation or effects, to any measure being taken in any particular form.

Furthermore, concerning the exclusive right of phonogram producers to make their phonograms available, including 'copies' thereof, [142] the Court held that the concept of 'copy', which is also used in the Geneva Convention [143] and must be interpreted in a manner consistent with that convention, is to be interpreted as not covering a phonogram that, while including sound samples transferred from another phonogram, does not reproduce all or a substantial part of that phonogram.

In addition, the Court ruled on the possibility of derogating from the exclusive right of phonogram producers to reproduce their phonograms, holding that a Member State cannot, in its national law, lay down an exception or limitation to that right other than those provided for in the Copyright Directive. [144] In that regard, it noted that the list of exceptions and limitations set out in that directive is exhaustive.

Lastly, the Court found that the concept of 'quotations' referred to in the Copyright Directive [145] does not extend to a situation in which it is not possible to identify the work concerned by the quotation in question. However, where the creator of a new musical work uses a sound sample taken from a phonogram that enables an average listener to identify the work from which the sample was taken, the use of that sample may, depending on the facts of the case, amount to a 'quotation' within the meaning of the Copyright Directive,

138| Article 17(2) of the Charter.

139| Article 13 of the Charter.

140| Article 11 of the Charter.

141| Article 2(c) of the Copyright Directive.

142| Article 9(1)(b) of Directive 2006/115.

143| Article 1(c) and Article 2 of the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, signed in Geneva on 29 October 1971.

144| Article 5 of the Copyright Directive.

145| Article 5(3)(d) of the Copyright Directive.

read in the light of Article 13 of the Charter, provided that that use has the intention of entering into dialogue with the work from which the sample was taken and the conditions set out in the Copyright Directive are satisfied.

In the judgment in ***Nederlands Uitgeversverbond and Groep Algemene Uitgevers*** (C-263/18, EU:C:2019:1111), delivered on 19 December 2019, the Grand Chamber of the Court ruled that *the supply to the public by downloading, for permanent use, of an e-book is covered by the concept of 'communication to the public' within the meaning of the Copyright Directive.*

Nederlands Uitgeversverbond ('NUV') and Groep Algemene Uitgevers ('GAU'), two associations whose purpose is to defend the interests of Netherlands publishers, applied to the District Court of The Hague (Netherlands) for an injunction prohibiting, inter alia, Tom Kabinet from making e-books available to members of the 'reading club' created by that company on its website or from reproducing those books. NUV and GAU claimed that those activities infringe their affiliates' copyright in those e-books. They submitted that, by offering 'second-hand' e-books for sale in the context of that reading club, Tom Kabinet made an unauthorised communication of those books to the public. Tom Kabinet contended, however, that such activities are covered by the distribution right which, under the Copyright Directive, is subject to a rule of exhaustion if the object concerned — in that instance, e-books — has been sold in the European Union by the rightholder or with his or her consent. That rule would mean that, as a result of the sale of the e-books at issue, NUV and GAU would no longer have the exclusive right to authorise or prohibit the distribution of those e-books to the public.

The Court found that the supply by downloading, for permanent use, of an e-book is not covered by the right of 'distribution to the public' provided for by Article 4(1) of the Copyright Directive, but that it is covered by the right of 'communication to the public' provided for by Article 3(1) of that directive, in which case exhaustion is excluded under paragraph 3 of that article.

In support of that finding, the Court concluded, in particular from the World Intellectual Property Organisation (WIPO) Copyright Treaty underlying that directive and from the *travaux préparatoires* for the directive, that the EU legislature had intended that rule of exhaustion to be reserved for the distribution of tangible objects, such as books on a material medium. By contrast, the application of that rule of exhaustion to e-books would be likely to affect the interests of rightholders in obtaining appropriate reward much more than in the case of books on a material medium, since dematerialised digital copies of e-books do not deteriorate with use and are, therefore, perfect substitutes for new copies on any second-hand market.

As regards, more specifically, the concept of 'communication to the public', the Court indicated that this should be understood in a broad sense as covering all communication to the public not present at the place where the communication originates and, thus, any such transmission or retransmission of a work to the public by wire or wireless means. That concept involves two cumulative criteria, namely an act of communication of a work and the communication of that work to a public.

With respect to the first criterion, it is apparent from the explanatory memorandum in the proposal for the Copyright Directive that 'the critical act is the "making available of the work to the public", thus the offering [of] a work on a publicly accessible site, which precedes the stage of its actual "on-demand transmission"', and that 'it is not relevant whether any person actually has retrieved it or not'. Thus, according to the Court, the making available of the works concerned to anyone who is registered with the reading club's website must be considered a 'communication' of a work, irrespective of whether the person concerned avails himself or herself of that opportunity by actually retrieving the e-book from that website.

So far as concerns the second criterion, account must be taken not only of the number of persons able to access the same work at the same time, but also of how many of them may access it in succession. In that case, according to the Court, the number of persons who may have access, at the same time or in succession,

to the same work via the reading club's platform is substantial. Consequently, subject to verification by the referring court taking into account all the relevant information, the work in question must be regarded as being communicated to a public.

The Court also held 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. In that case, since the making available of an e-book is generally accompanied by a user licence authorising the user who has downloaded the e-book concerned only to read that e-book from his or her own device, it must be held that a communication such as that effected by Tom Kabinet is made to a public that was not already taken into account by the copyright holders and, therefore, to a new public.

2. Industrial property

In the field of EU trade mark law, four judgments merit special attention. The first concerns the territorial jurisdiction of the courts of the Member States in relation to infringement and validity. The second required the Court to clarify the concept of 'bad faith' when an application for a European Union trade mark is filed. The third provided guidance on the power of the European Union Intellectual Property Office (EUIPO) to revoke its decisions that are vitiated by an obvious procedural error attributable to it. The fourth and last judgment deals with the issue of genuine use of an EU collective mark.

In the judgment in ***AMS Neve and Others*** (C-172/18, EU:C:2019:674), delivered on 5 September 2019, the Court, in response to a request for a preliminary ruling, *clarified the meaning of the wording 'Member State in which the act of infringement has been committed' in Article 97(5) of Regulation No 207/2009* [146] *on the European Union trade mark ('the Trade Mark Regulation'), concerning the extent of the territorial jurisdiction of the courts of the Member States in relation to infringement and validity.* The dispute in the main proceedings concerned an action claiming an infringement of an EU trade mark, brought against a third party using signs identical or similar to that mark in advertising and offers for sale on a website or on social media platforms. The action had been filed with a court of the United Kingdom, which held that it lacked jurisdiction to hear that action, considering that the court having territorial jurisdiction was the court of the place where the third party took the decision to advertise and offer for sale its products on that website or those platforms and took steps to implement that decision.

As a preliminary point, the Court held that the right conferred on the applicant to choose the court with jurisdiction on the basis of either Article 97(1) of the Trade Mark Regulation, according to the domicile of the defendant, or Article 97(5) of that regulation, according to where the act of infringement was committed, cannot be understood as meaning that the applicant may, with reference to the same acts of infringement, simultaneously bring actions based on Article 97(1) and (5) thereof, but merely reflects the fact that the forum indicated in Article 97(5) is an alternative to the fora indicated in the other paragraphs of Article 97. The EU legislature, in providing for such an alternative forum, enables the proprietor of an EU trade mark to bring targeted actions each of which relates to acts of infringement committed within a single Member State. Where a number of infringement actions involving the same parties concern the use of the same sign but do not relate to the same territory, they do not have the same subject matter and are therefore not subject

146| Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

to the rules on *lis pendens*. Accordingly, the courts of the various Member States before which actions are brought in such circumstances cannot deliver 'contradictory judgments', within the meaning of recital 17 of the Trade Mark Regulation, since the actions that the applicant has brought relate to distinct territories.

The Court then stated that an EU trade mark court before which an infringement action on the basis of Article 97(5) of the Trade Mark Regulation is brought must, when it is called upon to review its jurisdiction to give a ruling on whether there is an infringement in the territory of the Member State where that court is situated, be satisfied that the acts allegedly committed by the defendant were committed in that territory. Where those acts consist of advertising and offers for sale displayed electronically with respect to products bearing a sign identical or similar to an EU trade mark without the consent of the proprietor of that mark, it must be held that those acts were committed in the territory where the consumers or traders to whom that advertising and those offers for sale are directed are located, notwithstanding the fact that the defendant is established elsewhere, that the server of the electronic network that he or she uses is located elsewhere, or even that the products that are the subject of such advertising and offers for sale are located elsewhere. Thus, it must be ensured that a party infringing an EU trade mark cannot contest the application of that article and thereby undermine the effectiveness of that provision by relying on the place where its advertising and offers for sale were placed online in order to exclude the jurisdiction of any court other than the court of that place and the court with jurisdiction over where it is established. According to the Court, if the wording 'Member State in which the act of infringement has been committed' were to be interpreted as referring to the Member State in the territory of which the party carrying out those commercial acts set up its website and activated the display of its advertising and offers for sale, parties established within the European Union committing an infringement, operating electronically and seeking to prevent the proprietors of infringed EU marks from resorting to an alternative forum, would have to do no more than ensure that the territory where the advertising and offers for sale were placed online was the same territory as that where those parties are established. In addition, it may prove excessively difficult, or even impossible, for the applicant to ascertain where the defendant took decisions and technical measures to effect that activation.

Consequently, commercial acts, such as those at issue in the main proceedings, must be held to have been 'committed' in the territory where they can be classified as advertising or as offers for sale, that is to say, where their commercial content has in fact been made accessible to the consumers and traders to whom it was directed. Whether the result of that advertising and those offers for sale was that the defendant's products were purchased is, however, irrelevant.

In the judgment in ***Koton Mağazacilik Tekstil Sanayi ve Ticaret* v *EUIPO*** (C-104/18 P, EU:C:2019:724), delivered on 12 September 2019, the Court of Justice set aside the judgment of the General Court [147] and *clarified the concept of 'bad faith' at the time that an application for a European Union trade mark is filed.*

Mr Nadal Esteban and Koton Mağazacilik Tekstil Sanayi ve Ticaret, an undertaking which is the proprietor of KOTON figurative marks, had a business relationship until 2004. On 25 April 2011, Mr Esteban filed an application for registration as a European Union trade mark of the figurative sign STYLO & KOTON for goods and services in Classes 25, 35 and 39 of the Nice Agreement. [148] Following the partial upholding of the opposition filed by Koton Mağazacilik Tekstil Sanayi ve Ticaret, based on its KOTON marks registered for goods and services in Classes 18, 25 and 35, the mark STYLO & KOTON was registered for services in

147| Judgment of the General Court of 30 November 2017, ***Koton Mağazacilik Tekstil Sanayi ve Ticaret* v *EUIPO* — *Nadal Esteban (STYLO & KOTON)*** (T-687/16, not published, EU:T:2017:853).

148| Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

Class 39. Koton Mağazacilik Tekstil Sanayi ve Ticaret then brought an application for a declaration of invalidity on the basis of Article 52(1)(b) of the Trade Mark Regulation, pursuant to which the bad faith of an applicant when filing the application for the trade mark is an absolute ground for invalidity.

The General Court, confirming the decision to dismiss the application for a declaration of invalidity adopted by EUIPO, held that there could be no bad faith since there was neither identity nor similarity capable of causing confusion between the goods or services in respect of which the marks had been registered. Hearing the appeal, the Court of Justice was called upon to clarify the concept of 'bad faith'.

First of all, the Court stated that while, in accordance with its usual meaning in everyday language, the concept of 'bad faith' presupposes the presence of a dishonest state of mind or intention, that concept must moreover be understood in the context of trade mark law, which is that of the course of trade. The rules on the EU trade mark are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin. Consequently, the Court held that a trade mark must be declared invalid on the ground of bad faith where it is apparent from relevant and consistent indicia that the proprietor of that trade mark has filed the application for registration of that mark not with the aim of engaging fairly in competition, but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating origin.

Next, the Court held that it is not apparent from the judgment of 11 June 2009, ***Chocoladefabriken Lindt & Sprüngli*** (C-529/07, EU:C:2009:361), that the existence of bad faith may only be established where there is use on the internal market of an identical or similar sign for identical or similar goods capable of being confused with the sign for which registration is sought. There may be situations where the application for registration of a trade mark is liable to be regarded as having been filed in bad faith notwithstanding the fact that, at the time of that application, there was no use by a third party on the internal market of an identical or similar sign for identical or similar goods. In the case of an application for a declaration of invalidity based on Article 52(1)(b) of the Trade Mark Regulation, there is no requirement whatsoever that the applicant for that declaration be the proprietor of an earlier mark for identical or similar goods or services. Moreover, in cases where it transpires that, at the time of the application for the contested mark, a third party was using, in at least one Member State, a sign identical with or similar to the contested mark, the existence of a likelihood of confusion between those signs on the part of the public need not necessarily be established. In the absence of any likelihood of confusion between the sign used by a third party and the contested mark, or, if there has been no use, by a third party, of a sign identical with or similar to the contested mark, other factual circumstances may, as the case may be, constitute relevant and consistent indicia establishing the bad faith of the applicant.

Lastly, the Court of Justice found that the General Court had not taken into consideration, in its overall assessment, all the relevant factual circumstances as they appeared *at the time the application was filed*, whereas that point in time is decisive. Since it was claimed in the application that the mark should be declared invalid in its entirety, the application had to be examined by assessing Mr Esteban's intention at the time he sought registration of that mark. Consequently, the Court set aside the judgment under appeal.

In the judgment in ***Repower* v *EUIPO*** (C-281/18 P, EU:C:2019:916), delivered on 31 October 2019, the Court of Justice dismissed the appeal brought against the judgment of the General Court [149] and provided *clarification regarding the power of EUIPO to revoke its decisions that are vitiated by an obvious procedural error attributable to it.*

In that case, the applicant company, Repower, registered the word mark REPOWER with EUIPO. At the request of the intervener, repowermap.org, the Cancellation Division of EUIPO partially upheld the application for a declaration of invalidity of that mark with respect to certain goods and services. The action against that decision was dismissed by the Board of Appeal of EUIPO. The intervener brought an action for annulment before the General Court, following which the Board of Appeal, by a new decision, revoked its refusal decision on the ground that it was vitiated by an insufficient statement of reasons and, therefore, by an 'obvious procedural error' within the meaning of Article 80(1) of the Trade Mark Regulation.

Hearing an action brought by Repower against that revocation decision, the General Court held that EUIPO could not base that decision on Article 80(1) of the Trade Mark Regulation, in so far as a failure to state reasons does not constitute an 'obvious procedural error' within the meaning of that provision. [150] The General Court nevertheless considered that the revocation decision could be based on the general principle of law permitting the withdrawal of unlawful administrative acts. Having found that that error relating to the choice of legal basis did not justify the annulment of the revocation decision, the General Court dismissed the action brought by Repower.

For the purposes of interpreting the concept of 'obvious procedural error' within the meaning of Article 80(1) of the Trade Mark Regulation, the Court of Justice noted that it is necessary to take into account not only the wording thereof, but also its context and the objectives pursued by the regulation of which it forms a part.

In that regard, the Court of Justice considered that it follows from the scheme of the Trade Mark Regulation that the procedural errors referred to in Article 80(1) thereof relate in particular to the procedural provisions provided for in that regulation, such as the obligation to state reasons. That interpretation is supported by the objective pursued by Article 80(1) of the Trade Mark Regulation, which seeks to impose on EUIPO the obligation to revoke decisions which are vitiated by an obvious procedural error with the aim of ensuring good administration and procedural efficiency. That interpretation also reflects the Court of Justice's settled case-law according to which the obligation to state reasons constitutes an essential procedural requirement and is distinct from the question whether the reasons given are correct, which is concerned with the substantive legality of the measure at issue.

Consequently, the Court of Justice held, contrary to the General Court, that any infringement of the obligation to state reasons, such as a failure to state reasons or an inadequate statement of reasons, constitutes a procedural error for the purposes of Article 80(1) of the Trade Mark Regulation, which should lead to the revocation by EUIPO of the decision vitiated by it where that error is obvious.

149| Judgment of the General Court of 21 February 2018, ***Repower* v *EUIPO* — *repowermap.org (REPOWER)*** (T-727/16, EU:T:2018:88).

150| The first sentence of Article 80(1) of the Trade Mark Regulation provides that, where EUIPO has made an entry in the Register or taken a decision which contains an obvious procedural error attributable to EUIPO, it is to ensure that the entry is cancelled or the decision is revoked.

It follows that that provision was applicable in that case and that the General Court erred in law. However, the Court of Justice concluded that that error of law was not such as to lead to the judgment under appeal being set aside in so far as the operative part of that judgment, which dismissed the action brought by Repower against the revocation decision, appeared to be well founded for other reasons.

By the judgment in ***Der Grüne Punkt* v *EUIPO*** (C-143/19 P, EU:C:2019:1076), delivered on 12 December 2019, *the Court of Justice set aside the judgment of the General Court* [151] *on the ground that it had erred in law in applying the concept of 'genuine use' to an EU collective trade mark.*

In that case, the appellant, Der Grüne Punkt, had obtained registration of a collective figurative mark representing a circle with two arrows concerning a system of collection and recovery of packaging waste. EUIPO partially upheld an application for revocation on the ground that the trade mark had not been put to genuine use for all the goods for which it had been registered, with the exception of goods consisting of packaging.

The action for annulment against the decision of the Board of Appeal of EUIPO brought by the appellant was dismissed by the General Court.

In support of its appeal, the appellant claimed that the General Court had misinterpreted the concept of 'genuine use' within the meaning of Article 15(1) of the Trade Mark Regulation and had failed to take proper account of the characteristics of collective marks set out in Article 66 thereof.

First of all, the Court observed that the essential function of a collective mark is to distinguish goods or services of the members of the association which is the proprietor of that mark from those of other undertakings. Thus, unlike an individual mark, a collective mark does not have the function of indicating to the consumer 'the identity of origin' of goods or services in respect of which it is registered. In that regard, the Court noted that Article 66 of the Trade Mark Regulation by no means requires that manufacturers, producers, suppliers or traders who are affiliated with the association which is the proprietor of a collective mark form part of the same group of companies which manufacture or supply the goods or services under unitary control. Furthermore, the Court held that collective marks are, like individual marks, part of the course of trade. Their use must therefore, in order to be classified as 'genuine' within the meaning of Article 15(1) of the Trade Mark Regulation, in fact be part of the objective of the undertakings concerned to create or preserve an outlet for their goods and services.

Next, the Court held that such a mark is used in accordance with its essential function from the moment when that use enables the consumer to understand that the goods or services covered originate from undertakings which are affiliated with the association, the proprietor of the mark, and thereby to distinguish those goods or services from those originating from undertakings which are not affiliated. In that case, the Court of Justice considered it to be clear from the findings made by the General Court that the collective mark was used in accordance with its essential function, in view of the fact that the producer or distributor of the goods at issue was part of the appellant's licensing system.

Finally, the Court pointed out that the assessment of genuine use of the mark at issue should be carried out by evaluating, particularly, whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market, and the scale and frequency of use of the mark. The Court of Justice found that the General Court had failed to apply those criteria to that case. The Court of

151| Judgment of the General Court of 12 December 2018, ***Der Grüne Punkt* v *EUIPO* — *Halston Properties (Representation of a circle with two arrows)*** (T-253/17, EU:T:2018:909).

Justice held inter alia that it was for the General Court to examine whether the use properly established in that case, namely the affixing of the mark at issue to the packaging of the goods of undertakings affiliated with a system of local collection and of environmentally sound disposal of packaging waste, was viewed, in the economic sector concerned, as warranted to maintain or create a share in the market for the goods. According to the Court, it cannot be ruled out that the indication, by a manufacturer or a distributor on the packaging of everyday consumer goods, of the affiliation with such a recycling system may influence consumers' purchasing decisions and, thus, contribute to the maintenance or creation of a share in the market relating to those goods.

Taking the view that the General Court had erred in law in its application of the concept of 'genuine use', the Court of Justice set aside the judgment under appeal and annulled the decision of the Board of Appeal of EUIPO.

3. Telecommunications

Reference should be made under this heading to two cases in particular. The first is the judgment of 1 October 2019, ***Planet49*** (C-673/17), concerning a website user's consent to the storage of or access to information in the form of cookies. That judgment is presented in Section XIV.1 'Protection of personal data'.

The second is the judgment in ***AW and Others (Calls to 112)*** (C-417/18, EU:C:2019:671), delivered on 5 September 2019, in which the Court held that *Member States have an obligation to ensure that telecommunications undertakings make caller location information available, free of charge, to the authority handling emergency calls made to 112, subject to technical feasibility, including in those cases where the call is made from a mobile telephone which is not fitted with a SIM card.* In addition, that information must be sufficiently reliable and accurate to enable the emergency services to intervene. Finally, the Court specified the conditions for rendering the State liable in the event of a breach of EU law.

A girl aged 17 had been kidnapped in a suburb of Panevėžys (Lithuania), then raped and burnt alive in the boot of a car. Finding herself trapped in that car boot, she had called the Lithuanian emergency call answering centre, using a mobile telephone, on the single European emergency call number '112' 10 times in order to seek help. However, the equipment in the emergency call answering centre did not show the number of the mobile telephone used, which prevented the employees of that answering centre from locating her. It was not possible to determine whether the mobile telephone used by the victim was fitted with a SIM card or why her number was not visible at the emergency call answering centre.

Relatives of the victim brought an action seeking compensation from the Lithuanian State for the non-material damage they had sustained. They alleged that the Republic of Lithuania had failed properly to ensure the practical implementation of Article 26(5) of Directive 2002/22, [152] which requires Member States to ensure that the undertakings concerned make caller location information available, free of charge, to the authority handling emergency calls as soon as the call reaches that authority.

The Regional Administrative Court, Vilnius (Lithuania), hearing the case, submitted a request to the Court for a preliminary ruling regarding the scope of that obligation to transmit information on the location of a person calling 112.

First, the Court stated that the obligation laid down in Article 26(5) of Directive 2002/22 applies to Member States, subject to technical feasibility, including where the call is made from a mobile telephone which is not fitted with a SIM card.

Next, the Court pointed out that the last sentence of Article 26(5) of Directive 2002/22 confers on Member States some latitude when defining the criteria relating to the accuracy and reliability of information on the location of the caller to 112. However, the criteria which they define must ensure, within the limits of technical feasibility, that the caller's position is located in as reliable and accurate a manner as is necessary to enable the emergency services usefully to come to the caller's assistance. Since such an assessment is eminently technical and intimately linked to the specific characteristics of the national mobile telecommunications network, it is for the national court to carry out that assessment.

Lastly, as regards the conditions that must be satisfied in order for State liability for damage caused by a breach of EU law to be incurred, the Court noted that, admittedly, those conditions include that relating to the existence of a direct causal link between the breach of EU law and the damage sustained by those individuals. However, it is within the context of the national law on liability that the State must make reparation for the consequences of the loss and damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims. It follows that where, in accordance with the domestic law of a Member State, the existence of an indirect causal link between the unlawful act committed by the national authorities and the damage sustained by an individual is regarded as sufficient to render the State liable, such an indirect causal link between a breach of EU law attributable to that Member State and the damage sustained by an individual must also, in accordance with the principle of equivalence, be regarded as sufficient for the purposes of rendering that Member State liable for that breach of EU law.

4. Public procurement

In the judgment in ***Telecom Italia*** (C-697/17, EU:C:2019:599), delivered on 11 July 2019, the Court provided clarification, *in the context of a restricted procedure for the award of a public supply and public works contract, governed by Directive 2014/24,* [153] *on the conditions under which economic operators are permitted to submit a tender.* In that connection, the Court held that having regard to the requirement laid down in that directive for the legal and substantive identity of the economic operator submitting a tender to correspond to that of

152| Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

153| Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

the preselected operator, a preselected candidate which has agreed to acquire another preselected candidate, under a merger agreement concluded between the preselection stage and the tendering stage, but completed after the tendering stage, may submit a tender.

In May 2016, the company Infratel, on behalf of the Italian Ministry of Economic Development, initiated a restricted procedure for the award of public contracts for the construction, maintenance and management of a public passive ultra-broadband network in several regions of Italy. In connection with that procedure, which related to the award of five lots, requests to participate were submitted by the company Telecom Italia and by, inter alia, the companies Metroweb Sviluppo and OpEn Fiber. Although preselected, Metroweb Sviluppo did not ultimately submit a tender.

In January 2017, Infratel published the list of successful tenderers and a provisional classification of those tenderers. According to that classification, OpEn Fiber was in first place in each of the five lots, with Telecom Italia being placed second except in lot 4, where it was in third place. Telecom Italia, being dissatisfied with the outcome of the award procedure, first, applied for access to the documents relating to that procedure. It is apparent from those documents, in essence, that between the preselection stage and the deadline for submission of tenders, Metroweb Sviluppo was acquired by OpEn Fiber, a transaction not opposed by the European Commission. Secondly, Telecom Italia contested the award of the five lots concerned before the Italian courts.

Recalling first of all that, under the first sentence of Article 28(2) of Directive 2014/24, only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender, the Court emphasised that that provision presupposes that the preselected economic operators and those submitting tenders are legally and substantively the same. That rule is laid down in relation to the restricted procedure, which has several stages, and particularly in relation to the preselection and tendering stages. The Court, however, noted that that provision does not lay down any rules concerning any changes which may have occurred in the structure or economic and technical capacity of the preselected candidate.

In that regard, the Court recalled that in the analogous context of Directive 2004/17, [154] it had considered the consequences of such changes taking place during a negotiated procedure for the award of a public contract in the judgment in *MT Højgaard and Züblin*. [155] Thus, the Court had held that in a negotiated procedure, where a group of undertakings preselected as such, incorporating two economic operators, has been dissolved, one of those operators could take the place of the group and continue the procedure in its own name, without infringing the principle of equal treatment. However, it must be established that that economic operator by itself meets the requirements initially laid down by the contracting authority (first criterion) and that the continuation of its participation in that procedure does not mean that other tenderers are placed at a competitive disadvantage (second criterion).

Regarding the fulfilment of the first criterion in that case, the Court considered that the company OpEn Fiber continued to meet the requirements initially laid down by the contracting authority in that its substantive capacity had increased as a result of acquiring Metroweb Sviluppo.

154| Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1). That directive is no longer in force.

155| Judgment of the Court of 24 May 2016, ***MT Højgaard and Züblin*** (C-396/14, EU:C:2016:347).

Regarding the second criterion, an acquisition such as that involving Metroweb Sviluppo must, according to the Court, be effected in accordance with EU legislation, particularly Regulation No 139/2004. [156] The Court noted that the Commission had decided on 15 December 2016, pursuant to that regulation, not to oppose the merger between OpEn Fiber and Metroweb Sviluppo. In that context, the Court emphasised that there are other provisions of EU law, distinct from those governing public contracts, which are specifically intended to ensure that mergers such as that at issue in that case do not pose a threat to free and undistorted competition within the internal market. Thus, in so far as the conduct of an economic operator complies with those specific rules, its participation in such a merger cannot be regarded as being liable, in itself, to place other tenderers at a competitive disadvantage, simply on the basis that the merged entity will benefit from greater economic and technical capacity.

5. Foodstuffs

In the judgment in ***Organisation juive européenne and Vignoble Psagot*** (C-363/18, EU:C:2019:954), delivered on 12 November 2019, concerning the interpretation of Regulation (EU) No 1169/2011, [157] the Court, sitting as the Grand Chamber, ruled that *foodstuffs originating in territories occupied by the State of Israel must bear the indication of their territory of origin, accompanied, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, by the indication of that provenance*.

The main proceedings concerned a dispute between, on the one hand, Organisation juive européenne and Vignoble Psagot Ltd and, on the other hand, the French Minister for the Economy and Finance in relation to the legality of a notice concerning the indication of origin of goods originating in the territories occupied by the State of Israel since June 1967 and requiring that those foodstuffs bear the indications in question. That notice followed the publication by the European Commission of an Interpretative Notice on indication of origin of goods from those territories. [158]

In the first place, the Court observed that the country of origin or the place of provenance of a foodstuff must, in accordance with Articles 9 and 26 of Regulation No 1169/2011, be indicated where failure to indicate this might mislead consumers into believing that that foodstuff has a country of origin or a place of provenance different from its true country of origin or place of provenance. In addition, it noted that where the origin or provenance is indicated on a foodstuff, it must not be deceptive.

In the second place, the Court clarified the interpretation of both the concept of 'country of origin' [159] and the terms 'country' and 'territory' within the meaning of Regulation No 1169/2011. In that respect, it observed that that concept is defined in Article 2(3) of Regulation No 1169/2011, by reference to the Union Customs

156| 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).

157| Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ 2011 L 304, p. 18).

158| Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967 (OJ 2015 C 375, p. 4).

159| Articles 9(1)(i) and 26(2)(a) of Regulation No 1169/2011.

Code, [160] according to which goods which have either been wholly obtained in a particular 'country' or 'territory' or have undergone their last substantial processing or working in that country or territory are to be regarded as having their origin in that country or territory. [161]

As regards the term 'country', which is used numerous times in the TEU and the TFEU as a synonym for the term 'State', the Court noted that in order to ensure the consistent interpretation of EU law, the same meaning should be given to that term in the Union Customs Code and, consequently, in Regulation No 1169/2011. 'State' refers to a sovereign entity exercising, within its geographical boundaries, the full range of powers recognised by international law. As for the term 'territory', the Court noted that it follows from the very wording of the Union Customs Code [162] that that term refers to entities other than 'countries' and, therefore, other than 'States'. In that context, displaying, on foodstuffs, the indication that the State of Israel is their 'country of origin', when those foodstuffs actually originate in one of the territories which — while each has its own international status distinct from the State of Israel — are occupied by that State and subject to a limited jurisdiction of the latter, as an occupying power within the meaning of international humanitarian law, would be liable to mislead consumers. Consequently, the Court held that the indication of the territory of origin of the foodstuffs in question is mandatory, within the meaning of Regulation No 1169/2011, in order to prevent consumers from being misled as to the fact that the State of Israel is present in the territories concerned as an occupying power and not as a sovereign entity.

In the third and last place, the Court stated that the concept of 'place of provenance' [163] must be understood as referring to any specific geographical area within the country or territory of origin of a foodstuff, with the exception of a producer's address. Thus, the indication that a foodstuff comes from an 'Israeli settlement' located in one of the 'territories occupied by the State of Israel' may be regarded as an indication of the 'place of provenance', provided that the term 'settlement' refers to a specific geographical area.

In addition, as regards the issue whether the indication 'Israeli settlement' is mandatory, as an indication of the place of provenance, the Court first of all underlined that the settlements established in some of the territories occupied by the State of Israel are characterised by the fact that they give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of international humanitarian law. [164] The Court then held that the omission of that indication, with the result that only the territory of origin is indicated, might mislead consumers. Consumers have no way of knowing, in the absence of any information capable of enlightening them in that respect, that a foodstuff comes from a locality or a set of localities constituting a settlement established in one of those territories in breach of the rules of international humanitarian law. The Court noted that, under Regulation No 1169/2011, [165] the provision of information to consumers must enable them to make informed choices, with regard not only

160| Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1).

161| Article 60 of Regulation No 952/2013.

162| Article 60 of Regulation No 952/2013.

163| Articles 9(1)(i) and 26(2)(a) of Regulation No 1169/2011.

164| Sixth paragraph of Article 49 of the Convention relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12 August 1949.

165| Recitals 3 and 4 and Article 3(1) of Regulation No 1169/2011.

to health, economic, environmental and social considerations, but also to ethical considerations and considerations relating to the observance of international law. It made clear in that respect that such considerations could influence consumers' purchasing decisions.

In the judgment in ***Exportslachterij J. Gosschalk and Others*** (C-477/18 and C-478/18, EU:C:2019:1126), delivered on 19 December 2019, the Court had the opportunity to develop its case-law on the fees payable by slaughterhouses for official veterinary controls carried out by the competent authorities. Asked to interpret Regulation No 882/2004, [166] it held, first, that *the authorities are entitled to pass on to slaughterhouses the salaries and costs of staff who do not actually perform the controls, in proportion to the time objectively required of that administrative staff for activities inextricably linked to their performance.* Secondly, it found that the authorities are, under certain conditions, allowed to charge fees for control time that the slaughterhouse requested from the competent authority but which was not actually worked, even though those controls were to be carried out by contracted veterinarians who are not paid for control time not worked.

In the case in the main proceedings, several Netherlands slaughterhouses contested invoices issued by the Netherlands authorities for veterinary inspections carried out within their establishments. Those inspections are carried out by veterinarians and auxiliaries working for the competent authority or by contracted auxiliaries of a private company. In practice, the slaughterhouse submits a request to the authority specifying the number of persons required to carry out the control and the time needed to complete it. If the inspection work takes less time than planned, the slaughterhouse is still required to pay the control time requested but not worked.

According to the slaughterhouses, the time not worked should not be invoiced, and the salaries and costs of the administrative and support staff of the authority should not be included in the fees charged to them. The slaughterhouses also challenged the rates applied for the work of contracted veterinarians, who are paid on a different basis by the authority. Finally, the referring court had doubts regarding the taking into account, in the fees, of the costs of building up buffer reserves for a private company providing contractors, since those reserves are intended to pay staff in the event of a health crisis so that those staff are able to resume work as soon as the crisis is over.

Most of these questions revolve around the compatibility of the Netherlands legislation with the requirement under Regulation No 882/2004 that fees may be levied only to finance costs actually occasioned by official controls and borne by the competent authority. [167] In that context, the Court noted from the outset that the requirement that official controls be effective is a key concern for the EU legislature. In the light of that requirement of effectiveness, it pointed out, in the first place, that administrative and support staff also contribute to the effectiveness of controls. They relieve veterinarians of the logistical organisation of inspection work and contribute to the monitoring of controls. The salaries and costs of those staff may therefore be taken into account in the calculation of the fees, but only in proportion to the hours of work required for activities inextricably linked to the performance of official controls.

In the second place, the Court found that charging for control time which has not actually been worked is allowed where failure to levy such fees could affect the effectiveness of the controls system. However, slaughterhouses must have the possibility of informing the competent authority of their intention to shorten the duration of a control vis-à-vis the period originally planned, provided that that intention is expressed within a reasonable period specified for that purpose by that authority.

166| Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1, and corrigendum OJ 2004 L 191, p. 1).

167| Article 27(1) and (4)(a) of Regulation No 882/2004.

The Court added that charging for control time not worked is subject to additional conditions where the inspection is carried out by contracted veterinarians who are not remunerated for control time not worked. In that case, the authority may, at most, charge a sum corresponding to the amount of the fee, less the salary costs of contracted veterinarians. The balance of the fee thus obtained must also genuinely correspond to overhead costs provided for in the regulation.

Moreover, as regards the taking into account in general of the fees of contracted veterinarians, who are paid less than veterinarians employed by the competent authority, the Court stated that flat-rate fees, which are, in principle, allowed under Regulation No 882/2004, may also be applied when contracted veterinarians carry out the control. However, those fees must not, in general, be higher than the costs borne by the authority. Therefore, if the authority finds that it has made a profit over a given period, it must reduce the amount of the flat-rate fees for the following period.

Finally, the Court dismissed the possibility of taking into account, in the fee calculation, the costs of building up buffer reserves for a private company which the authority uses to source auxiliaries. The fees may cover only the costs actually stemming from controls carried out in food establishments.

6. Motor insurance

In the judgment in ***Línea Directa Aseguradora*** (C-100/18, EU:C:2019:517), delivered on 20 June 2019, the Court interpreted *the concept of 'use of vehicles' within the meaning of Directive 2009/103* [168] *on civil liability motor insurance* and found that that concept covers a situation in which a vehicle parked in a private garage of a building for more than 24 hours has caught fire, giving rise to a fire which originated in the electrical circuit of that vehicle and caused damage to that building.

In August 2013, a vehicle parked for more than 24 hours in a private garage in a building caught fire and caused damage. The fire originated in the electrical circuit of the vehicle. The owner of the vehicle had taken out insurance against civil liability in respect of the use of motor vehicles from the company Línea Directa. The building was insured by Segurcaixa, which compensated the company that owned the building in the amount of EUR 44 704.34 for the damage caused.

In March 2014, Segurcaixa brought an action against Línea Directa for the latter to be ordered to reimburse the compensation paid, on the ground that the accident had originated in a 'use of a vehicle', within the meaning of Spanish law, covered by the vehicle's motor insurance. Segurcaixa's application was dismissed at first instance. In the appeal proceedings, Línea Directa was ordered to pay the compensation requested by Segurcaixa. Línea Directa lodged an appeal on a point of law before the Spanish Supreme Court. As it had doubts regarding the interpretation of the concept of 'use of vehicles' in Directive 2009/103, that court decided to refer several questions to the Court for a preliminary ruling.

168| Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11).

The Court first of all recalled that the concept of 'use of vehicles', within the meaning of that directive, [169] is an autonomous concept of EU law, the interpretation of which cannot be left to the discretion of each Member State. It also emphasised that that objective of protecting the victims of accidents caused by those vehicles has continuously been pursued and reinforced by the EU legislature.

In the light of its case-law, [170] the Court recalled that the concept of 'use of vehicles' is not limited to road use and includes any use of a vehicle that is consistent with its usual function, including any use of a vehicle as a means of transport. In that context, the Court noted, on the one hand, that the fact that the vehicle involved in an accident was stationary when the accident occurred does not, in itself, preclude the use of that vehicle at that time from falling within the scope of its function as a means of transport. Likewise, whether or not the engine of the vehicle concerned was running at the time of the accident is not conclusive either. On the other hand, no provision in Directive 2009/103 limits the scope of the insurance obligation and of the protection which that obligation is intended to give to the victims of accidents caused by motor vehicles to the use of such vehicles on certain terrain or on certain roads.

Consequently, the Court concluded that the concept of 'use of vehicles', within the meaning of Directive 2009/103, does not depend on the characteristics of the terrain on which the vehicle is used and, in particular, the fact that the vehicle at issue is, at the time of the accident, stationary and in a car park. In those circumstances, the Court held that the parking and the period of immobilisation of the vehicle are natural and necessary steps which form an integral part of the use of that vehicle as a means of transport. Thus, a vehicle is used in accordance with its function as a means of transport, in principle, also while it is parked between two journeys.

In that case, the Court considered that the parking of a vehicle in a private garage constitutes a use of that vehicle which is consistent with its function as a means of transport, that conclusion not being affected by the fact that the vehicle was parked for more than 24 hours in that garage.

Lastly, as regards the fact that the accident at issue in the main proceedings resulted from a fire caused by the electrical circuit of a vehicle, the Court held that since the vehicle, which caused that accident, meets the definition of 'vehicle', within the meaning of Directive 2009/103, [171] there is no need to distinguish between the parts of that vehicle which caused the harmful event or to determine the functions which that part performs.

7. Control of the acquisition and possession of weapons

By its judgment in ***Czech Republic*** **v** ***Parliament and Council*** (C-482/17, EU:C:2019:1035), delivered on 3 December 2019, the Court *dismissed the action for the whole or partial annulment of Directive 2017/853* [172] *('the contested directive') by which the European Parliament and the Council amended Council Directive 91/477/EEC on*

169| The first paragraph of Article 3 of Directive 2009/103 provides that each Member State is, subject to Article 5 of that directive, to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.

170| See, inter alia, the judgments of the Court of 20 December 2017, ***Núñez Torreiro*** (C-334/16, EU:C:2017:1007), and of 15 November 2018, ***BTA Baltic Insurance Company*** (C-648/17, EU:C:2018:917).

171| Article 1(1) of Directive 2009/103.

172| Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons (OJ 2017 L 137, p. 22).

control of the acquisition and possession of weapons [173] ('the Firearms Directive'). The Court held that the measures taken by the European Parliament and the Council in the contested directive do not entail breaches of the principles of conferral of powers, proportionality, legal certainty, protection of legitimate expectations or non-discrimination as alleged by the Czech Republic in support of its action.

With a view to abolishing border controls within the Schengen area, the Firearms Directive established a harmonised minimum framework for the possession and acquisition of firearms and their transfer between Member States. To that end, that directive lays down provisions concerning the conditions subject to which various categories of firearms may be acquired and held, while laying down, on the basis of requirements of public safety, that the acquisition of certain types of firearm must be prohibited.

In response to certain terrorist acts, the European Parliament and the Council adopted, in 2017, the contested directive in order to introduce stricter rules for the most dangerous deactivated and semi-automatic firearms. At the same time, that directive also intends to facilitate the free movement of certain weapons by laying down inter alia marking rules.

So far as concerns automatic firearms converted into semi-automatic firearms, which are in principle prohibited, the contested directive contains a derogation whose conditions are fulfilled only by Switzerland, which is part of the Schengen area and to which the Firearms Directive applies. It involves the condition relating to the existence of a military system based on general conscription and having had in place over the last 50 years a system of transfer of military firearms to persons leaving the army.

The Czech Republic brought an action before the Court seeking the annulment, in whole or in part, of the contested directive. In those proceedings, the Czech Republic was supported by Hungary and Poland, while the European Parliament and the Council were supported by the French Republic and the European Commission.

As regards the alleged breach of the principle of conferral of powers, first of all, the Court recalled that even where an act based on Article 114 TFEU, such as the Firearms Directive, has already removed any obstacle to trade in the area that it harmonises, the EU legislature cannot be denied the possibility of adapting that act, on the basis of that provision, to any change in circumstances having regard to its task of safeguarding the general interests recognised by the Treaties. Those general interests include the fight against international terrorism and serious crime and the maintenance of public security.

Next, in the case of an act which amends existing rules, the Court stated that it is important to take into account, for the purposes of identifying its legal basis, the existing rules which it amends and, in particular, their objective and content. Examining the amending act in isolation could lead to the paradoxical result that that act could not be adopted on the basis of Article 114 TFEU, whereas it would be possible for the EU legislature to achieve the same normative result by repealing the initial act and, on the basis of that provision, fully recasting it into a new act. Consequently, the Court held that it was necessary to identify the legal basis on which the contested directive had to be adopted by taking into account both the context constituted by the Firearms Directive and the rules stemming from the amendments made to it by the contested directive.

Lastly, after comparing the objective and the content of the Firearms Directive with those of the contested directive, the Court found that both directives are intended to ensure approximation of the provisions of the Member States on the free movement of firearms for civilian use whilst circumscribing that freedom with

173| Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons (OJ 1991 L 256, p. 51).

safety guarantees suited to the nature of those goods, and that the contested directive simply adjusts the balance created by the Firearms Directive between those two objectives in order to adapt it to changes in circumstances.

On that point, the Court recalled that the harmonisation of aspects relating to the safety of goods is one of the essential elements for the proper functioning of the internal market, disparate rules in that area being such as to create obstacles to trade. Given that the specificity of firearms resides in the danger they pose not only to users but also to the public at large, public safety considerations are essential in the context of rules on the acquisition and possession of those goods.

In those circumstances, the Court held that the EU legislature did not exceed the margin of discretion conferred on it by Article 114 TFEU in adopting the contested directive on the basis of that provision.

As regards the alleged breach of the principle of proportionality, the Court examined whether the Interinstitutional Agreement on Better Law-Making [174] formally required the Commission to carry out an impact assessment of the measures envisaged by the adoption of the contested directive so as to enable the proportionality of those measures to be assessed. In that respect, the Court noted that the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if the legislative initiative is liable to have significant economic, environmental or social implications. An obligation to carry out such an assessment in every circumstance, however, does not follow from the wording of that agreement.

Therefore, not carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with, provided, however, that it has sufficient information enabling it to assess the proportionality of the envisaged measures.

Later in the judgment, the Court found that the EU legislature had at its disposal numerous analyses and recommendations covering all the issues raised in the Czech Republic's argument and that, contrary to what that Member State claimed, the measures criticised did not appear, in the light of those analyses and recommendations, manifestly inappropriate in relation to the objectives of ensuring public safety and security for citizens of the Union and facilitating the functioning of the internal market in firearms for civilian use.

Consequently, the Court held that, in the case at hand, the EU institutions had not exceeded their wide discretion when called upon to conduct such complex assessments and evaluations of a political, economic or social nature. Finally, the Court further rejected the arguments of the Czech Republic directed more specifically against certain provisions of the contested directive which that Member State deemed to be contrary to the principles of proportionality, legal certainty and protection of legitimate expectations of categories of owners or holders of weapons potentially subject to a stricter regime under the contested directive and, lastly, the principle of non-discrimination.

Regarding that last principle, the Court held inter alia that the derogation enjoyed by Switzerland takes into account both the culture and traditions of that country and the fact that, owing to those traditions, it has the proven experience and ability to trace and monitor the persons and weapons concerned, which gives reason to assume that the public security and safety objectives pursued by the contested directive will, despite that derogation, be achieved. Given that no Member State of the European Union appears to be in a comparable situation to that of Switzerland, there is no discrimination.

174| Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016 (OJ 2016 L 123, p. 1).

XIV. Internet and electronic commerce

A number of judgments are worthy of note under this heading, including three in the field of personal data protection and one concerning electronic commerce. Furthermore, two judgments, *Funke Medien NRW* (C-469/17) and *Spiegel Online* (C-516/17), both delivered on 29 July 2019, deal with the protection of the exclusive rights of authors where their works are reproduced and communicated to the public via the internet. Those two judgments are presented in Section XIII.1 'Copyright'.

1. Protection of personal data

In 2019, the Court, sitting as the Grand Chamber, delivered three particularly important judgments in the area of personal data protection. Two of them required the Court to clarify the obligations of operators of a search engine in the context of the de-referencing of sensitive data, and the territorial scope of de-referencing. The third judgment concerns a website user's consent to the storage of or access to information in the form of cookies.

By its judgment of 24 September 2019, ***GC and Others (De-referencing of sensitive data)*** (C-136/17, EU:C:2019:773), the Court, sitting as the Grand Chamber, clarified *the obligations of operators of a search engine in the context of a request for de-referencing relating to sensitive data*.

Google had refused to accede to the requests of four individuals to de-reference, in the list of results displayed by the search engine in response to searches against their names, various links leading to web pages published by third parties, including press articles. Following complaints by those four individuals, the French Data Protection Authority — Commission nationale de l'informatique et des libertés (CNIL) — refused to serve formal notice on Google to carry out the de-referencing requested. The French Council of State, before which the case was brought, asked the Court to clarify the obligations of an operator of a search engine when handling a request for de-referencing under Directive 95/46. [175]

First, the Court recalled that the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade-union membership, and the processing of data concerning health or sex life, is prohibited, [176] subject to certain exceptions and derogations. As regards the processing of data relating to offences, criminal convictions or security measures, such processing may in principle be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law. [177]

175| 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). That directive was repealed, with effect from 25 May 2018, by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

176| Article 8(1) of Directive 95/46 and Article 9(1) of Regulation 2016/679.

177| Article 8(5) of Directive 95/46 and Article 10 of Regulation 2016/679.

The Court ruled that the prohibition and restrictions relating to the processing of those special categories of data apply to the operator of a search engine, in the same way as any other controller of personal data. The purpose of those prohibitions and restrictions is to ensure enhanced protection as regards such processing, which, because of the particular sensitivity of the data, is liable to constitute a particularly serious interference with the fundamental rights to privacy and the protection of personal data. [178]

However, the operator of a search engine is responsible not because personal data appear on a web page published by a third party, but because of the referencing of that page. In those circumstances, the prohibition and restrictions relating to the processing of sensitive data apply to that operator only by reason of that referencing and thus via a verification to be carried out, under the supervision of the competent national authorities, on the basis of a request by the data subject.

Secondly, the Court held that when the operator receives a request for de-referencing relating to sensitive data, it is in principle required, subject to certain exceptions, to accede to that request. As regards those exceptions, the operator may, inter alia, refuse to accede to such a request if it establishes that the links lead to data which are manifestly made public by the data subject, [179] provided that the referencing of those links satisfies the other conditions of lawfulness of the processing of personal data and unless the data subject has the right to object to that referencing on grounds relating to the data subject's particular situation. [180]

In any event, when the operator of a search engine receives a request for de-referencing, it must ascertain whether the inclusion in the list of results displayed following a search on the basis of the data subject's name of the link to a web page on which sensitive data are published is strictly necessary for protecting the freedom of information of internet users [181] potentially interested in accessing that web page by means of such a search. In that regard, the Court pointed out that while the rights to privacy and the protection of personal data override, as a general rule, the freedom of information of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

Thirdly, the Court ruled that, in the context of a request for de-referencing in respect of data relating to criminal proceedings brought against the data subject, concerning an earlier stage of the proceedings and no longer corresponding to the current situation, it is for the operator of a search engine to assess whether, in the light of all the circumstances of the case, the data subject has a right to the information in question no longer, in the present state of things, being linked with the data subject's name by a list of results displayed following a search carried out on the basis of that name. However, even if that is not the case because the inclusion of the link in question is strictly necessary for reconciling the data subject's rights to privacy and the protection of personal data with the freedom of information of potentially interested internet users, the operator is required, at the latest on the occasion of the request for de-referencing, to adjust the list of results in such a way that the overall picture it gives the internet user reflects the current legal position, which means in particular that links to web pages containing information on that point must appear in first place on the list.

178| The rights to privacy and the protection of personal data are guaranteed by Articles 7 and 8 of the Charter.

179| Article 8(2)(e) of Directive 95/46 and Article 9(2)(e) of Regulation 2016/679.

180| Point (a) of the first paragraph of Article 14 of Directive 95/46 and Article 21(1) of Regulation 2016/679.

181| Freedom of expression and information is enshrined in Article 11 of the Charter.

By its judgment of 24 September 2019, ***Google (Territorial scope of de-referencing)*** (C-507/17, EU:C:2019:772), the Court, sitting as the Grand Chamber, *held that the operator of a search engine is, in principle, required to carry out a de-referencing only on the versions of its search engine corresponding to all Member States.*

The CNIL served formal notice on Google that, where that company grants a request for de-referencing, it must remove from the list of results displayed on all its search engine's domain name extensions, following a search conducted on the basis of the name of the data subject, links to web pages containing personal data concerning that data subject. Following Google's refusal to comply with that formal notice, the CNIL imposed a penalty of EUR 100 000 on that company. The French Council of State, in the proceedings initiated before it by Google, asked the Court to clarify the territorial scope of the obligation for a search engine operator to give effect to the right to de-referencing under Directive 95/46.

First of all, the Court recalled the possibility, under EU law, for natural persons to assert their right to de-referencing against a search engine operator that has one or more establishments in the territory of the European Union, regardless of whether the processing of personal data (in that case, the referencing of links to web pages containing personal data concerning the person availing himself or herself of that right) takes place in the European Union or not. [182]

As regards the scope of the right to de-referencing, the Court considered that the operator of a search engine is required to carry out the de-referencing not on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States. It noted in that regard that while a universal de-referencing would, in view of the characteristics of the internet and search engines, meet in full the EU legislature's objective of guaranteeing a high level of protection of personal data throughout the European Union, it is in no way apparent from EU law [183] that, for the purposes of achieving such an objective, the legislature chose to confer a scope on the right to de-referencing which goes beyond the territory of the Member States. In particular, while EU law establishes cooperation mechanisms between the supervisory authorities of the Member States so that they may come to a joint decision based on weighing the right to privacy and the protection of personal data, on the one hand, against the interest of the public in various Member States in having access to information, on the other, no provision is currently made for such mechanisms as regards the scope of a de-referencing outside the European Union.

As EU law currently stands, it is for the operator of a search engine to carry out the requested de-referencing not only on the version of the search engine corresponding to the Member State of residence of the person benefiting from that de-referencing, but on the versions of the search engine corresponding to the Member States, in order, in particular, to ensure a consistent and high level of protection throughout the European Union. Moreover, it is for such an operator to take, if necessary, sufficiently effective measures to prevent or, at the very least, seriously discourage EU internet users from gaining access, as the case may be from a version of the search engine corresponding to a third State, to the links concerned by the de-referencing, and it is for the national court to ascertain whether the measures adopted by the operator meet that requirement.

Lastly, the Court emphasised that although EU law does not require the operator of a search engine to carry out a de-referencing on all the versions of its search engine, it also does not prohibit such a practice. Accordingly, a supervisory or judicial authority of a Member State remains competent to weigh up, in the light of national standards of protection of fundamental rights, a data subject's right to privacy and the

182| Article 4(1)(a) of Directive 95/46 and Article 3(1) of Regulation 2016/679.

183| Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46 and Article 17(1) of Regulation 2016/679.

protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine.

In the judgment of 1 October 2019, ***Planet49*** (C-673/17, EU:C:2019:801), the Court, sitting as the Grand Chamber, held that consent to the storage of or access to information in the form of cookies installed on a website user's terminal equipment is not validly constituted if given by way of a pre-ticked checkbox, irrespective of whether or not the information in question is personal data. Furthermore, the Court made clear that *the service provider must inform a website user of the duration of the operation of cookies and whether or not third parties may have access to those cookies.*

The case in the main proceedings concerned a promotional lottery organised by Planet49 on the website www.dein-macbook.de. Internet users wishing to take part in that lottery were required to enter their names and addresses on a web page with checkboxes. The checkbox authorising the installation of cookies was pre-ticked. In an appeal brought by the German Federation of Consumer Organisations, the German Federal Court of Justice harboured doubts about the validity of the consent obtained from internet users by means of the pre-ticked checkbox and about the extent of the information obligation owed by the service provider.

The request for a preliminary ruling concerned, in substance, the concept of consent referred to in the Directive on privacy and electronic communications, [184] read in conjunction with Directive 95/46 [185] and the General Data Protection Regulation. [186]

First, the Court observed that Article 2(h) of Directive 95/46, to which Article 2(f) of the Directive on privacy and electronic communications refers, defines 'consent' as being 'any freely given specific and informed indication of his [or her] wishes by which the data subject signifies his [or her] agreement to personal data relating to him [or her] being processed'. It noted that the requirement of an 'indication' of the data subject's wishes clearly points to active, rather than passive, behaviour. However, consent given in the form of a pre-ticked checkbox does not imply active behaviour on the part of a website user. Furthermore, the legislative origins of Article 5(3) of the Directive on privacy and electronic communications, which provides — as amended by Directive 2009/136 — that the user must have 'given his or her consent' to the storage of cookies, seems to indicate that user consent may no longer be presumed but must be the result of active behaviour on the part of the user. Finally, active consent is now provided for in the General Data Protection Regulation, [187] Article 4(11) of which requires an indication of the data subject's wishes in the form of 'clear affirmative action' and recital 32 of which expressly precludes 'silence, pre-ticked boxes or inactivity' from constituting consent.

The Court therefore held that consent is not validly constituted if the storage of information, or access to information already stored in the website user's terminal equipment, is permitted by way of a pre-ticked checkbox which the user must deselect to refuse giving consent. It added that the fact that the user selects the button to participate in the lottery in question cannot be sufficient for it to be concluded that the user validly gave consent to the storage of cookies.

184| Article 2(f) and Article 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

185| Article 2(h) of Directive 95/46.

186| Article 6(1)(a) of Regulation 2016/679.

187| Article 6(1)(a) of Regulation 2016/679.

Secondly, the Court stated that Article 5(3) of the Directive on privacy and electronic communications aims to protect the user from interference with his or her private sphere, regardless of whether or not that interference involves personal data. It follows that the concept of consent is not to be interpreted differently according to whether or not the information stored or accessed on a website user's terminal equipment is personal data.

Thirdly, the Court noted that that provision requires the user concerned to have given consent, having been provided with clear and comprehensive information, inter alia, about the purposes of the processing. Clear and comprehensive information implies that a user is in a position to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed. In that regard, the Court held that the duration of the operation of the cookies and whether or not third parties may have access to those cookies form part of the clear and comprehensive information which must be provided to a website user by the service provider.

2. Electronic commerce

By its judgment of 19 December 2019, ***Airbnb Ireland*** (C-390/18, EU:C:2019:1112), the Grand Chamber of the Court held, first, *that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service, must be classified as an 'information society service' under Directive 2000/31 on electronic commerce.* [188] Secondly, the Court found that in criminal proceedings with an ancillary civil action, an individual may oppose the application to him or her of measures of a Member State restricting the freedom to provide such a service which that individual provides from another Member State, where those measures were not notified in accordance with the second indent of Article 3(4)(b) of that directive.

The dispute in the main proceedings concerned criminal proceedings brought in France following a complaint, together with an application to be joined as a civil party to the proceedings, lodged against Airbnb Ireland by the Association pour un hébergement et un tourisme professionnels (Association for professional tourism and accommodation). Airbnb Ireland is an Irish company that manages an electronic platform which, in return for payment of a commission, makes it possible to establish contact, particularly in France, between professional hosts and private individuals offering short-term accommodation services and people looking for such accommodation. In addition, Airbnb Ireland offers those hosts ancillary services, such as a format for setting out the content of their offer, civil liability insurance, a tool for estimating their rental price or payment services for the provision of those services.

The association which lodged the complaint against Airbnb Ireland maintained that that company did not merely connect two parties through its eponymous platform; it also acted as an estate agent without holding a professional licence, in breach of the act known as the Hoguet Law, which applies to the activities of real estate professionals in France. For its part, Airbnb Ireland claimed that, on any view, Directive 2000/31 precluded that legislation.

188| 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).

Asked, in the first place, about the classification of the intermediation service provided by Airbnb Ireland, the Court pointed out, referring to the judgment in *Asociación Profesional Elite Taxi*, [189] that if an intermediation service satisfies the conditions laid down in Article 1(1)(b) of Directive 2015/1535, [190] to which Article 2(a) of Directive 2000/31 refers — that is to say, it is provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services — then, in principle, it is an 'information society service', distinct from the subsequent service to which it relates. However, this will not be the case if it appears that that intermediation service forms an integral part of an overall service whose main component is a service coming under another legal classification.

In that case, the Court found that an intermediation service such as that provided by Airbnb Ireland satisfied those conditions, and the nature of the links between the intermediation service and the provision of accommodation did not justify departing from the classification of that intermediation service as an 'information society service' and thus the application of Directive 2000/31 to it.

To underline the separate nature of such an intermediation service vis-à-vis the accommodation services to which it relates, the Court noted, first, that that service is not aimed only at providing immediate accommodation services, but rather consists essentially in providing a tool for presenting and finding accommodation for rent, thereby facilitating the conclusion of future rental agreements. Therefore, that type of service cannot be regarded as being merely ancillary to an overall accommodation service. Secondly, the Court pointed out that an intermediation service such as the one provided by Airbnb Ireland is in no way indispensable to the provision of accommodation services, since guests and hosts have a number of other channels in that respect, some of which are long-standing. Thirdly and lastly, the Court stated that there was nothing in the file to indicate that Airbnb sets or caps the amount of the rents charged by the hosts using that platform.

The Court further stated that the other services offered by Airbnb Ireland do not call that finding into question, since the various services provided are merely ancillary to the intermediation service provided by that company. In addition, it pointed out that, unlike the intermediation services at issue in the judgments in *Asociación Profesional Elite Taxi* and *Uber France*, [191] neither that intermediation service nor the ancillary services offered by Airbnb Ireland make it possible to establish the existence of a decisive influence exercised by that company over the accommodation services to which its activity relates, with regard both to determining the rental price charged and selecting the hosts or accommodation for rent on its platform.

In the second place, the Court examined whether Airbnb Ireland may, in the main proceedings, oppose the application to that company of a law restricting the freedom to provide information society services provided by an operator from another Member State, such as the Hoguet Law, on the ground that that law was not notified by the French Republic in accordance with the second indent of Article 3(4)(b) of Directive 2000/31. In that regard, the Court stated that the fact that that law predates the entry into force of Directive 2000/31 cannot have had the consequence of freeing the French Republic of its notification obligation. Next, drawing on the reasoning followed in the judgment in *CIA Security International*, [192] it found that that obligation, which constitutes a substantial procedural requirement, must be recognised as having direct effect. The Court

189| Judgment of the Court of 20 December 2017, ***Asociación Profesional Elite Taxi*** (C-434/15, EU:C:2017:981, paragraph 40).

190| Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

191| Judgment of the Court of 10 April 2018, ***Uber France*** (C-320/16, EU:C:2018:221).

192| Judgment of the Court of 30 April 1996, ***CIA Security International*** (C-194/94, EU:C:1996:172).

therefore concluded that a Member State's failure to fulfil its obligation to give notification of such a measure may be relied on by an individual not only in criminal proceedings brought against that individual, but also in a claim for damages brought by another individual who has been joined as civil party.

XV. Social policy

In relation to social policy, several judgments deserve to be mentioned. They concern the principle of equal treatment in employment and social security, the organisation of working time, the right to paid annual leave and the protection of workers in the event of the insolvency of their employer.

1. Equal treatment in employment and social security

Reference must be made under this heading to four judgments that deal, in one way or another, with different treatment on grounds of sex or sexual orientation and religion. In a fifth judgment, delivered in ***Commission v Poland (Independence of ordinary courts)*** (C-192/18, EU:C:2019:924), delivered on 5 November 2019, the Court upheld the action for failure to fulfil obligations brought by the Commission against the Republic of Poland and held that that Member State had failed to fulfil its obligations under EU law, first, by establishing a different retirement age for male and female judges and public prosecutors in Poland and, secondly, by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges. [193]

In its judgment in ***E.B.*** (C-258/17, EU:C:2019:17), delivered on 15 January 2019, the Grand Chamber of the Court ruled on *the application of Directive 2000/78* [194] *('the Anti-Discrimination Directive') in relation to a disciplinary decision adopted in 1975 ordering the early retirement of an official with a reduction of 25% in the amount of his pension.* That disciplinary sanction had been imposed on an Austrian police official as a result of having been convicted of the crime of an attempted act of same-sex indecency with young persons. In 2009, the person concerned submitted several applications to the pensions authority seeking, inter alia, to challenge the legal effects of that disciplinary decision. Ruling on that case, the referring court held that the contested disciplinary decision was based on a difference in treatment on grounds of sexual orientation, in so far as the penalty provided for by the national legislation applicable at the material time would have been considerably less severe in the absence of the male homosexual nature of the indecency sanctioned. Accordingly, it decided to ask the Court about the applicability of the provisions of the Anti-Discrimination Directive in a case such as that at issue in the main proceedings and about the obligations incumbent, as the case may be, on the national court under that directive.

The Court first of all held that a situation such as that created by the compulsory early retirement of the former police official falls within the scope of application *ratione materiae* of the Anti-Discrimination Directive provided that the retirement pension paid to that former official is covered by the concept of 'pay' within the

193| That judgment is presented in Section I.1 'Right to an impartial tribunal and a fair trial'.

194| 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).

meaning of Article 157 TFEU. Therefore, it is for the referring court to verify whether that pension is, under national law, regarded as pay which continues to be paid in the context of an employment relationship which continues after the civil servant becomes entitled to retirement benefits.

As regards the applicability *ratione temporis* of the Anti-Discrimination Directive, the Court noted, next, that a new rule of law applies not to situations that have arisen and become definitive under the old law, but solely to their future effects and to new legal situations. It follows that the disciplinary sanction consisting in the compulsory early retirement of the police official, which is based on a difference of treatment on grounds of sexual orientation and gives rise to direct discrimination within the meaning of Article 2(2)(a) of the Anti-Discrimination Directive, can no longer be called into question on the basis of that directive since it became final before the expiry of the time limit for transposing that directive and exhausted all of its effects at the time of the directive's entry into force. The application of the Anti-Discrimination Directive after the expiry of the time limit for transposing it requires, by contrast, the national court to re-examine, for the period beginning on that date, the discriminatory sanction consisting in the 25% reduction in the amount of the pension regularly paid to the former official, in order to calculate the amount he would have received in the absence of any discrimination on grounds of sexual orientation.

In the judgment in ***Cresco Investigation*** (C-193/17, EU:C:2019:43), delivered on 22 January 2019, the Grand Chamber of the Court *held that Austrian legislation granting a paid public holiday on Good Friday and, in the case of work carried out on that day, 'public holiday pay' only to employees belonging to certain Christian churches is incompatible with Article 21 of the Charter, which may be relied on in disputes between individuals, and with the Anti-Discrimination Directive.*

In the case in the main proceedings, an action was brought against a private detective agency by one of its employees who had worked on a Good Friday but did not receive 'public holiday pay', which, under national law, was to be paid only to members of certain churches. The employee claimed that he was a victim of discrimination on grounds of religion and sought payment by his employer of that pay. The referring court hearing the case decided to ask the Court about the compatibility of the Austrian legislation with Article 21 of the Charter and with the Anti-Discrimination Directive.

In the first place, the Court found that that legislation amounts to direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of the Anti-Discrimination Directive. The difference in treatment established by the national legislation is directly based on the employees' religion. Furthermore, it concerns categories of employees in comparable situations. Both the grant of a paid public holiday on Good Friday and the grant of public holiday pay to employees who are members of one of the churches referred to are dependent only on whether that employee is formally a member of that church. Thus, first, such employees are free to choose, as they wish, how to spend their time on that public holiday and may, for example, use it for rest or leisure purposes, whereas other employees who wish to have a rest or leisure period on Good Friday are not, however, entitled to a corresponding public holiday. Secondly, the employees who are members of the churches concerned are entitled to public holiday pay even if they would have worked on Good Friday without feeling any obligation or need to celebrate that religious festival. In that respect, their situation is no different from that of other employees who worked on Good Friday without receiving such a benefit.

In the second place, the Court — while noting that the objective of the Austrian legislation at issue, namely to take account of the particular importance of Good Friday for the members of the churches concerned, falls within the scope of protection of freedom of religion — found that the direct discrimination which it establishes cannot be justified on the basis of Article 2(5) of the Anti-Discrimination Directive or Article 7(1) thereof. Provision is made in Austrian law for employees not belonging to the Christian churches covered by the legislation at issue to celebrate a religious festival that does not coincide with a public holiday not by the grant of an additional public holiday but by the imposition of a duty of care on employers vis-à-vis their employees, which allows the latter to obtain, if they so wish, the right to be absent from their work for the

amount of time necessary to perform certain religious rites. It follows that the legislation at issue is not necessary for the protection of the freedom of religion within the meaning of Article 2(5) of the Anti-Discrimination Directive. For that very reason, that legislation also cannot be regarded as including specific measures the aim of which is to compensate, in accordance with the principle of proportionality and, as far as possible, the principle of equal treatment, for a disadvantage in the working life of the employees concerned, as referred to in Article 7(1) of that directive.

As regards the implementation, in the case in the main proceedings, of the prohibition of discrimination on grounds of religion under EU law, the Court confirmed that the Anti-Discrimination Directive cannot be relied on in a dispute between individuals in order to set aside the legislation of a Member State where, as in that case, it is not capable of being interpreted in conformity with that directive. However, the Anti-Discrimination Directive does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States. Furthermore, the prohibition of any discrimination on grounds of religion or belief is mandatory as a general principle of EU law and is laid down in Article 21(1) of the Charter.

Therefore, that prohibition is sufficient in itself to confer on individuals a right on which they may rely as such in a dispute between them and another individual in a field covered by EU law. The referring court is thus obliged to guarantee the legal protection afforded under that article in order to ensure the full effect thereof. It must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature.

Thus, the Court concluded that until measures reinstating equal treatment have been adopted by the Austrian legislature, employers must, in accordance with Article 21 of the Charter, ensure that employees who are not members of one of the churches covered by the national provisions at issue enjoy the same treatment as that enjoyed only by employees who are members of one of those churches under those provisions.

In its judgment in ***Hakelbracht and Others*** (C-404/18, EU:C:2019:523), delivered on 20 June 2019, the Court ruled on the *scope of the protection provided for in Article 24 of Directive 2006/54* [195] *('the Directive on equality between men and women') against the victimisation of workers disadvantaged by their employer on account of the support they have provided to a person who has been discriminated against on grounds of sex, and in particular on the possibility for a Member State to limit such protection to official witnesses only.*

The judgment arose in a dispute between, inter alia, an employee and her former employer with a view to obtaining compensation in consequence of her dismissal nine months after she objected to her employer's refusal to employ an appropriate candidate because of that candidate's pregnancy. The employee was accused of being the cause of the complaint lodged by that candidate with the Institute for Equality of Women and Men, in so far as that employee had informed that candidate that her application had not been accepted because she was pregnant.

The Court held that Article 24 of the Directive on equality between men and women precludes national legislation under which, in a situation where a person who believes to have been discriminated against on grounds of sex has lodged a complaint, an employee who has supported that person in that situation is protected from retaliatory measures taken by the employer solely if that employee has acted as a witness in the context of the investigation of that complaint and that employee's witness statement satisfies formal requirements under that legislation.

195| Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

The Court observed, first of all, that the category of employees who are entitled to the protection provided for by that provision must be interpreted broadly, since the wording of that provision does not limit the protection solely to employees who have lodged complaints or their representatives, or to those who comply with certain formal requirements governing the recognition of a certain status, such as that of a witness.

Next, having regard to the objective of the Directive on equality between men and women, the Court stated that, under Article 17 thereof, adequate judicial or administrative procedures for enforcement of the obligations imposed by that directive must be made available to all persons who consider themselves wronged by the failure to apply the principle of equal treatment to them. According to the Court, that provision is a specific expression of the principle of effective judicial protection, reaffirmed by Article 47 of the Charter.

The Court concluded that the effectiveness of the protection required by the Directive on equality between men and women against discrimination on grounds of sex would not be guaranteed if it did not cover the measures which an employer might take against employees having, formally or informally, defended the protected person or testified in that person's favour. Those employees could then be discouraged from intervening on behalf of that person for fear of being deprived of protection if they do not meet certain formal requirements, which could seriously jeopardise attaining the objective pursued by the Directive on equality between men and women by reducing the likelihood that cases of discrimination on grounds of sex are detected and resolved.

In the judgment in ***Safeway*** (C-171/18, EU:C:2019:839), delivered on 7 October 2019, the Grand Chamber of the Court examined *the compatibility, with the principle of equal pay between men and women provided for in Article 119 of the EC Treaty,* [196] *of a measure seeking to end discrimination found by the Court in its judgment of 17 May 1990,* ***Barber*** (C-262/88, EU:C:1990:209; 'the judgment in *Barber*'). That discrimination consisted in fixing a normal pension age ('the NPA') which was differentiated by gender, namely 65 years for men and 60 years for women. In order to remedy that discrimination, a pension scheme had retroactively equalised the NPA of all its members to 65 years. The Court held that Article 119 of the EC Treaty precludes, in the absence of an objective justification, such an equalisation measure in respect of the period between the announcement of that measure and its adoption, even where such an approach is authorised under national law and under the trust deed governing the pension scheme.

The pension scheme at issue in the main proceedings had been created in the form of a trust by Safeway Ltd in 1978. Following delivery of the judgment in *Barber*, the authorities with responsibility for managing the pension scheme, Safeway and Safeway Pension Trustees Ltd, announced in September and December 1991 that the NPA would be equalised to 65 years in respect of all members, with effect as of 1 December 1991. However, that equalisation measure was not formally adopted until 2 May 1996, by means of a trust deed, with effect as of 1 December 1991. Proceedings were then brought before the United Kingdom courts concerning the question whether that retroactive amendment of the NPA was compatible with EU law.

In the first place, the Court pointed out that the consequences to be inferred from the finding of discrimination made in the judgment in *Barber* differ depending on the periods of service concerned. As regards the periods relevant for the purposes of that case, namely the periods of service between delivery of that judgment and the adoption, by a pension scheme, of measures reinstating equal treatment, persons within the disadvantaged category (in this instance, men) must be granted the same advantages as those enjoyed by persons within the favoured category (in this instance, women).

196| The provision applicable at the material time and which corresponds to the current Article 157 TFEU.

In the second place, the Court listed the requirements which must be satisfied by the measures adopted with a view to ending discrimination contrary to Article 119 of the EC Treaty to enable such measures to be regarded as reinstating the equal treatment required under that provision. First, those measures cannot, as a rule, be made subject to conditions which maintain discrimination, even on a transitional basis. Secondly, they must observe the principle of legal certainty, and therefore the introduction of a mere practice, which has no binding legal effects with regard to the persons concerned, is not permitted. The Court concluded as a result that in the context of the pension scheme at issue in the main proceedings, measures satisfying those requirements were not adopted until 2 May 1996, by means of the trust deed adopted on that date, and not at the time of the announcements made by the authorities with responsibility for that scheme to the members in September and December 1991.

In those circumstances, the Court held that to allow a measure to equalise with retroactive effect (in that case, as of 1 December 1991) the NPA to that of the persons within the previously disadvantaged category, namely 65 years, would be contrary not only to the objective of the harmonisation of working conditions while maintaining improvement, which follows from the preamble to the EC Treaty and Article 117 thereof, but also to the principle of legal certainty and the requirements flowing from the case-law of the Court regarding, inter alia, Article 119 of the EC Treaty.

However, the Court pointed out that measures seeking to end discrimination contrary to EU law may, exceptionally, be adopted with retroactive effect provided that they are in fact warranted by an overriding reason in the public interest. While the risk of seriously undermining the financial balance of a pension scheme may constitute such an overriding reason in the public interest, the Court observed that it is for the referring court to verify whether the measure at issue in the main proceedings was warranted by the objective of preventing the pension scheme from being thus undermined.

2. Organisation of working time

In its judgment in ***CCOO*** (C-55/18, EU:C:2019:402), delivered on 14 May 2019, the Grand Chamber of the Court ruled on *the measures that Member States are required take in order to ensure that the right of workers to a limitation of maximum working hours and to daily and weekly rest periods is observed, and, in particular, on whether observance of that right requires a system to be put in place enabling the duration of time worked each day by each worker to be measured.* The judgment arose out of litigation between a trade union and an employer in which the union sought a declaration that the employer was obliged to set up a system for recording the time worked each day by its members of staff, in order to make it possible to verify compliance with, first, the working times stipulated and, secondly, the obligation to provide union representatives with information on overtime worked each month.

Against that background, the Court held that Articles 3, 5 and 6 of Directive 2003/88, [197] read in the light of Article 31(2) of the Charter, and Articles 4(1), 11(3) and 16(3) of Directive 89/391, [198] preclude legislation that, according to the interpretation given to it in national case-law, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured.

197| 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).

198| Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

In that regard, the Court first observed that the provisions of Directive 2003/88 give specific form to the fundamental right of every worker to a limitation of maximum working hours and to daily and weekly rest periods, a right which is expressly enshrined in Article 31(2) of the Charter and which must, therefore, be interpreted in the light of the latter.

Next, in relation more specifically to setting up a system enabling the duration of time worked each day by each worker to be measured, the Court pointed out that, in the absence of such a system, it is not possible to determine objectively and reliably either the number of hours worked by the worker and when that work was done, or the number of hours worked beyond normal working hours as overtime. In those circumstances, it appears to be excessively difficult, if not impossible in practice, for workers to ensure compliance with the rights conferred on them by EU law, with a view to actually benefiting from the limitation on weekly working time and minimum daily and weekly rest periods provided for by that directive.

The objective and reliable determination of the number of hours worked each day and each week is essential in order to establish, first, whether the maximum weekly working time defined in Article 6 of Directive 2003/88, including, in accordance with that article, overtime, was complied with during the reference period set out in Article 16(b) or Article 19 of that directive and, secondly, whether the minimum daily and weekly rest periods, defined in Articles 3 and 5 of that directive respectively, were complied with in the course of each 24-hour period as regards the daily rest period, or in the course of the reference period referred to in Article 16(a) of the directive as regards the weekly rest period.

The Court concluded that having regard to the fact that Member States must take all the measures necessary to ensure that minimum rest periods are observed and to prevent maximum weekly working time being exceeded so as to guarantee the full effectiveness of Directive 2003/88, a national law which does not provide for an obligation to have recourse to an instrument that enables the objective and reliable determination of the number of hours worked each day and each week is not capable of guaranteeing the effectiveness of the rights conferred by Article 31(2) of the Charter and by that directive, since it deprives both employers and workers of the possibility of verifying whether those rights are complied with and is therefore liable to compromise the objective of the directive, which is to ensure better protection of the safety and health of workers.

Finally, the Court added that the fact that a worker may, under national procedural rules, rely on other sources of evidence, such as witness statements, the production of emails or the consultation of mobile telephones or computers, in order to provide indications of a breach of those rights and thus bring about a reversal of the burden of proof, had no impact in that regard. Such sources of evidence do not enable the number of hours the worker worked each day and each week to be objectively and reliably established. In particular, as regards witness evidence, the Court emphasised the worker's position of weakness in the employment relationship. It also held that the powers to investigate and impose penalties conferred by national law on supervisory bodies, such as the employment inspectorate, do not constitute an alternative to the system referred to above, enabling the duration of time worked each day by each worker to be measured, since in the absence of such a system, those authorities are themselves deprived of an effective means of obtaining access to objective and reliable data as to the duration of time worked by the workers in each undertaking, which may prove necessary in order to exercise their supervisory function and, where appropriate, impose a penalty.

The Court also indicated that Member States have discretion as regards the arrangements for implementing such a system, in particular the form that it must take, having regard, as necessary, to the particular characteristics of each sector of activity concerned, or the specific characteristics of certain undertakings concerning, inter alia, their size.

3. Right to paid annual leave

In the judgment in ***TSN and AKT*** (Joined Cases C-609/17 and C-610/17, EU:C:2019:981), delivered on 19 November 2019, the Court, sitting as the Grand Chamber, ruled, first, that *Article 7(1) of Directive 2003/88, which guarantees the right to a period of paid annual leave of at least four weeks*, does not preclude national rules or collective agreements which provide for the grant of days of paid annual leave which exceed that minimum period, and yet exclude the carrying over of those days of leave on the grounds of illness. Secondly, the Court ruled that Article 31(2) of the Charter, which provides, in particular, that every worker has the right to paid annual leave, is not intended to apply where such national rules or collective agreements exist.

Each of the cases pending before the referring court concerned a worker who was entitled, under the collective agreement applicable to his sector, to a period of paid annual leave exceeding the minimum period of four weeks laid down by Directive 2003/88, namely seven weeks (Case C-609/17) and five weeks (Case C-610/17). As those workers had been incapable of working on the grounds of illness during a period of paid annual leave, they asked their respective employers to carry over the part of the annual leave that they had been unable to enjoy. However, their employers refused to grant those requests in so far as they concerned the part of the right to paid annual leave exceeding the minimum leave period of four weeks laid down by Directive 2003/88.

In the first place, regarding Directive 2003/88, the Court recalled that that directive does not preclude domestic provisions granting a right to a period of paid annual leave longer than the four weeks laid down in Article 7(1) thereof. However, in such a situation, the rights to paid annual leave which exceed that minimum period are governed not by the directive, but by national law, in particular as regards the conditions for granting and extinguishing those additional days of leave. Consequently, Member States continue to have the freedom to grant or not to grant the right to carry over all or some of those additional days of leave where the worker has, during a period of annual leave, been incapable of working due to illness, provided that the right to paid annual leave actually enjoyed by the worker remains at least equal to the minimum period of four weeks guaranteed by Directive 2003/88.

In the second place, regarding the Charter, the scope of which is defined in Article 51(1) thereof, the Court began by noting that, so far as action by Member States is concerned, the provisions of the Charter are addressed to those States only when they are implementing EU law. By adopting rules or authorising the conclusion of collective agreements which provide for the grant of days of paid annual leave which exceed the minimum period of four weeks guaranteed by Directive 2003/88, and yet exclude the carrying over of those days on the grounds of illness, a Member State is not implementing that directive for the purposes of Article 51(1) of the Charter, with the result that the Charter, in particular Article 31(2) thereof, is not intended to apply.

In that regard, the Court emphasised, inter alia, that Directive 2003/88, which was adopted on the basis of Article 137(2) EC, now Article 153(2) TFEU, simply lays down the minimum safety and health requirements for the organisation of working time. Under Article 153(4) TFEU, such minimum requirements are not to prevent any Member State from maintaining or introducing more stringent protective measures that are compatible with the Treaties. Accordingly, Member States remain free, in exercising the powers they have retained in the area of social policy, to adopt such measures, which are more stringent than those which form the subject matter of action by the EU legislature, provided that those measures do not undermine the coherence of that action.

The Court thus found that where Member States grant, or permit their social partners to grant, rights to paid annual leave which exceed the minimum period of four weeks laid down by Directive 2003/88, such rights, or the conditions for a possible carrying over of those rights in the event of illness which has occurred during

the leave, fall within the exercise of the powers retained by Member States, without being governed by that directive. Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter.

4. Protection of workers in the event of the insolvency of their employer

In the judgment in ***Pensions-Sicherungs-Verein*** (C-168/18, EU:C:2019:1128), delivered on 19 December 2019, the Court, in its interpretation of *Article 8 of Directive 2008/94 on the protection of employees in the event of the insolvency of their employer*, [199] held that a reduction in the amount of occupational old-age pension benefits paid to a former employee, on account of the insolvency of his or her former employer, is to be regarded as manifestly disproportionate where, as a result of the reduction, the former employee is already living, or would have to live, below the at-risk-of-poverty threshold. The Court took the view that the same applies even if the employee receives at least half of the amount of the benefits arising from his or her accrued rights.

In the case pending before the referring court, a German national received, with effect from December 2000, an occupational old-age pension, which comprised a monthly pension supplement and an annual Christmas bonus that were granted directly by the former employer, together with a pension paid by a German pension fund on the basis of contributions made by the former employer. Following financial difficulties experienced by the pension fund in 2003, the amount of the benefits that were paid was reduced, with the authorisation of the Federal Agency for the Supervision of Financial Services. The former employer offset that reduction until 2012, when insolvency proceedings were initiated in respect of it. From that point forward, the former employee received reduced benefits without the reduction being offset, since the private law institution designated by the Federal Republic of Germany as the institution which guarantees occupational pensions against the risk of an employer's insolvency assumed responsibility for only the monthly pension supplement and the annual Christmas bonus, refusing to offset the reduction.

The Court, first of all, pointed out that the situation at issue in the main proceedings concerned a former employee whose former employer was in a state of insolvency and, at the date of the onset of that insolvency and on account thereof, his immediate entitlement to old-age benefits was compromised. The Court concluded that Article 8 of Directive 2008/94 applied to a situation such as that in that case.

As regards, next, the circumstances in which a reduction in the amount of occupational old-age pension benefits must be regarded as manifestly disproportionate, giving rise to the obligation on Member States to ensure that workers enjoy a minimum degree of protection, the Court pointed out that Member States, in transposing Article 8 of Directive 2008/94, have considerable latitude and are obliged only to guarantee the minimum degree of protection required by that provision. The Court recalled in that regard that a former employee must receive, in the event of the insolvency of his or her employer, at least half of the old-age benefits arising out of his or her accrued rights, which does not, however, preclude the losses suffered from being regarded, in certain circumstances, as manifestly disproportionate, even where that minimum degree of protection must be ensured. In that regard, the Court stated that a reduction in old-age benefits must be regarded as manifestly disproportionate where the ability of the interested person to meet his or her needs

199| Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

is seriously compromised. That would be the case if, as a result of the reduction, a former employee is already living or would have to live below the at-risk-of-poverty threshold determined by Eurostat for the Member State concerned, that Member State then being obliged to guarantee compensation in an amount which, without necessarily covering all of the losses suffered, is such as to prevent them from being manifestly disproportionate.

Finally, the Court held that Article 8 of Directive 2008/94, in so far as it requires Member States to ensure a minimum degree of protection for a former employee exposed to a manifestly disproportionate reduction in old-age benefits, contains a clear, precise and unconditional obligation, which is intended to confer rights on individuals. Accordingly, that provision may be relied upon against an institution governed by private law that is designated by the Member State concerned as the institution which guarantees occupational pensions against the risk of an employer's insolvency where, in the light of the task with which it is vested and the circumstances in which it performs the task, that institution can be treated as comparable to the State, provided that the task of providing a guarantee with which the institution is vested actually covers the type of old-age benefits in respect of which the minimum degree of protection provided for in that article is sought.

5. Posting of workers

In the judgment in ***Dobersberger*** (C-16/18, EU:C:2019:1110), delivered on 19 December 2019, the Court, sitting as the Grand Chamber, held that *Directive 96/71* [200] *does not apply to employees of an undertaking established in a Member State who provide on-board, cleaning, or food and drink services on international trains crossing the Member State of the railway operator concerned*, where those workers carry out a significant part of the work inherent in those services in the territory of the Member State in which their undertaking is established and where they begin or end their shifts there.

Mr Dobersberger is the managing director of an undertaking established in Hungary which, under a series of subcontracts involving companies established in Austria and Hungary, provided on-board services on certain international trains of the Österreichische Bundesbahnen (Austrian Federal Railways). Those trains passed through Austria with Budapest (Hungary) as their station of departure or terminus. The services were provided by workers domiciled in Hungary, most of whom were hired out to the undertaking by another Hungarian undertaking. All the workers had their centre of interests in Hungary and started and ended their shifts there. In addition, they received food and drinks in Budapest and loaded them on to the trains there. They were also required to carry out stock checks and calculate the turnover in Budapest.

200| Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

Following an inspection in Austria, administrative penalties of a criminal nature were imposed on Mr Dobersberger for breach of Austrian social legislation on the posting of workers to the territory of that Member State. According to the Austrian authorities, the Hungarian workers were posted to Austrian territory, with the result that Mr Dobersberger was required to satisfy certain administrative obligations. Thus, he should have declared, one week before commencement of the work, the use of those workers and made available, at the place of performance of the work, their employment contract and various documents relating to the wages paid to them, in German, as well as documents relating to their affiliation to the social security system.

In those circumstances, the question arose as to whether Directive 96/71, which the Austrian social legislation aims to transpose, is applicable to the provision of services on board an international train by workers from an undertaking established in one Member State, under a contract concluded with a railway operator having its head office in another Member State, when the train crosses the second Member State.

In that respect, the Court, first of all, stated that on-board, cleaning, or food and drink services provided on trains are not inherently connected to the service of rail passenger transport. Therefore, those services do not fall under Articles 90 to 100 TFEU, relating to transport, but come under Articles 56 to 62 TFEU, with the exception of Article 58(1) TFEU, relating to services. It follows that those services are capable of being covered by Directive 96/71, which was adopted on the basis of primary law provisions relating to services.

In order to determine whether the services in question fall within the scope of Directive 96/71, the Court examined the concept of 'posted worker' within the meaning of that directive. It held that a worker cannot be regarded as being posted to the territory of a Member State if the performance of his or her work does not have a sufficient connection with that territory. Workers who perform a significant part of their work in the Member State in which the undertaking by which they have been assigned to provide services on international trains is established, and who begin or end their shifts in that Member State, do not maintain a sufficient connection with the territory of the Member State or States through which those trains pass to be regarded as 'posted' within the meaning of Directive 96/71. Their situation is therefore not covered by that directive.

The Court added that it is irrelevant, in that respect, whether the provision of services is covered, in the context of a subcontracting chain, by a contract concluded with an undertaking established in the same Member State as that of the railway operator which is contractually linked to the latter. Nor is it relevant that the undertaking assigns workers to supply those services who have been hired out to it by an undertaking established in the same Member State as its own.

XVI. Public health

In the judgment in ***VIPA*** (C-222/18, EU:C:2019:751), delivered on 18 September 2019, the Court ruled that a Member State may *prohibit a pharmacy from dispensing prescription-only medicinal products on the basis of an order form issued by a healthcare professional authorised to prescribe medicinal products and practising in another Member State where those order forms do not include the name of the patient concerned*.

VIPA, a commercial company incorporated under Hungarian law which operates a pharmacy, dispensed prescription-only medicinal products, thereby honouring order forms issued by a medical company established in the United Kingdom and by a doctor practising in Austria who was not authorised to practise by the Hungarian health authorities. As a result, the Hungarian National Institute of Pharmacy and Nutrition imposed a fine of 45 000 000 Hungarian forint (HUF) (approximately EUR 140 000) on VIPA, prohibited any further unlawful supply of medicinal products at the pharmacy in question and withdrew its operating licence.

The Budapest Administrative and Labour Court (Hungary), hearing an action by VIPA, asked the Court whether the obligation to recognise prescriptions issued in another Member State under Article 11(1) of Directive 2011/24 [201] applies to order forms which do not include the name of the patient for whom the medicinal products ordered are intended.

First of all, the Court noted that Article 3(k) of Directive 2011/24, defining the meaning of 'prescription', does not specify whether the name of the patient concerned must be referred to. However, Article 11(1) of that directive, in all the language versions with the exception of the Hungarian and Portuguese versions, makes, in essence, express reference to a prescription for a named patient. In addition, Implementing Directive 2012/52, [202] by providing in Article 3 thereof, read in conjunction with the annex to that implementing directive, that the prescriptions referred to in Article 11(1) of Directive 2011/24 must include patient identification data, establishes that the obligation to recognise prescriptions provided for in Article 11(1) does not apply to order forms that do not include the name of the patient concerned.

That interpretation is supported by the objectives pursued by Directive 2011/24, which lays down rules to facilitate the access of individual patients to safe, high-quality cross-border healthcare. [203] Order forms such as those at issue, first, do not ensure the health and safety of the patient to whom the medicinal product will be administered and, secondly, are intended not to enable a patient to obtain medicinal products, but to enable a healthcare professional to obtain supplies of those products. Consequently, the Court held that it would be contrary to the objectives of Directive 2011/24 to consider that order forms that do not include the name of the patient concerned fall within the scope of the obligation to recognise prescriptions laid down by that directive.

In addition, the Court noted that although the national legislation at issue constituted a restriction on the free movement of goods, prohibited by Article 35 TFEU, such a restriction may nevertheless be justified, inter alia by Article 36 TFEU, in particular on grounds of the protection of human health and human life. In that regard, the Court found that the national legislation in question is appropriate for the purpose of ensuring that prescription-only medicinal products benefit the public of the Member State in which the pharmacy

201| Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ 2011 L 88, p. 45).

202| Commission Implementing Directive 2012/52/EU of 20 December 2012 laying down measures to facilitate the recognition of medical prescriptions issued in another Member State (OJ 2012 L 356, p. 68).

203| Article 1(1) and (2) of Directive 2011/24, read in conjunction with recitals 10 and 11 of that directive.

dispensing the medicinal product is established, thereby contributing to ensuring a stable, safe and high-quality supply of prescription-only medicinal products to the public of that Member State. If, by means of order forms such as those at issue in the main proceedings, the export of prescription-only medicinal products, in potentially significant quantities, for the purpose of treating patients on the territory of another Member State was possible, that might result in insufficient supplies to pharmacies and, consequently, insufficient coverage of the patients' needs for prescription-only medicinal products in the Member State concerned, in breach of the obligation laid down in the second paragraph of Article 81 of Directive 2001/83. [204]

Accordingly, the Court held that Articles 35 and 36 TFEU do not preclude the national legislation at issue, in so far as that legislation is justified by the objective of protecting human health and human life, is appropriate for securing the attainment of that objective and does not go beyond what is necessary to attain it, which is for the national court to determine.

XVII. Consumer protection

Four judgments are worthy of note under the heading of consumer protection. The first concerns the interpretation of the concepts of 'consumer' and 'seller or supplier', within the meaning of Directive 93/13 on unfair terms, [205] in connection with a mortgage loan granted by a company to one of its employees and his spouse. Two others deal with the maintenance in part of an accelerated repayment clause of a mortgage loan contract that has been found to be unfair and the conduct of mortgage enforcement proceedings initiated on the basis of that clause. The fourth and last judgment relates, in particular, to the interpretation of the concepts of 'consumer' and 'unsolicited supply of goods', within the meaning of Directive 2011/83 on consumer rights, [206] in connection with national legislation on the supply of thermal energy. Mention must also be made of the judgment in ***Kanyeba and Others*** (Joined Cases C-349/18 to C-351/18) on the unfairness of a contractual term in a transport contract. [207]

204| Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 (OJ 2011 L 174, p. 74). The second paragraph of Article 81 of that directive requires the holder of a marketing authorisation for a medicinal product and the distributors of that medicinal product actually placed on the market in a Member State to ensure, within the limits of their responsibilities, appropriate and continued supplies of that medicinal product to pharmacies and persons authorised to supply medicinal products so that the needs of patients in the Member State in question are covered.

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

206| Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64), Article 27.

207| That judgment is presented in Section X 'Transport'.

In the judgment in ***Pouvin and Dijoux*** (C-590/17, EU:C:2019:232), delivered on 21 March 2019, the Court ruled on the interpretation *of the concepts of 'consumer' and 'seller or supplier', as defined by Directive 93/13, in the context of a request for payment of outstanding sums owed under a mortgage loan granted by a company to one of its employees and his spouse, in order to finance the purchase of their main residence*.

According to a term of that loan contract, the contract was to be automatically terminated where, for whatever reason, the borrower ceased to be a member of that company's staff. Following the resignation of the employee, the latter and his spouse stopped paying the loan instalments. In accordance with that term, the company issued a summons against the borrowers for payment of the outstanding sums owed in respect of capital, interest and a penalty clause.

Ruling on that case, the court at first instance found that the term providing for the automatic termination of the loan contract was unfair. That judgment was then overturned by the appellate court, which held that the automatic termination of the contract at issue occurred on the date of the employee's resignation. Since the employee and his spouse considered that they had acted as consumers and claimed that a term such as that at issue in the main proceedings, which provides for the termination of the loan on the occurrence of an event that is external to the contract is unfair, they brought an appeal in cassation.

As regards, in the first place, the concept of 'consumer', [208] the Court held that that concept covers the employee of an undertaking and his or her spouse, who conclude a loan contract with that undertaking, reserved, principally, to members of staff of that undertaking, with a view to financing the purchase of real estate for private purposes. It stated that the fact that a natural person concludes a contract, other than an employment contract, with his or her employer does not, in itself, prevent that person from being classified as a 'consumer' within the meaning of Directive 93/13. As regards the exclusion of employment contracts from the scope of that directive, the Court ruled that a real estate loan contract offered by an employer to its employee and the latter's spouse cannot be classified as an 'employment contract' in so far as it does not regulate an employment relationship or employment conditions.

As regards, in the second place, the concept of 'seller or supplier', [209] the Court took the view that it covers an undertaking which concludes, in the context of its professional activity, a loan contract reserved, principally, to members of its staff with one of its employees and his or her spouse, even if granting loans does not constitute its main activity. In that regard, the Court noted that even if the main activity of such an employer consists not in offering financial instruments, but in supplying energy, that employer has technical information and expertise, and human and material resources that a natural person, namely the other party to the contract, is not deemed to have. The Court also stated that offering a loan contract to its employees, thus offering them the possibility of being able to buy property, serves to attract and maintain a qualified and skilled workforce facilitating the exercise of the employer's professional activity. In that context, the Court pointed out that the existence or otherwise of a potential direct income for that employer, provided for by that contract, has no bearing on the recognition of that employer as a 'seller or supplier' within the meaning of Directive 93/13. It also considered that a broad interpretation of 'seller or supplier' serves to attain the objective of that directive consisting in protecting the consumer as the weaker party to the contract concluded with a seller or supplier and to restore the balance between the parties.

208| Article 2(b) of Directive 93/13.

209| Article 2(c) of Directive 93/13.

By its judgment of 26 March 2019 in the Joined Cases ***Abanca Corporación Bancaria*** (C-70/17, EU:C:2019:250) and ***Bankia*** (C-179/17, EU:C:2019:250), the Court, sitting as the Grand Chamber, adjudicated on *the interpretation of Articles 6 and 7 of Directive 93/13*.

The disputes in the main proceedings concerned applicants who had concluded mortgage loan contracts in Spain which contained a clause making it possible to require the early termination of the contract, in particular in the event of failure to pay one single monthly instalment.

The referring courts sought a ruling from the Court as to whether Articles 6 and 7 of Directive 93/13 are to be interpreted as meaning that, where an accelerated repayment clause of a mortgage loan contract is found to be unfair, it may nonetheless be maintained in part, with the elements which make it unfair removed and, if not, whether mortgage enforcement proceedings initiated on the basis of that clause may nonetheless continue by means of the supplementary application of a rule of national law because the impossibility of availing of those proceedings could be contrary to consumers' interests.

In that regard, the Court held that Articles 6 and 7 of Directive 93/13 must be interpreted, first of all, as precluding an accelerated repayment clause of a mortgage loan contract that has been found to be unfair from being maintained in part, with the elements which make it unfair removed, where the removal of those elements would be tantamount to revising the content of that clause by altering its substance. Next, the Court held that those same articles do not preclude the national court from compensating for the invalidity of such an unfair term by replacing that term with the new wording of the legislative provision on which it was based, which is applicable where the parties to the contract so agree, provided that the mortgage loan contract in question cannot continue in existence if that unfair term is removed and it is established that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences.

In that context, the Court recalled that where a national court finds that an unfair term in a contract concluded between a seller or supplier and a consumer is void, Article 6(1) of Directive 93/13 must be interpreted as precluding a rule of national law which allows the national court to modify that contract by revising the content of that term. Thus, if it were open to the national court to revise the content of unfair terms included in such a contract, such a power would be liable to compromise attainment of the long-term objective of Article 7 of Directive 93/13. That power would contribute to eliminating the dissuasive effect on sellers or suppliers of the straightforward non-application with regard to the consumer of those unfair terms, in so far as those sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers or suppliers.

However, in a situation where a contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term, Article 6(1) of Directive 93/13 does not preclude the national court from removing, in accordance with the principles of contract law, an unfair term and replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences, so that the consumer would thus be penalised.

Such a substitution is fully justified in the light of the purpose of Directive 93/13. It is consistent with the objective of Article 6(1) of that directive, since that provision is intended to substitute for the formal balance established by the contract between the rights and obligations of the parties a real balance re-establishing equality between them, not to annul all contracts containing unfair terms.

If it were not permissible to replace an unfair term with a supplementary provision of national law and the court was thus required to annul the contract in its entirety, the consumer might be exposed to particularly unfavourable consequences, so that the dissuasive effect resulting from the annulment of the contract could well be jeopardised. In general, the consequence of such an annulment with regard to a loan contract would

be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting unfair terms in its contracts.

For similar reasons, the Court held that in a situation where a mortgage loan contract concluded between a seller or supplier and a consumer is not capable of continuing in existence following the removal of an unfair term whose wording is based on a provision of legislation which is applicable where the parties to the contract so agree, Article 6(1) of Directive 93/13 also does not preclude a national court from replacing that term, with a view to preventing that contract from becoming invalid, with the new wording of that reference provision, introduced after the conclusion of the contract, in so far as the annulment of the contract would expose the consumer to particularly unfavourable consequences.

It is for the referring courts to verify, in accordance with the rules of national law and adopting an objective approach, whether the removal of those terms would mean that the continued existence of the mortgage loan contracts is no longer possible.

In such a case, it will be for the referring courts to examine whether the annulment of the mortgage loan contracts at issue in the main proceedings would expose the consumers concerned to particularly unfavourable consequences. In that case, the Court observed that it was apparent from the orders for reference that such an annulment could have effects, in particular, on the procedural requirements of national law pursuant to which the banks may obtain repayment from the consumers, in court, of the entirety of the outstanding amount of the loan.

In the judgment in ***EVN Bulgaria Toplofikatsia and Toplofikatsia Sofia*** (C-708/17 and C-725/17, EU:C:2019:1049), [210] delivered on 5 December 2019, the Court found that *Directive 2011/83 on consumer rights* [211] *and Directive 2005/29 on unfair commercial practices* [212] *do not preclude national legislation that requires owners of an apartment in a building in co-ownership connected to a district heating network to contribute to the costs of the consumption of thermal energy by the common parts and the internal installation of that building, even though they did not individually request the supply of that heating and they do not use it in their apartment.* The Court also held that Directives 2006/32 [213] and 2012/27 [214] on energy efficiency do not preclude the national legislation at issue, under which billing for such consumption, for each owner of an apartment in a building in co-ownership, is calculated proportionately to the heated volume of his or her apartment.

210| That judgment is also concerned with energy efficiency. See Section XIX 'Energy'.

211| Article 27 of Directive 2011/83.

212| Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22), Article 5(1) and (5).

213| Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC (OJ 2006 L 114, p. 64), Article 13(2).

214| Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ 2012 L 315, p. 1), Article 10(1).

The disputes in the main proceedings arose in the context of two actions for the payment of bills addressed to owners of properties in buildings held in co-ownership for the consumption of thermal energy by the internal installation and common parts of those buildings. The property owners refused to pay those bills, arguing that, while their property is supplied by the district heating network pursuant to a contract for supply agreed between the association of property owners and the thermal energy provider, they did not, however, individually consent to receiving district heating and do not use it in their own apartment.

The Court first of all considered the interpretation of the concept of 'consumer', within the meaning of Directive 2011/83, [215] and held that, as customers of an energy provider, the owners and the holders of a right *in rem* over the use of property in a building in co-ownership connected to a district heating network are covered by that concept, to the extent that they are natural persons not engaged in commercial or professional activities. The Court therefore concluded that the contracts for the supply of district heating at issue in the main proceedings fall within the category of contracts concluded between traders and consumers, within the meaning of Article 3(1) of Directive 2011/83.

Next, the Court clarified the concept of the 'unsolicited supply' of a product, within the meaning of Article 27 of Directive 2011/83, by observing that the provision of thermal energy to the internal installation and consequently the common parts of a building in co-ownership, carried out following a decision adopted by the association of property owners of that building to connect it to the district heating, in accordance with national law, was not an unsolicited supply of district heating.

Finally, the Court ruled on the method of billing for the consumption of thermal energy in buildings in co-ownership. In that regard, it observed that, in accordance with Directive 2006/32, [216] Member States must ensure that the final users in the fields, inter alia, of electricity and district heating are provided with individual meters that measure precisely their actual consumption, where that is technically possible. According to the Court, it is hard to conceive being able completely to distinguish the heating bills individually in buildings in co-ownership, in particular in respect of the internal installation and the common parts, given that the apartments in such a building are not thermally independent of one another since heat circulates between the units that are heated and those that are less or are not heated. In those circumstances, the Court concluded that having regard to the wide discretion available to Member States as to the method for calculating the consumption of thermal energy in buildings in co-ownership, Directives 2006/32 and 2012/27 do not preclude a calculation of the heat emitted by the internal installation that is done proportionately to the heated volume of each apartment.

215| Article 2(1) of Directive 2011/83.

216| Article 13(2) of Directive 2006/32.

XVIII. Environment

Reference must be made to a number of judgments in connection with environmental protection. The first judgment involves the application of the precautionary principle in relation to the placing of plant protection products on the market. The second deals with whether Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources can be relied on before the national courts. Three other judgments are also worthy of mention. The first relates to the interpretation of the Habitats Directive while the other two concern the application of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment. [217]

1. Precautionary principle

In its judgment in ***Blaise and Others*** (C-616/17, EU:C:2019:800), delivered on 1 October 2019, the Court, sitting as the Grand Chamber, gave a ruling on the validity, in the light of the precautionary principle, of Regulation (EC) No 1107/2009. [218] The reference for a preliminary ruling was made in criminal proceedings brought against Mr Blaise and 20 other defendants charged with damaging or defacing property belonging to another person, while acting together. Those individuals had entered shops in the département of Ariège (France) and damaged cans of weed killer, containing glyphosate, and glass display cases. To justify their actions, intended to alert shops and their customers to the dangers associated with selling weed killer containing glyphosate, the defendants pleaded the precautionary principle. In order to give a ruling on whether that argument was well founded, the referring court considered that it had to determine the validity of Regulation No 1107/2009 in the light of the precautionary principle and therefore referred questions to the Court on that point.

Defining the scope of the precautionary principle, the Court, first, stated that the EU legislature must comply with that principle when it adopts rules governing the placing on the market of plant protection products. Since the purpose of Regulation No 1107/2009 is to lay down rules for the authorisation of plant protection products and the approval of the active substances contained in those products, so that they can be placed on the market, the EU legislature was required to establish a normative framework to ensure that the competent authorities have available to them, when they decide on that authorisation and approval, sufficient information in order adequately to assess the risks to health resulting from the use of those active substances and plant protection products. In that regard, the Court emphasised that in view of the need to strike a balance between a number of objectives and principles, and given the complexity of the application of the relevant criteria, judicial review by the Court must necessarily be limited to the question whether the EU legislature committed a manifest error of assessment.

Secondly, the Court held that the absence of a definition of the concept of 'active substance' in the regulation is not incompatible with the precautionary principle. An applicant is bound to declare, when submitting his or her application for authorisation of a plant protection product, any substance that forms part of the composition of that product that corresponds to the criteria set out in the regulation. An applicant does not,

217| One other decision deserving of note is the judgment in ***Deutsche Umwelthilfe*** (C-752/18), delivered on 19 December 2019, in which the Court adjudicated on the adoption by the national courts of enforcement measures, by means of coercive detention, against persons in charge of national authorities who persistently refuse to comply with a judicial decision enjoining them to perform their obligations under Directive 2008/50 on ambient air quality. That judgment is presented in Section IV 'EU law and national law'.

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

therefore, have the option of choosing at his or her discretion which constituent of that product is to be considered to be an active substance. In thereby determining the obligations imposed on the applicant in relation to the identification of active substances, the EU legislature did not commit a manifest error of assessment.

Furthermore, the Court held that the regulation is compatible with the precautionary principle, in that it requires that the cumulative effects of the constituents of a plant protection product must be taken into account. The procedure for the approval of active substances and the procedure for the authorisation of plant protection products provide that an examination of applications is to include an assessment of the possible harmful effect of a product, including effects caused by the interaction between the constituents of the product. On that point, the regulation is again not vitiated by any manifest error of assessment.

The Court came to the same conclusion with respect to the reliability of the tests, studies and analyses taken into account in order to authorise a plant protection product. In the view of the Court, the fact that the tests, studies and analyses required in the procedures for the approval of an active substance and authorisation of a plant protection product are submitted by the applicant, with no independent counter-analysis, does not involve any breach of the precautionary principle. The regulation requires, in that regard, the applicant to submit proof that the products have no harmful effect, regulates the quality of the tests and analyses submitted, and confers on the competent authorities that have to decide on an application the responsibility of undertaking an objective and independent assessment. In that context, those authorities must necessarily take into account relevant information other than that submitted by the applicant and, in particular, the most reliable scientific data available and the most recent results of international research, and must not give in all cases preponderant weight to the studies provided by the applicant. Lastly, the Court stated that the regulation does not exempt the applicant from providing tests of the carcinogenicity and toxicity of the product at issue. Such a product may be authorised only if the competent authorities exclude the risk of any immediate or delayed harmful effect on human health.

Consequently, nothing capable of affecting the validity of Regulation No 1107/2009 was identified.

2. Protection of waters against pollution caused by nitrates

In the judgment in ***Wasserleitungsverband Nördliches Burgenland and Others*** (C-197/18, EU:C:2019:824), delivered on 3 October 2019, the Court *stated, for the first time, that natural and legal persons directly concerned by the pollution of groundwaters can rely, before the national courts, on certain provisions of Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources* [219] ('the Nitrates Directive').

The judgment was delivered in the context of a dispute between, on the one hand, the Water Association of North Burgenland (Austria), an Austrian municipality operating a municipal well, and an individual who owns a domestic well, as applicants, and, on the other hand, the Austrian Federal Ministry for Sustainability and Tourism. The applicants complained of the pollution of the groundwaters in their region, the nitrate level of which regularly exceeded the threshold of 50 mg/l provided for in the Nitrates Directive. In that context, they made requests seeking the adoption of measures to reduce the nitrate levels of those waters. The Ministry contested the applicants' *locus standi* to request such measures. Thus, the Court was asked to clarify whether

219| Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1).

natural and legal persons such as the three applicants can rely on the provisions of the Nitrates Directive with a view to demanding the adoption or amendment of national measures provided for in that directive so as to lower the nitrate concentration in the groundwaters.

First, the Court stated that in order to preserve the binding effect of directives as well as their effectiveness, national law cannot exclude, in principle, the possibility for individuals to rely on the provisions set out in those acts of EU law. The natural or legal persons directly concerned by an infringement of the provisions of a directive should, at least, be in a position to require the competent authorities to observe the obligations in question, if necessary by bringing an action before the courts.

Next, the Court stated that a nitrate level of groundwaters that exceeds or is at a risk of exceeding the threshold of 50 mg/l provided for in the Nitrates Directive is contrary to the main objective of that directive. That directive seeks to allow individuals to make legitimate use of groundwaters. If that threshold is not observed, the waters must be deemed polluted. Thus, the risk of exceeding the threshold of 50 mg/l can already interfere with the normal use of water and requires the implementation of decontamination measures by water source rightholders. Those natural or legal persons are therefore directly concerned by the infringement of the main objective of the Nitrates Directive and must be in a position to bring an action before the national authorities and courts to demand compliance with the obligations imposed on Member States by that directive.

In that regard, the Court recalled that when nitrates of agricultural origin significantly contribute to water pollution, the Nitrates Directive applies and obliges Member States to launch action programmes and take all the necessary measures with a view to reducing the concentration of nitrates so as to avoid the nitrate level of the water exceeding 50 mg/l or avoid the risk of that level being exceeded. To that end, Member States are also required to control strictly the status of the waters within the framework of monitoring programmes and by means of selected measuring points, taking into account the best available scientific and technical data.

The obligation imposed on Member States to adopt the necessary measures to lower the nitrate level of groundwaters provided for in the Nitrates Directive is clear, precise and unconditional and can therefore be relied on directly by individuals vis-à-vis Member States.

In the light of those considerations, the Court held that when an agricultural activity significantly contributes to the pollution of groundwaters, the natural and legal persons whose legitimate use of their water sources is interfered with should be in a position to require the national authorities to amend an existing action programme or adopt other measures provided for in the Nitrates Directive, as long as the nitrate levels of the groundwaters exceed or could exceed 50 mg/l, in the absence of those measures.

3. Habitats Directive

In its judgment in ***Luonnonsuojeluyhdistys Tapiola*** (C-674/17, EU:C:2019:851), delivered on 10 October 2019, which concerns *the interpretation of Council Directive 92/43* [220] ('the Habitats Directive'), the Second Chamber of the Court set out all the conditions under which Member States may adopt measures derogating from the prohibition on the deliberate killing of specimens of strictly protected species, [221] in that case, wolves (*Canis lupus*).

By two decisions of 18 December 2015, the Finnish Wildlife Agency authorised the killing of seven wolves in the region of Pohjois-Savo between 23 January and 21 February 2016. The main objective was the prevention of illegal killing, namely poaching. Hearing the appeals brought by a Finnish association for nature conservation against those decisions, the Finnish Supreme Administrative Court asked the Court, in essence, to determine whether the Habitats Directive precludes the adoption of such decisions.

The Court replied that the Habitats Directive must be interpreted as precluding the adoption of such decisions where they do not satisfy all the conditions set out by the directive.

Thus, in the first place, such derogations must define the objectives which they pursue in a clear, precise and substantiated manner, and establish, on the basis of rigorous scientific data, that they are appropriate with a view to achieving that objective. In that case, the Court found that combating poaching may be relied on as an objective covered by the directive, but the authorisation must be actually capable of reducing illegal hunting and do so to such an extent that it would have a net positive effect on the conservation status of the wolf population.

In the second place, it must be shown, in a precise and appropriate manner, that the objective pursued cannot be attained by means of a satisfactory alternative. On that point, the Court noted that the mere existence of an illegal activity such as poaching or difficulties with which its monitoring can be associated cannot constitute sufficient evidence in that regard. On the contrary, priority must be given to strict and effective monitoring of that illegal activity.

In the third place, Article 16 of the Habitats Directive states that maintaining the populations of the species concerned at a favourable conservation status in their natural range is a necessary precondition for such derogations to be granted. Those derogations must therefore be based on criteria defined in such a manner as to ensure the long-term preservation of the dynamics and social stability of the species in question. They must also be subject to an assessment of that conservation status and of the impact that they may have on it. Moreover, Member States must, in accordance with the precautionary principle, refrain from granting or implementing such derogations where there is doubt as to whether or not such a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status.

Finally, in the fourth place, Member States must satisfy the specific conditions laid down in Article 16(1)(e) of the Habitats Directive. First, they must set a limited and specified number of specimens that can be the subject of a derogation, in such a way as to avoid any risk of significant negative impact on the structure of

220| 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).

221| Article 12(1)(a) of the Habitats Directive provides that Member States are to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) thereto in their natural range, by prohibiting inter alia all forms of deliberate capture or killing of specimens of those species in the wild.

the population in question. Secondly, they must define those specimens on a selective basis and to a limited extent, which may involve individual identification. Thirdly, they must ensure that both the grant and the application of those derogations are subject to effective control in a timely manner.

4. Assessment of the effects of certain public and private projects on the environment

Two judgments deserve to be mentioned under this heading. In the judgment in ***European Commission* v *Ireland (Derrybrien wind farm)*** (C-261/18, EU:C:2019:955), delivered on 12 November 2019, the Court, sitting as the Grand Chamber, imposed pecuniary penalties on Ireland for failing to give concrete effect to the judgment of 3 July 2008, *Commission* v *Ireland*, [222] in so far as the Court had made a finding of infringement of Directive 85/337 [223] on the assessment of the effects certain public and private projects on the environment. That judgment is presented in Section V.1.1 'Actions for failure to fulfil obligations'.

By its judgment in ***Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*** (C-411/17, EU:C:2019:622), delivered on 29 July 2019, the Court, sitting as the Grand Chamber, ruled on *the interpretation of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora and of Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment.* [224] The judgment was delivered in connection with proceedings between, on the one hand, two associations, Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL, whose purpose is the protection of the environment and living conditions, and the Belgian Council of Ministers concerning legislation under which the Kingdom of Belgium provided for (i) the restarting of industrial production of electricity, for a period of almost 10 years, at a nuclear power station that had previously been shut down, and (ii) deferral by 10 years of the date initially set for deactivating and ceasing industrial production of electricity at an active nuclear power station. Those associations, in essence, complained that the Belgian authorities had adopted that legislation without complying with the requirements laid down in those directives to conduct a prior assessment.

In that context, the Court held that the measures at issue concerning the extension of industrial production of electricity by a nuclear power station constitute a 'project' within the meaning of Directives 2011/92 and 92/43, since they necessarily involve major works, altering the physical aspect of the sites concerned. Such a project must, in principle, be made subject to an assessment of the effects on the environment and on the protected sites concerned prior to the adoption of those measures. The fact that the implementation of those measures involves subsequent acts, such as the issue, for one of the power stations in question, of a new specific consent for the production of electricity for industrial purposes, is not decisive in that respect. Work that is inextricably linked to those measures must also be made subject to such an assessment before the adoption of the measures if the nature and potential effects of that work on the environment and on the protected sites are sufficiently identifiable at that stage.

A Member State may, under Directive 2011/92, exempt a project from the requirement to conduct an environmental impact assessment in order to ensure the security of its electricity supply only where it can demonstrate in particular that the risk to the security of that supply is reasonably probable and that the

222| Judgment of the Court of 3 July 2008, ***Commission* v *Ireland*** (C-215/06, EU:C:2008:380).

223| Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

224| Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

project in question is sufficiently urgent to justify not carrying out the assessment. However, the possibility of granting such an exemption is without prejudice to the obligation to conduct an environmental impact assessment in respect of projects which, like that at issue in the main proceedings, have transboundary effects.

Furthermore, while the objective of ensuring the security of a Member State's electricity supply at all times constitutes an imperative reason of overriding public interest within the meaning of Directive 92/43, which justifies proceeding with the project in spite of a negative assessment and in the absence of alternative solutions, that is not so where the protected site likely to be affected by the project hosts a priority natural habitat type or a priority species. In such a case, only the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned would constitute a public security ground, within the meaning of that directive, and may constitute such a justification. Lastly, the Court held that if domestic law allows it, a national court may, by way of exception, maintain the effects of measures, such as those at issue in the main proceedings, adopted in breach of the obligations laid down by Directives 2011/92 and 92/43, where such maintenance is justified by overriding considerations relating to the need to nullify a genuine and serious threat of rupture of the electricity supply in the Member State concerned, which cannot be remedied by any other means or alternatives, particularly in the context of the internal market. The effects may, however, be maintained only for as long as is strictly necessary to remedy the breach.

5. Energy from renewable sources

In its judgment of 24 October 2019, ***Prato Nevoso Termo Energy*** (C-212/18, EU:C:2019:898), the Court confirmed that *the Italian legislation governing the authorisation of the use of bioliquids derived from the treatment of used vegetable oils as a power source for a power plant is, in principle, not contrary to either Directive 2008/98* [225] *on waste or Directive 2009/28* [226] *on the promotion of the use of energy from renewable sources.*

In that case, Prato Nevoso Termo Energy Srl ('Prato Nevoso'), which operates a thermal and electrical power plant, applied to the Province of Cuneo (Italy) for authorisation to replace methane, as the power source for its plant, with a bioliquid, namely a vegetable oil derived from the collection and chemical treatment of used cooking oils. The competent national authority rejected that application, in accordance with the applicable Italian legislation, on the grounds that that vegetable oil is not included in the national list containing the categories of fuels derived from biomass that may be used in a plant producing atmospheric emissions without having to comply with the rules on energy recovery from waste. The Italian legislation therefore had the effect that the bioliquid derived from the chemical treatment of used frying oils must be regarded as waste and not as fuel. Prato Nevoso brought an action before the referring court, challenging that decision rejecting its application. The referring court subsequently made a request for a preliminary ruling, seeking to ascertain whether such national legislation was compatible with the provisions of the abovementioned directives.

225| Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

226| Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015 (OJ 2015 L 239, p. 1).

Relying, in particular, on the judgment in *Tallinna Vesi* [227] of 28 March 2019, the Court held that Directive 2008/98 on waste does not, in principle, preclude a Member State from making the use of a bioliquid derived from waste as fuel subject to the legislation on energy recovery from waste on the grounds that it does not fall within any of the categories in the national list of fuels authorised in a plant producing atmospheric emissions. According to the Court, that finding is not invalidated by the provisions on national authorisation procedures laid down in Directive 2009/28 on the promotion of the use of energy from renewable sources, since those provisions do not cover regulatory procedures for the adoption of end-of-waste status criteria.

However, the Court noted that in such a case, it must be examined whether the national authorities could conclude, without making a manifest error of assessment, that the bioliquid in question should be regarded as waste. Referring to the objectives of Directive 2008/98 and its power to provide the national court with all indications which may assist it in resolving the dispute before it, the Court noted that Article 6(1) of Directive 2008/98 provides that certain waste ceases to be waste when it has undergone a recovery or recycling operation and meets specific criteria to be defined by Member States in accordance with several conditions, including the absence of 'overall adverse environmental or human health impacts'. In the light of the arguments put forward by the Italian Government, the Court noted that the existence of a certain degree of scientific uncertainty regarding the environmental risks associated with a substance — such as the bioliquid in question — ceasing to be classified as waste may lead a Member State to decide not to include that substance on the list of fuels authorised in a plant producing atmospheric emissions. In accordance with the precautionary principle laid down in Article 191(2) TFEU, if, after examining the best available scientific information, there remains uncertainty as to whether the use, in specific circumstances, of a substance derived from the recovery of waste is devoid of any possible harmful effect on the environment and human health, the Member State must refrain from laying down criteria for determining end-of-waste status as regards that substance or making provision for an individual decision recognising that end-of-waste status.

227| Judgment of the Court of 28 March 2019, ***Tallinna Vesi*** (C-60/18, EU:C:2019:264).

XIX. Energy

Two judgments are worthy of note under this heading. The first is the judgment of 5 December 2019, ***EVN Bulgaria Toplofikatsia and Toplofikatsia Sofia*** (C-708/17 and C-725/17, EU:C:2019:1049), in which the Court considered whether national legislation governing the supply of thermal energy was compatible with EU law. [228]

The second is the judgment in ***GRDF*** (C-236/18, EU:C:2019:1120), delivered on 19 December 2019, in which the Court ruled on *the temporal scope of the decision-making power conferred on the national regulatory authorities, in the context of their duty to settle disputes on the market in natural gas, by Article 41(11) of Directive 2009/73 concerning the internal market in natural gas.* [229]

The case arose from a dispute between two natural gas suppliers and GRDF, the operator of the natural gas distribution system in France, concerning the validity of a clause in their contracts for the transmission of natural gas on the distribution system, concluded in 2005 and 2008. Under that clause, suppliers were required to collect, in the context of the contracts concluded with final customers, the amounts due by way of the GRDF tariff for distribution services and to pay those amounts to GRDF, including when final customers had not paid them. In 2014, a decision of the dispute resolution body of the French Energy Regulatory Commission — Commission de régulation de l'énergie (CRE) — found that the contracts at issue were incompatible with Directive 2009/73 as from the date of their conclusion. After that decision was upheld on appeal, GRDF brought an appeal before the French Court of Cassation, which decided to submit a request for a preliminary ruling to the Court for the purpose of determining, in essence, whether Directive 2009/73 precludes a decision of a regulatory authority from producing effects before the emergence of a dispute between the parties.

The Court held that that directive does not preclude a regulatory authority, acting as a dispute settlement authority, from adopting a decision ordering the system operator to enter into a contract for the transmission of natural gas concluded with a supplier in accordance with EU law for the whole of the contractual period, including, therefore, for the period prior to the emergence of a dispute between the parties. In that regard, the Court first of all observed that Article 41(11) of Directive 2009/73 does not specify the temporal effects of decisions of the regulatory authority acting as the dispute settlement authority. Next, interpreting that provision in the light of the objective and context of Directive 2009/73, the Court observed that, under Article 41(1)(b) of that directive, the regulatory authority's duty is to ensure that system operators comply with their obligations, including the obligation to apply the method of third-party access to the system objectively and without discrimination between system users. That entails an obligation on the part of Member States to ensure that, by virtue of Article 41(10) of Directive 2009/73, the regulatory authority has the power to adopt binding decisions with regard to natural gas undertakings, requiring them to modify, if necessary, the terms and conditions for connection and access to the system, including tariffs, so that they are proportionate and applied in a non-discriminatory manner. To limit the temporal scope of a decision of

228| That judgment is presented in Section XVII 'Consumer protection'.

229| Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

the regulatory authority, acting as a dispute settlement authority, to the period subsequent to the emergence of the dispute between the parties would run counter to the objectives of Directive 2009/73 and would undermine its effectiveness.

The Court also held that that interpretation of Article 41(11) of Directive 2009/73 is not called into question either by the principle of legal certainty or by the principle of the protection of legitimate expectations. First, although a national court may exceptionally be authorised, under the conditions laid down by the Court, to maintain certain effects of an annulled national measure, the referring court has not, in that case, referred to specific evidence capable of establishing particular risks of legal uncertainty. Secondly, although GRDF claimed that the contracts for the transmission of gas at issue had been negotiated under the aegis and control of the CRE, it failed to establish that the CRE had been given precise assurances as to the conformity of the clause at issue, this, however, being a matter for the referring court to determine.

XX. Overseas countries and territories

In the judgments in ***Commission* v *United Kingdom*** (C-391/17, EU:C:2019:919) and ***Commission* v *Netherlands*** (C-395/17, EU:C:2019:918), delivered on 31 October 2019, the Court held that *the United Kingdom and the Kingdom of the Netherlands had failed to fulfil their obligations under Article 4(3) TEU* by failing to compensate the loss of own resources resulting from the wrongful issue, in the light of decisions on the association of the overseas countries and territories (OCTs) with the European Economic Community/European Community [230] ('the OCT decisions'), respectively, by the authorities of Anguilla, of export certificates EXP in respect of imports of aluminium from Anguilla during the period 1999/2000, and, by the authorities of Curaçao and Aruba, of movement certificates EUR.1 in respect of imports of milk powder and rice from Curaçao during the period 1997-2000 and imports of groats and meal from Aruba during the period 2002/2003.

As regards the OCTs, Member States agreed, under the EC Treaty, to associate with the European Union the non-European countries and territories which have special relations with certain Member States, including the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands. Pursuant to that treaty, the OCTs concerned were thus subject to special arrangements for association set out by the Treaty. Those special arrangements mean, inter alia, that imports into Member States of goods originating in the OCTs are completely exempt from customs duties. That exemption is clarified by the decisions in question, in that products originating in the OCTs and, under certain conditions, products not originating in the OCTs but which are in free circulation in an OCT and are re-exported as such to the European Union are to be accepted for import into the European Union free of customs duties and taxes having equivalent effect. It is also apparent from the OCT decisions that both the Member States and the competent authorities of the OCTs are, together with the Commission, involved in operations carried out by the European Union under those decisions.

Evidence of compliance with the provisions relating to that exemption is provided by a certificate issued by the customs authorities of the exporting OCT. That certificate may be verified subsequently by the customs authorities of the importing State. Related disputes are referred to a committee chaired by a representative of the Commission and composed of representatives of the Member States, in which the local authorities of the exporting OCT do not participate.

230 | Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1) and Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') (OJ 2001 L 314, p. 1).

In Case C-391/17, a company established in Anguilla had set up a transhipment scheme, in 1998, under which imports of aluminium from third countries were declared for customs purposes in Anguilla and then transported to the European Union. The Anguillan authorities had issued export certificates for the re-export in question, whilst granting the EU importers transport aid.

In Case C-395/17, milk powder and rice from Curaçao had been imported into Germany between 1997 and 2000. In addition, groats and meal from Aruba had been imported into the Netherlands in 2002 and 2003. The authorities of Curaçao and Aruba had issued movement certificates in respect of those goods, even though they did not meet the requirements for being considered products originating in those OCTs that are covered by the exemption from customs duties and taxes having equivalent effect.

In both cases, enquiries had been carried out. Following those enquiries, the Commission adopted decisions in which it concluded, having established the irregularity of the certificates examined, that it was appropriate to waive post-clearance entry in the accounts of customs duties relating to the imports made upon submission of those certificates. On the basis of those decisions, the Member States that imported the products concerned from Anguilla, Curaçao and Aruba waived post-clearance entry in the accounts of those duties. The Commission, therefore, called on the United Kingdom and the Kingdom of the Netherlands to compensate the loss of EU own resources resulting from the issue of the certificates concerned. Since those Member States denied any liability in that regard, the Commission decided to bring actions for failure to fulfil obligations against them.

The Court examined those actions in the light of the principle of sincere cooperation, as enshrined in Article 4(3) TEU.

First, the Court recalled that, under the first paragraph of Article 198 TFEU, the two Member States concerned are among those which have special relations with OCTs and that the special arrangements for association were based, at the time when the relevant certificates were issued, on those special relations. Those relations are characterised by the fact that the OCTs are not independent States but depend on a Member State, which is responsible, in particular, for representing them internationally. Under that article, application of the special arrangements for association benefits only countries and territories having special relations with the Member State concerned, where that Member State requested that the special arrangements for association be made applicable to them.

Next, the Court found that the issue of the contested certificates was governed by the OCT decisions and thus by EU law, and that the authorities of the OCTs were therefore obliged to comply with the requirements contained in those decisions. The procedures laid down by those decisions to settle differences or problems in that context reflect the centrality, in terms of the arrangements for association, of the special relations between the OCT concerned and the Member State responsible for it. Those special relations create a specific liability on the part of the Member State vis-à-vis the European Union when the authorities of the OCTs issue certificates in breach of those decisions. The Court made clear that the preferential and derogating nature of the customs arrangements that apply to the goods in question in both cases mean that the obligation of Member States, linked to the principle of loyalty, to take all the measures necessary to guarantee the application and effectiveness of EU law must be fulfilled all the more strictly there. The Court concluded from this that the two Member States concerned are liable, vis-à-vis the European Union, for any error committed by the authorities of their OCTs, in the context of the issue of the certificates in question.

Lastly, the Court pointed out that in so far as the issue of certificates in breach of the OCT decisions prevents the importing Member State from collecting the customs duties which it would have had to collect in the absence of those certificates, the resulting loss of own resources constitutes the unlawful consequence of an infringement of EU law. That consequence obliges the Member State which is liable vis-à-vis the European Union for the wrongful issue of certificates to compensate the loss. The compensation obligation is merely a particular expression of the obligation, arising from the principle of sincere cooperation, under which Member States are required to take all necessary measures to remedy an infringement of EU law and to nullify the unlawful consequences of it. Default interest, calculated from the date on which the Commission requested compensation for the loss, must be added to that loss, given that compensation only for the amount of customs duties which could not be collected is not sufficient to nullify the unlawful consequences of the wrongful issue of the certificates in question.

XXI. International agreements

In the opinion of the Full Court on the ***EU-Canada CET Agreement*** (Opinion 1/17, EU:C:2019:341) of 30 April 2019, the Court declared *Section F of Chapter Eight of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, concerning the establishment of a mechanism for the resolution of investment disputes between investors and States ('the ISDS mechanism') compatible with EU primary law.* This mechanism provides, inter alia, for the creation of a Tribunal and an Appellate Tribunal, and, in the longer term, a multilateral investment Tribunal.

The Court first of all recalled that an international agreement could be compatible with EU law only if it had no adverse effect on the autonomy of the EU legal order. That autonomy, which exists with respect both to the law of the Member States and to international law, stems from the essential characteristics of the European Union and its law and thus resides in the fact that the Union possesses a constitutional framework that is unique to it.

The Court stated, at the outset, that the envisaged ISDS mechanism stood outside the EU judicial system. The courts envisaged by the CETA are indeed separate from the domestic courts of Canada, the Union and its Member States. Consequently, the Court held that EU law does not preclude the CETA from providing for the creation of tribunals or from conferring on them jurisdiction to interpret and apply the provisions of the agreement. By contrast, such tribunals cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.

In that regard the Court stated, first, that the CETA does not confer on the envisaged tribunals any power to interpret or apply EU law other than that relating to the provisions of that agreement. Secondly, as regards there being no effect on the operation of the EU institutions in accordance with the EU constitutional framework, the Court considered that the jurisdiction of the envisaged tribunals would adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union with respect to all operators. However, it is apparent from the CETA that the discretionary powers of the envisaged tribunals do not extend to permitting them to call into question the level of protection of a public interest determined by the Union following a democratic process. Consequently, the Court concluded that Section F of Chapter Eight of the CETA does not adversely affect the autonomy of the EU legal order.

As regards the compatibility of the ISDS mechanism with the general principle of equal treatment, the request for an opinion referred to a difference in treatment arising from the fact that it will be impossible for enterprises and natural persons of Member States that invest within the Union to challenge EU measures before the tribunals envisaged by the CETA, whereas Canadian enterprises and natural persons that invest within the Union will, for their part, be able to challenge such measures before those tribunals. In that respect, the Court recalled that no express limitation is imposed on the scope of equality before the law, as enshrined in Article 20 of the Charter, and that principle is therefore applicable to all situations governed by EU law, including those falling within the scope of an international agreement entered into by the Union. Furthermore, that fundamental right is available to all persons whose situations fall within the scope of EU law, irrespective of their origin. Equality before the law enshrines the principle of equal treatment, which requires that comparable situations must not be treated differently. However, the Court found that Canadian enterprises and natural persons that invest within the Union are not in a situation comparable to that of enterprises and natural persons of the Member States that invest within the Union, so the difference in treatment referred to in the request for an opinion does not constitute discrimination.

As regards the compatibility of the ISDS mechanism with the right of access to an independent tribunal, the Court recalled, first, that the Union is subject to the provisions of the second and third paragraphs of Article 47 of the Charter, which enshrine that right. Accordingly, while Canada is indeed not bound by the safeguards provided by the Charter, the Union is so bound and therefore cannot enter into an agreement that establishes tribunals with the jurisdiction to issue awards that are binding on the Union and to deal with disputes brought before them by EU litigants if those safeguards are not provided. The Court then observed that the purpose of the creation of a mechanism standing outside the judicial systems of the parties is to ensure that the confidence of foreign investors extends to the body that has jurisdiction to declare infringements, by the host State with respect to their investments, of Sections C and D of Chapter Eight of the CETA. Consequently, the independence of the envisaged tribunals and access to those tribunals for foreign investors are inextricably linked to the objective of free and fair trade that is stated in Article 3(5) TEU and is pursued by the CETA. As regards accessibility to the envisaged tribunals, the Court observed that in the absence of rules designed to ensure that the tribunals are financially accessible to natural persons and small and medium-sized enterprises, the ISDS mechanism may, in practice, be accessible only to investors who have significant financial resources. It went on to note that there was no commitment in the CETA that a body of rules to ensure the level of accessibility required by Article 47 of the Charter will be put in place as soon as those tribunals are established. However, Statement No 36, which forms an integral part of the context in which the Council adopted the decision to authorise the signature of the CETA on behalf of the Union, provides that the Commission and the Council give a commitment to ensure the accessibility of the envisaged tribunals to small and medium-sized enterprises. The Court found that that commitment was sufficient justification for the conclusion that the CETA is compatible with the requirement that those tribunals be accessible.

Finally, the Court found that the CETA provided sufficient guarantees that the envisaged tribunals will satisfy the requirement of independence, both in its external aspect, which presupposes that those tribunals will exercise their functions wholly autonomously, and in its internal aspect, which concerns the maintenance of an equal distance of the Members of those tribunals from the parties to the proceedings and the absence of any personal interest of those Members in the outcome of those proceedings.

XXII. European civil service

In the judgment in ***Spain* v *Parliament*** (C-377/16, EU:C:2019:249), delivered on 26 March 2019, the Court, sitting as the Grand Chamber, annulled, in the context of an action under Article 263 TFEU, a call for expressions of interest issued by the European Parliament for the recruitment of contract staff in order to perform the duties of drivers, which restricted the choice of 'language 2' of the selection procedure to English, French and German and required those languages to be used as the languages of communication for the purpose of the procedure.

On 14 April 2016, the European Parliament issued a call for expressions of interest with a view to establishing a database of candidates for recruitment as contract staff members to act as drivers. Title IV of that call provided that the recruitment in question was subject to 'a thorough knowledge … of German, English or French' as 'language 2'. According to the Parliament, that restriction was in the interest of the service requiring 'newly recruited staff to be immediately operational and able to communicate effectively in their daily work', those three languages being the most widely employed in that institution. Candidates were also required to submit their applications using an online registration form available only in these three languages on the website of the European Personnel Selection Office (EPSO).

As regards the restriction on the choice of languages for communications between candidates and EPSO in the selection procedure in question, the Court held that it could not be ruled out that candidates could have been deprived of the possibility of using the official language of their choice to submit their applications and could therefore have been subject to a difference in treatment based on language. In that context, the Court pointed out, inter alia, that in accordance with Article 2 of Regulation No 1/58, [231] documents sent to the institutions of the European Union by a person subject to the jurisdiction of a Member State may be drafted in any one of the official languages referred to in Article 1 of that regulation selected by the sender. That right to choose, from among the official languages of the European Union, the language to be used in dealings with the institutions is fundamental, as an essential component of respect for the linguistic diversity of the European Union, the importance of which is set out in the fourth subparagraph of Article 3(3) TEU and in Article 22 of the Charter. Nevertheless, in the specific context of the selection procedures for EU staff, the institutions may make provision for restrictions on the use of official languages, provided that such restrictions are, in accordance with Article 1d(6) of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), as applied to members of the contract staff under Article 80(4) of the Conditions of Employment of Other Servants ('the CEOS'), [232] objectively and reasonably justified by a legitimate objective of general interest in the framework of staff policy and are proportionate to the aim pursued. In that case, the European Parliament did not provide any reason capable of demonstrating the existence of such a legitimate objective of general interest capable of justifying the decision to restrict the languages of communication to English, French and German.

As regards the decision to restrict the choice of 'language 2' to those languages for the selection procedure itself, the Court considered that candidates whose language skills did not allow them to meet that requirement were deprived of the opportunity to participate in that selection procedure, even if they had sufficient

231| Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 74), as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ 2013 L 158, p. 1).

232| Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968 (I), p. 30), as amended by Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 (OJ 2013 L 287, p. 15).

knowledge, in accordance with the conditions laid down in Article 82(3)(e) of the CEOS, of at least two official languages of the European Union. That restriction may constitute a difference in treatment on grounds of language. Although the interest of the service may require, on the basis of a legitimate objective of general interest, that the persons recruited have a specific knowledge of languages, it is for the institution restricting the language regime of a selection procedure, which has broad discretion in that regard, to establish that such a restriction is appropriate for the purpose of meeting the actual needs relating to the duties to be performed; that restriction must be proportionate to that interest and be based on clear, objective and foreseeable criteria enabling candidates to understand the reasons for it and the EU judicature to review its legality.

In that case, the Court held that the reasons given in Title IV of the call for expressions of interest were not in themselves sufficient to establish that the duties of a driver in the European Parliament required knowledge of one of the three languages in question, to the exclusion of the other official languages of the European Union. In so far as the European Parliament did not, furthermore, adopt, pursuant to Article 6 of Regulation No 1/58, internal rules of procedure governing the application of its language regime, it cannot be stated, without regard to the duties that the persons recruited will actually be called upon to perform, that those three languages are necessarily the most useful languages for all the duties in that institution. As for the fact that the description of the duties required to be performed by the drivers recruited showed that they would carry out the bulk of their work in Brussels, Luxembourg and Strasbourg, that is to say, three cities in Member States which include French or German in their official languages, the Court held that this was not sufficient to justify the restriction at issue. The Parliament did not show that the restriction to each of the languages designated as 'language 2' for the selection procedure was objectively and reasonably justified in the light of the functional specificities of the posts to be filled and why, by contrast, the languages chosen could not include other official languages that might be relevant for such posts.

Finally, as regards the consequences of the annulment of the call for expressions of interest, the Court annulled the database constituted for that purpose. It took the view that the candidates who had been registered in that database had not received any guarantee of recruitment and, therefore, that the mere inclusion of candidates in the database was not capable of giving rise to a legitimate expectation requiring that the effects of the call for expressions of interest be maintained in force. By contrast, the annulment did not have any effect on recruitments already completed.

In the judgment in ***Commission* v *Italy*** (C-621/16 P, EU:C:2019:251), delivered on 26 March 2019, the Grand Chamber of the Court confirmed, on appeal, *the judgment of the General Court* [233] *that had annulled, on the basis of Articles 1d and 28 of the Staff Regulations, Article 1(2) of Annex III to those Staff Regulations and Article 1 of Council Regulation (EEC) No 1/58, two notices of open competition issued by EPSO with a view to drawing up a reserve list of administrators. Those notices restricted the choice of the second language of the selection procedure to English, French and German and required those languages to be used as the languages of communication with EPSO.*

As regards, in the first place, the admissibility of the actions at first instance, the Court first recalled that actions for annulment are available in the case of all measures adopted by the institutions which are intended to have binding legal effects, whatever their form. Next, the Court held that the General Court had correctly concluded, in the light of the legal nature of the notices of competition at issue, that those notices did not constitute measures which confirm or merely implement the general rules governing open competitions, but measures which have 'binding legal effects as regards the language rules for the competitions in question', and therefore constitute acts which are open to challenge. In that regard, the Court pointed out that the

233| Judgment of the General Court of 15 September 2016, ***Italy* v *Commission*** (T-353/14 and T-17/15, EU:T:2016:495).

organisation of a competition is governed by a notice, which lays down the essential elements of that competition, such as the knowledge of languages required in view of the special nature of the posts to be filled, in accordance with the provisions of Annex III to the Staff Regulations. That notice thus lays down the 'regulatory framework' for the competition in question in accordance with the objective set by the appointing authority and, accordingly, produces binding legal effects. That assessment of the legal nature of the notices of competition was, in that case, borne out both by the wording of the general rules governing open competitions adopted by EPSO and by that of the notices of competition at issue.

In the second place, as to the exercise of judicial review and the intensity of review applied by the General Court, the Court recalled that the EU institutions must enjoy a wide discretion in the organisation of their services and, in particular, in the determination of the criteria of ability required for the positions to be filled and, in the light of those criteria and in the interests of the service, in the determination of the conditions and procedure for organising competitions. However, that discretion is governed in mandatory terms by Article 1d of the Staff Regulations, which prohibits any discrimination on grounds of language and provides that differences in treatment based on language resulting from restrictions on the language regime of a competition to a limited number of official languages can only be accepted if such a restriction is objectively justified and proportionate to the actual needs of the service. In addition, any requirement relating to specific language skills must be based on clear, objective and predictable criteria enabling candidates to understand the reasons for that requirement and allowing the EU judicature to review the lawfulness thereof.

Since the lawfulness of the restriction depends on it being justified and proportionate, the General Court was right to undertake, in the case at hand, an actual assessment of whether, in particular, the notices of competition at issue, the general rules governing open competitions and the evidence provided by the Commission included 'concrete indications' capable of establishing, objectively, whether the interests of the service justified the restriction on the choice of second language in the competition. The General Court must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of supporting the conclusions drawn from it.

In the third place, as regards the restriction on the choice of the languages of communication between candidates and EPSO, the Court of Justice held that the reasoning followed by the General Court, according to which Regulation No 1/58 governed any restriction on the official languages required for communications between EPSO and candidates to the competitions, was flawed. According to the Court, although it had held, in its judgment in *Italy* v *Commission* (C-566/10 P), [234] that in the absence of special rules applicable to officials and servants in the internal rules of the institutions concerned by the notices of competition at issue in that case, relations between those institutions and their officials and servants are not totally excluded from the scope of Regulation No 1/58, that clarification applies not to the languages of communication between EPSO and candidates, but to the languages in which those notices of competition are *published*. Accordingly, in the context of EU personnel selection procedures, differences in treatment as regards the language arrangements for competitions may be permitted pursuant to Article 1d(6) of the Staff Regulations. However, in that case, the Court of Justice held that the General Court had correctly concluded that the grounds given to support the choice of the languages of communication were not capable of justifying, within the meaning of Article 1d(1)

234| Judgment of the Court of 27 November 2012, ***Italy* v *Commission*** (C-566/10 P, EU:C:2012:752).

and (6) of the Staff Regulations, the restriction on the choice of the languages of communication with EPSO, since the notices of competition at issue did not specify upon which objectively verifiable elements that restriction was based, which must be proportionate to the actual needs of the service.

In the judgment in ***HK* v *Commission*** (C-460/18 P, EU:C:2019:1119), delivered on 19 December 2019, the Court of Justice *set aside the judgment of the General Court of 3 May 2018 in* HK *v* Commission [235] *and, in giving final judgment in the dispute, dismissed both the action for annulment brought by the appellant against the decision of the European Commission refusing to grant him a survivor's pension as the surviving spouse of an official and his action for damages for the material and non-material damage allegedly suffered.*

This case concerned the appellant's request for a survivor's pension as the surviving spouse of a European Commission official who died on 11 April 2015, to whom he had been married since 9 May 2014. The couple had already been cohabiting since 1994. The appellant had regularly received money from his partner because of health problems which prevented him from working or engaging in training.

First of all, the Court of Justice set aside the judgment of the General Court dismissing the appellant's action, on the ground that the General Court had infringed its obligation to state reasons. In that regard, the Court of Justice pointed out that the statement of reasons in the judgment under appeal did not disclose in a clear and comprehensible manner the General Court's reasoning with regard to the determination of the persons eligible to receive a survivor's pension under the first paragraph of Article 17 of Annex VIII to the Staff Regulations, which was important for the question of the comparable nature of the situations weighed up for the purposes of examining the compatibility of that article of the Staff Regulations with the general principle of non-discrimination.

In taking the view that the case was ready for judgment, the Court of Justice went on to hold that the Commission was correct to refuse the appellant entitlement to the survivor's pension on the ground that he did not satisfy the condition relating to the minimum duration of one year of marriage to the deceased official, laid down in the first paragraph of Article 17 of Annex VIII to the Staff Regulations.

The Court of Justice stated that neither the fact that that article excludes from its scope cohabitation, nor the fact that it imposes such a minimum duration of marriage in order for the surviving spouse to be entitled to the survivor's pension, were manifestly inappropriate in relation to the objective of the survivor's pension and did not infringe the general principle of non-discrimination.

According to the Court of Justice, entitlement to the survivor's pension is not linked to any financial dependence of the spouse on the deceased. By contrast, the recipient of that pension must have been linked to the deceased official in the context of a civil relationship which has created a set of rights and obligations between them, such as marriage or, in certain circumstances, a registered marital partnership.

The Court of Justice stated that those conditions include in particular the fact that the surviving partner supplies an official document recognised as such by a Member State or by any competent authority of a Member State, attesting to the status of non-marital partners, and the fact that the couple did not have access to legal marriage.

235| T-574/16, not published, EU:T:2018:252.

Thus, the Court of Justice held that a de facto union, such as cohabitation, which is not, in principle, the subject of a statute laid down by law, does not satisfy the required conditions and, therefore, with regard to the survivor's pension, cohabitants are not in a situation comparable to that of married persons or to that of partners who have entered into a registered partnership satisfying the pension eligibility conditions.

Furthermore, the Court of Justice found that with a view to combating abuse or even fraud, the EU legislature had discretion in establishing entitlement to a survivor's pension and that the requirement that the marriage must have lasted for at least one year in order for the surviving spouse to receive the survivor's pension was intended to ensure the reality and stability of the relationship between the persons concerned.

The Court of Justice concluded that the action for compensation for the material or non-material damage allegedly suffered also had to be dismissed as unfounded, since the appellant's claims in that regard were closely linked to the claim for annulment, which itself had been dismissed as unfounded.

C| Activity of the Registry of the Court of Justice in 2019

By Mr **Marc-André Gaudissart**, Deputy Registrar

While the tasks entrusted to it are many and varied, in particular because of its special place in the structure of a multilingual institution such as the Court of Justice of the European Union and its role as intermediary between the courts of the Member States and the parties' representatives, on the one hand, and the cabinets and institution's departments, on the other hand, the primary task of the Registry of the Court of Justice is, of course, to ensure that proceedings are conducted properly and that the files for the cases brought before the Court are maintained rigorously, from the moment the document instituting proceedings is entered in the Registry's register until the decision closing the proceedings is served on the parties or the court which brought the matter before it. The number of cases brought before and closed by the Court of Justice therefore has a direct impact on the Registry's workload and its ability to meet the challenges it faces in a wide variety of areas.

As the past year was once again characterised by intense activity, both in terms of new cases and cases closed, the following paragraphs will mainly be devoted to an overview of the main statistical trends, and not to the other tasks carried out by the Registry, even though they mobilised a significant proportion of its resources in 2019, particularly in the context of compliance with the regulatory requirements relating to the protection of personal data and the ongoing work and discussions concerning the implementation of an integrated case management system.

I. New cases

While one might have thought that the record set in 2018 — with no fewer than 849 new cases in a single year — could not be beaten, the statistics defied all predictions once again: the past year saw a further increase of around 14% in the number of new cases, with no fewer than ***966 new cases brought before the Court of Justice in 2019***. Never before has such a large number of cases been brought before the Court! As in the previous two years, the increase is largely due to a further rise in the number of requests for a preliminary ruling — with 641 requests, these cases accounted for two thirds of all new cases in 2019, and more than twice the number of requests submitted to the Court a decade ago (302 requests in 2009)! — and also to a significant increase in the number of appeals. With 266 cases, appeals, appeals against interim measures and appeals on intervention accounted for more than 27% of the new cases in 2019 (compared to just over 23% the previous year). This increase is predominantly attributable to the high number of decisions delivered by the General Court in 2018, owing in part to the increase in its staff.

With 35 new cases in 2019 (compared to 57 in 2018), the number of actions for failure to fulfil obligations fell significantly, by contrast, but it seems premature at this stage to draw conclusions, as the drop in the number of such actions may also be due to the specific institutional context of the past year, characterised, in particular, by the end of the 'Juncker' Commission's mandate and the inauguration of a new Commission, which might adopt a different approach to litigation than its predecessor. Finally, the past year was marked by the action brought by the Court of Auditors under Article 286(6) of the Treaty on the Functioning of the European Union and the request from the European Parliament seeking an opinion (1/19) under Article 218(11) of that Treaty

on the compatibility with the Treaties of, inter alia, the conclusion by the European Union of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

As regards requests for a preliminary ruling, courts of all the Member States, without exception, turned to the Court of Justice in 2019. As in 2018, Germany, Italy and Spain continue to top the 'geographical' ranking of references for a preliminary ruling in 2019 — with, respectively, 114, 70 and 64 requests made in the past year by the courts of those Member States — but what is particularly striking is the number of references from the courts of the States that joined the European Union in 2004, 2007 and 2013, as well as the relatively high number of requests for a preliminary ruling from the United Kingdom (18), despite that Member State's decision to leave the European Union.

Romania and Poland, with 49 and 39 requests for a preliminary ruling in 2019, respectively, occupy fourth and fifth place in the geographical ranking of references for a preliminary ruling, ahead of founding States such as Belgium, France or the Netherlands (whose courts turned to the Court of Justice on 38, 32 and 28 occasions in 2019, respectively), while the number of requests from courts in Bulgaria (24), Croatia (10), Latvia (12), Slovakia (10) and Slovenia (5) also rose considerably. This trend clearly testifies to the vitality of the dialogue that the Court of Justice maintains with the courts of all the Member States, even though muted concerns may, at times, underpin that dialogue; some of the questions referred to the Court concern matters as sensitive as Member States' observance of the basic precepts and principles of the rule of law governing, among other things, the appointment of judges and their retirement age, the existence of independent and impartial disciplinary procedures, and the establishment of minimum safeguards for asylum applicants and beneficiaries of international protection.

As to the remainder, the cases brought before the Court in 2019 — whether by way of the preliminary ruling procedure or in the form of direct actions or appeals — covered a vast range of areas, reflecting how broad and diverse the matters governed by EU law are. These include the mandatory grant of minimum rest periods and equal pay for men and women in comparable situations; compensation for air passengers in the event of cancellation or inordinate delay of a flight; the need to ensure that the public is properly informed when certain plant protection products are placed on the market; and the need to ensure that consumers are adequately informed about the precise composition or geographical origin of the foodstuffs they buy. However, as in 2018, the top three positions are occupied by cases concerning the area of freedom, security and justice (105 new cases), taxation (74 cases), and intellectual and industrial property (also 74 cases). At the beginning of 2019, a large number of appeals were also lodged against judgments delivered by the General Court in December 2018 in State aid and competition matters, which explains the particularly high number of new cases in these two areas (with 59 and 42 new cases, respectively).

Finally, it should be noted that the past year was again characterised by a significant number of requests to expedite proceedings: the expedited procedure was requested in no fewer than 58 cases (compared to 36 in 2018 and 31 in 2017) and the urgent preliminary ruling procedure was requested (or proposed) in some 20 cases (1 more than in the previous year and 5 more than in 2017). Although not all of these requests were granted, they nevertheless required the Court to examine, within a short time frame, the circumstances invoked in each individual case in order to determine whether or not to initiate one of those two procedures. In 2019, that examination resulted in the urgent preliminary ruling procedure being applied in 11 cases and the expedited procedure in a further 3 cases.

II. Cases closed

While the number of new cases was particularly high over the past year, that increase, fortunately, was offset once again by an unprecedented number of cases closed. With ***865 cases settled in 2019***, the Court hit a new all-time high, the previous record having been set in 2018 with 760 cases closed. That figure represents an increase of around 14%!

Without going into detail here on the cases closed in 2019 and their scope — in this respect, reference is made to the developments in the case-law described in the second part of this chapter — three elements will be of particular interest to the reader when reviewing the figures and statistics set out below.

The first element is undoubtedly the high proportion of orders in the total number of cases closed in 2019. While the Court issued some 218 orders in 2018, that number rose to 293 in 2019, all categories combined. There are two reasons for that increase.

The first is the greater use of all the possibilities afforded by the Rules of Procedure for ruling on actions brought before the Court within a short time frame, in particular Article 99 of those rules, which allows the Court to give, by reasoned order, a rapid response to questions referred to it for a preliminary ruling where those questions are identical to a question on which the Court has already ruled or where the reply to such a question may be clearly deduced from the case-law or where the answer admits of no reasonable doubt (no fewer than 57 cases were closed on the basis of that provision in 2019).

The second reason is the entry into force on 1 May 2019 of Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019, [1] which introduced a new mechanism for certain categories of appeal whereby the Court will allow an appeal to proceed, wholly or in part, only where it raises an issue that is significant with respect to the unity, consistency or development of EU law. As that requirement was considered not met or at least not sufficiently substantiated by the appellants in various cases, the Court adopted a high number (27) of orders that an appeal is not allowed to proceed in 2019, which contributed to the increase in the number of orders closing the proceedings.

Reference must also be made to the first case in which Article 182 of the Rules of Procedure was applied, allowing the Court to declare an appeal manifestly well founded where it has already ruled on one or more questions of law identical to those raised by the pleas in law of the appeal.

With regard to the distribution of cases closed by court formation, mention must be made of the opinion (1/17) delivered by the Full Court on 30 April 2019 on the compatibility with EU law of the investor-State dispute settlement (ISDS) mechanism established by the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, as well as the significant proportion of decisions delivered by the Grand Chamber of the Court, which closed no fewer than 82 cases in 2019. The growing number of decisions delivered by chambers of three judges is also worthy of note. In 2019, the chambers of the Court sitting with three judges closed no fewer than 351 cases by way of judgment or order, compared to 251 cases in 2018. This sharp increase, which comes at a time of heavy workload, is partly due to the Court's intention to make the best possible use of those court formations by assigning appropriate cases to them, if necessary coupled with the delivery of an Opinion, which used to be rather rare for cases assigned to such formations. The proportion of decisions delivered by chambers of five judges was slightly higher in 2019: these formations closed 343 cases in the past year, compared to 323 in 2018.

1| OJ 2019 L 111, p. 1.

Finally, the duration of proceedings has remained stable overall, or even decreased, despite the significant increase in the number of cases. In 2019, the average duration of preliminary ruling proceedings was 15.5 months (and 3.7 months for cases dealt with under the urgent preliminary ruling procedure), compared to 16 months and 3.1 months in 2018, respectively, while the average duration of direct actions and appeals was 19.1 months (compared to 18.8 months in 2018) and 11.1 months (compared to 13.4 months), respectively. As indicated above, those figures are largely due to the more widespread use of orders, particularly in the field of intellectual and industrial property, where a large number of appeals were dismissed either on the basis of Articles 170a or 170b of the Rules of Procedure of the Court (new mechanism for determining whether appeals should be allowed to proceed) or under Article 181 thereof.

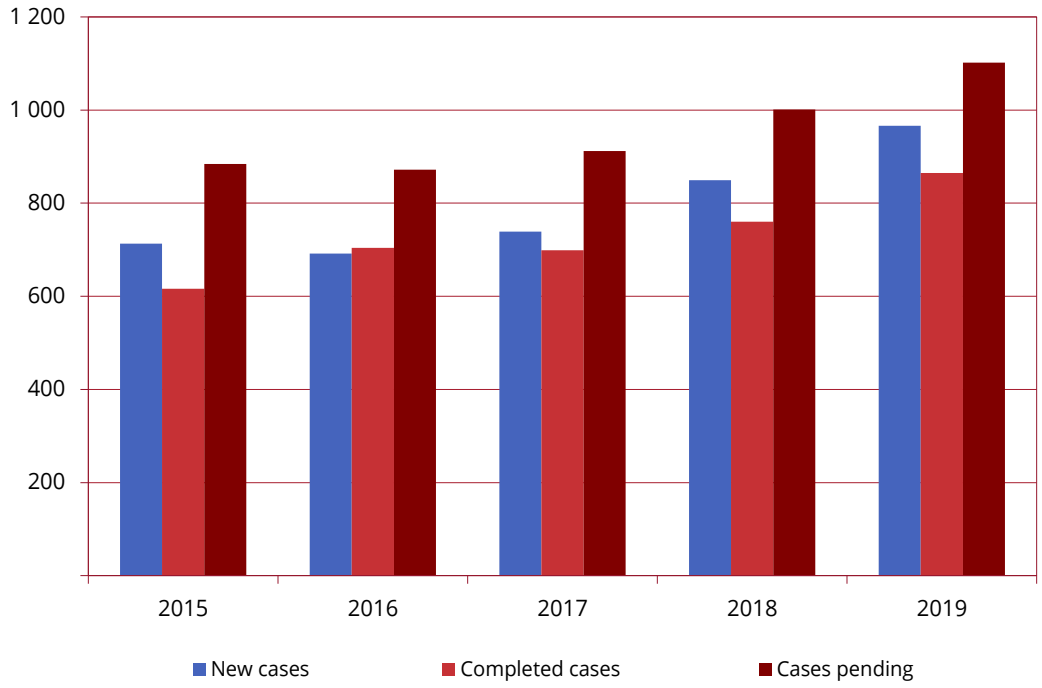
III. Cases pending

As a logical consequence of the increase in the number of new cases in 2019, which was greater than the increase in the number of cases closed, however high, the number of cases pending before the Court also rose compared to the previous year, standing at ***1 102 as of 31 December 2019*** (1 013 cases, including the joinder of cases on the ground of similarity).

It is in that context, in particular, that the mechanism whereby the Court determines whether an appeal should be allowed to proceed came into force on 1 May 2019 and amendments were made by the Court in the past year to its Rules of Procedure, the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings and the Practice directions to parties concerning cases brought before the Court. These amendments, the scope of which is described in the first part of this chapter, seek to clarify, supplement or simplify the provisions governing proceedings before the Court and define the framework for its relations with national courts and the parties' representatives. They should enable the Court to contain, to some extent, the increase in the number of cases brought before it, without prejudice to other measures which might be proposed should the need arise, if the upward trend continues, in order to simplify the handling of certain cases or readjust the division of jurisdiction between the Court of Justice and the General Court.

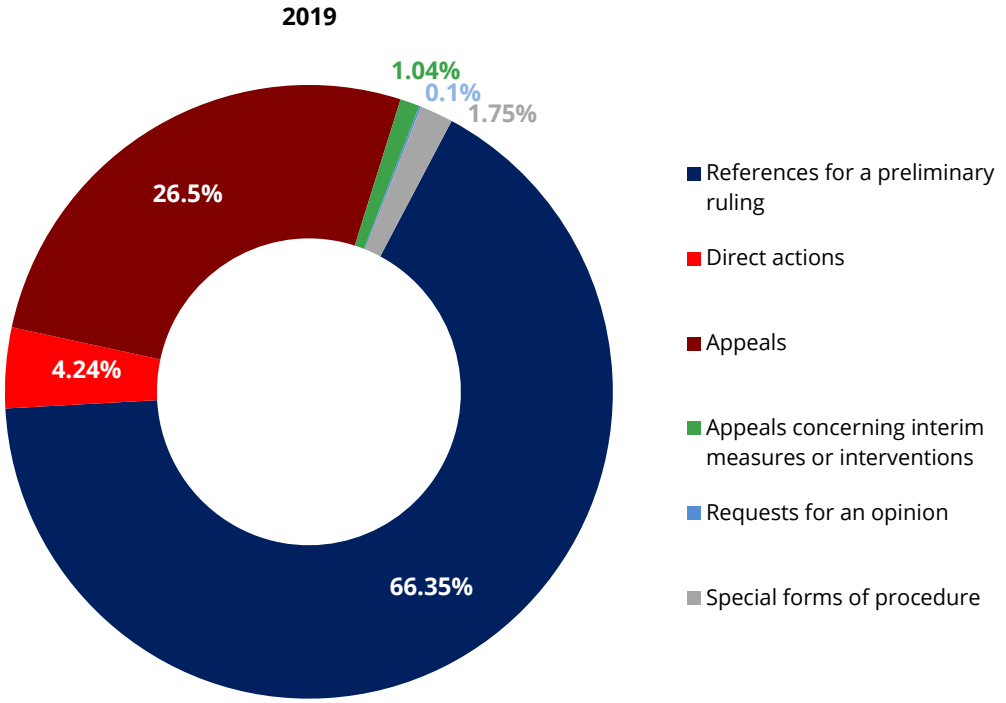
D Statistics concerning the judicial activity of the Court of Justice

I. General activity of the Court of Justice — New cases, completed cases, cases pending (2015-2019)



	2015	2016	2017	2018	2019
New cases	713	692	739	849	966
Completed cases	616	704	699	760	865
Cases pending	884	872	912	1 001	1 102

II. New cases — Nature of proceedings (2015-2019)



	2015	2016	2017	2018	2019
References for a preliminary ruling	436	470	533	568	641
Direct actions	48	35	46	63	41
Appeals	206	168	141	193	256
Appeals concerning interim measures or interventions	9	7	6	6	10
Requests for an opinion	3		1		1
Special forms of procedure [1]	11	12	12	19	17
Total	**713**	**692**	**739**	**849**	**966**
Applications for interim measures	2	3	3	6	6

1| 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.

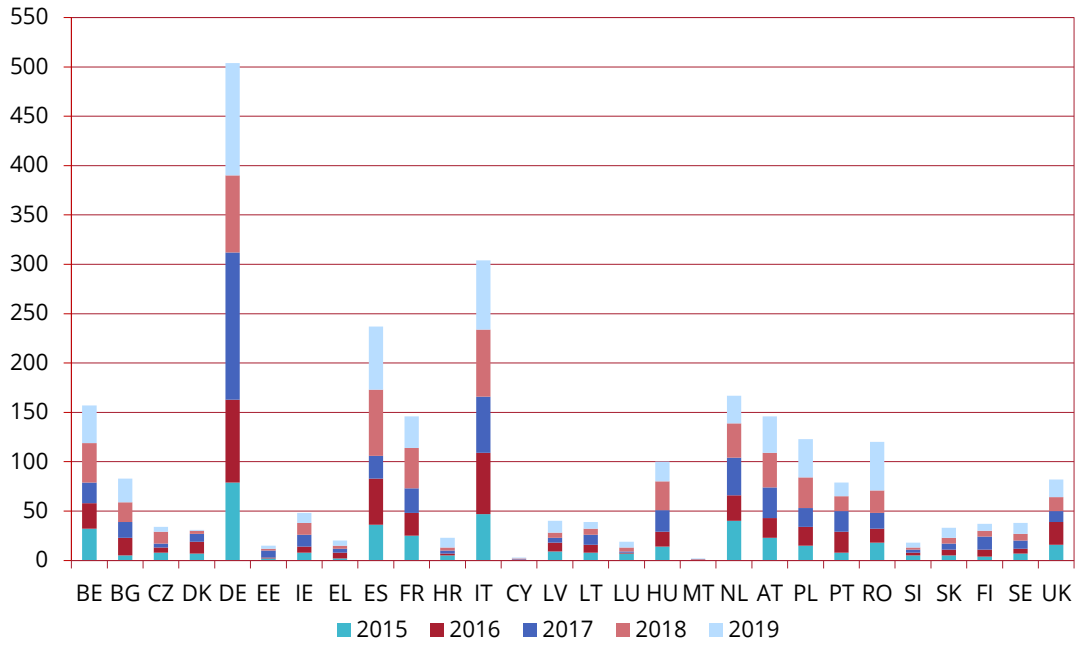
III. New cases — Subject matter of the action (2015-2019)

	2015	2016	2017	2018	2019
Access to documents	7	6	1	10	5
Accession of new States			1		
Agriculture	17	27	14	26	24
Approximation of laws	22	34	41	53	29
Arbitration clause			5	2	3
Area of freedom, security and justice	53	76	98	82	106
Association of the Overseas Countries and Territories	1				
Citizenship of the Union	6	7	8	6	8
Commercial policy	15	20	8	5	10
Common fisheries policy	1	3	1	1	1
Common foreign and security policy	12	7	6	7	19
Company law	1	7	1	2	3
Competition	40	35	8	25	42
Consumer protection	40	23	36	41	73
Customs union and Common Customs Tariff	29	13	14	14	18
Economic and monetary policy	11	1	7	3	11
Economic, social and territorial cohesion	3		2		1
Education, vocational training, youth and sport			2		
Energy	1	3	2	12	6
Environment	47	30	40	50	47
External action by the European Union	3	4	3	4	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	6	3	6	6	8
Free movement of capital	6	4	12	9	6
Free movement of goods	8	3	6	4	8
Freedom of establishment	12	16	8	7	8
Freedom of movement for persons	15	28	16	19	41
Freedom to provide services	24	15	18	37	12
Industrial policy	11	3	6	4	7
Intellectual and industrial property	88	66	73	92	74
Law governing the institutions	24	22	26	34	38
Principles of EU law	13	11	12	29	33
Public health	10	1	1	4	6
Public procurement	26	19	23	28	27
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	5	2	2	1	3
Research and technological development and space	1	3	3	1	
Social policy	32	33	43	46	41
Social security for migrant workers	7	10	7	14	2
State aid	29	39	21	26	59
Taxation	49	70	55	71	73
Transport	27	32	83	39	54
TFEU	**702**	**676**	**719**	**814**	**910**
Protection of the general public				1	1
Safety control				1	
Euratom Treaty				**2**	**1**
Principles of EU law				1	1
EU Treaty				**1**	**1**
Law governing the institutions				2	
Privileges and immunities	2	2		2	3
Procedure	9	13	12	12	16
Staff Regulations		1	8	16	35
Others	**11**	**16**	**20**	**32**	**54**
OVERALL TOTAL	**713**	**692**	**739**	**849**	**966**

IV. New cases — Subject matter of the action (2019)

	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Special forms of procedure
Access to documents			4	1		5	
Agriculture	14	1	8	1		24	
Approximation of laws	25	1	3			29	
Arbitration clause			3			3	
Area of freedom, security and justice	103	3				106	
Citizenship of the Union	8					8	
Commercial policy	5		5			10	
Common fisheries policy		1				1	
Common foreign and security policy			19			19	
Company law	2		1			3	
Competition	12		27	3		42	
Consumer protection	72		1			73	
Customs union and Common Customs Tariff	18					18	
Economic and monetary policy	3		8			11	
Economic, social and territorial cohesion			1			1	
Energy	4	1	1			6	
Environment	30	12	5			47	
External action by the European Union	2		1		1	4	
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	7	1				8	
Free movement of capital	5	1				6	
Free movement of goods	8					8	
Freedom of establishment	8					8	
Freedom of movement for persons	40	1				41	
Freedom to provide services	12					12	
Industrial policy	6	1				7	
Intellectual and industrial property	15	1	58			74	
Law governing the institutions	2	4	30	1		38	1
Principles of EU law	32	1				33	
Public health	3		2	1		6	
Public procurement	25	1	1			27	
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)			3			3	
Social policy	40		1			41	
Social security for migrant workers	2					2	
State aid	17	1	39	2		59	
Taxation	67	5		1		73	
Transport	51	3				54	
TFEU	**638**	**39**	**221**	**10**	**1**	**910**	**1**
Protection of the general public		1				1	
Euratom Treaty		**1**				**1**	
Principles of EU law	1					1	
EU Treaty	**1**					**1**	
Privileges and immunities	1	1				3	1
Procedure			1			16	15
Staff Regulations	1		34			35	
Others	**2**	**1**	**35**			**54**	**16**
OVERALL TOTAL	**641**	**41**	**256**	**10**	**1**	**966**	**17**

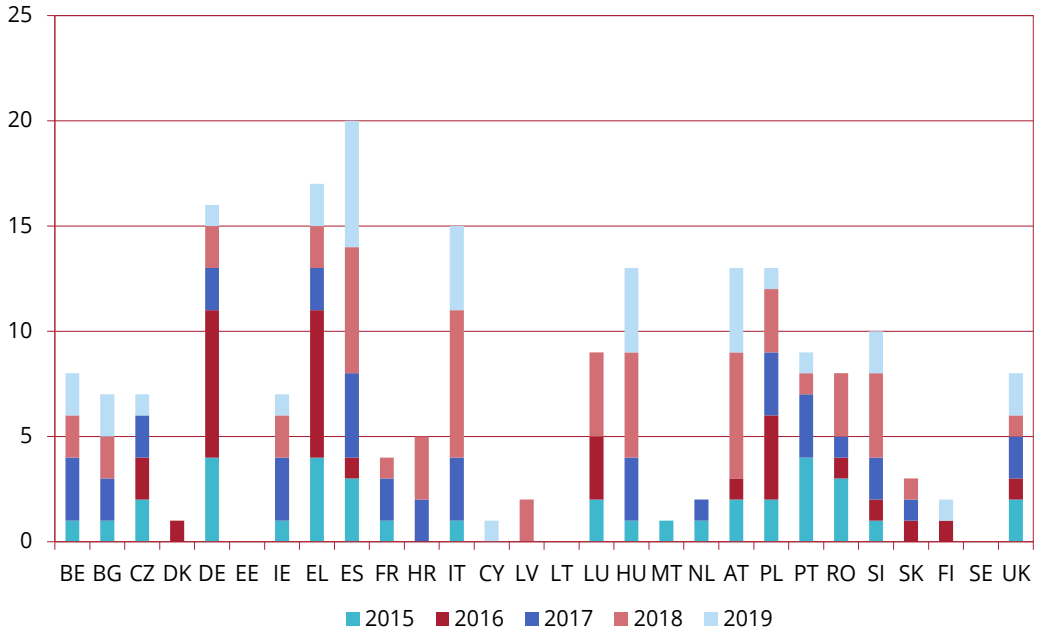
V. New cases — References for a preliminary ruling by Member State (2015-2019)



	2015	2016	2017	2018	2019	Total
Belgium	32	26	21	40	38	**157**
Bulgaria	5	18	16	20	24	**83**
Czech Republic	8	5	4	12	5	**34**
Denmark	7	12	8	3	1	**31**
Germany	79	84	149	78	114	**504**
Estonia	2	1	7	2	3	**15**
Ireland	8	6	12	12	10	**48**
Greece	2	6	4	3	5	**20**
Spain	36	47	23	67	64	**237**
France	25	23	25	41	32	**146**
Croatia	5	2	3	3	10	**23**
Italy	47	62	57	68	70	**304**
Cyprus				1	1	**2**
Latvia	9	9	5	5	12	**40**
Lithuania	8	8	10	6	7	**39**
Luxembourg	7	1	1	4	6	**19**
Hungary	14	15	22	29	20	**100**
Malta		1			1	**2**
Netherlands	40	26	38	35	28	**167**
Austria	23	20	31	35	37	**146**
Poland	15	19	19	31	39	**123**
Portugal	8	21	21	15	14	**79**
Romania	18	14	16	23	49	**120**
Slovenia	5	3	3	2	5	**18**
Slovakia	5	6	6	6	10	**33**
Finland	4	7	13	6	7	**37**
Sweden	7	5	8	7	11	**38**
United Kingdom	16	23	11	14	18	**82**
Others [1]	1					**1**
Total	**436**	**470**	**533**	**568**	**641**	**2 648**

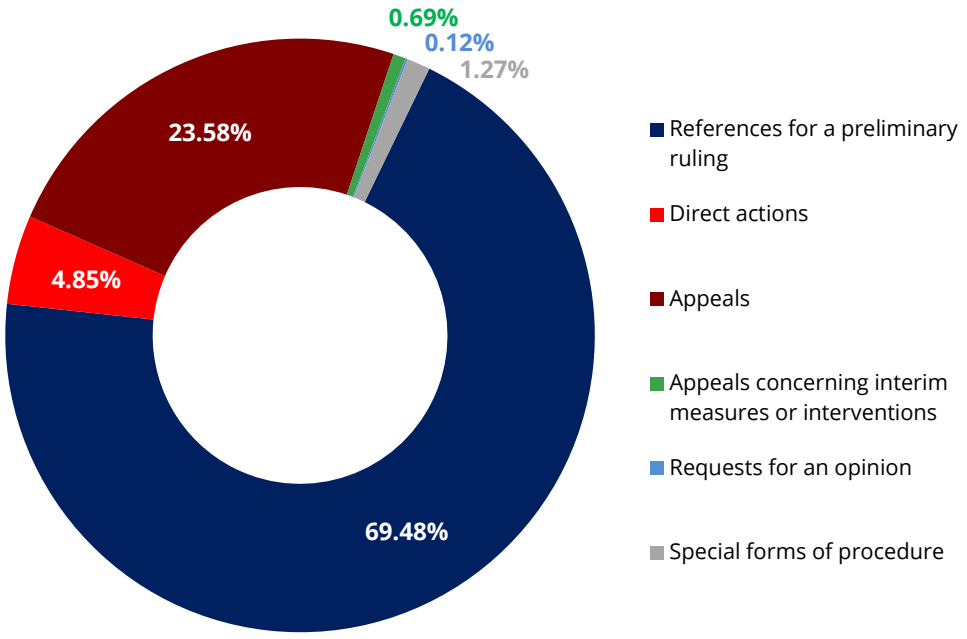
1| Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

VI. New cases —
Actions for failure of a Member State to fulfil its obligations (2015-2019)



	2015	2016	2017	2018	2019	Total
Belgium	1		3	2	2	**8**
Bulgaria	1		2	2	2	**7**
Czech Republic	2	2	2		1	**7**
Denmark		1				**1**
Germany	4	7	2	2	1	**16**
Estonia						
Ireland	1		3	2	1	**7**
Greece	4	7	2	2	2	**17**
Spain	3	1	4	6	6	**20**
France	1		2	1		**4**
Croatia			2	3		**5**
Italy	1		3	7	4	**15**
Cyprus					1	**1**
Latvia				2		**2**
Lithuania						
Luxembourg	2	3		4		**9**
Hungary	1		3	5	4	**13**
Malta	1					**1**
Netherlands	1		1			**2**
Austria	2	1		6	4	**13**
Poland	2	4	3	3	1	**13**
Portugal	4		3	1	1	**9**
Romania	3	1	1	3		**8**
Slovenia	1	1	2	4	2	**10**
Slovakia		1	1	1		**3**
Finland		1			1	**2**
Sweden						
United Kingdom	2	1	2	1	2	**8**
Total	**37**	**31**	**41**	**57**	**35**	**201**

VII. Completed cases — Nature of proceedings (2015-2019) [1]

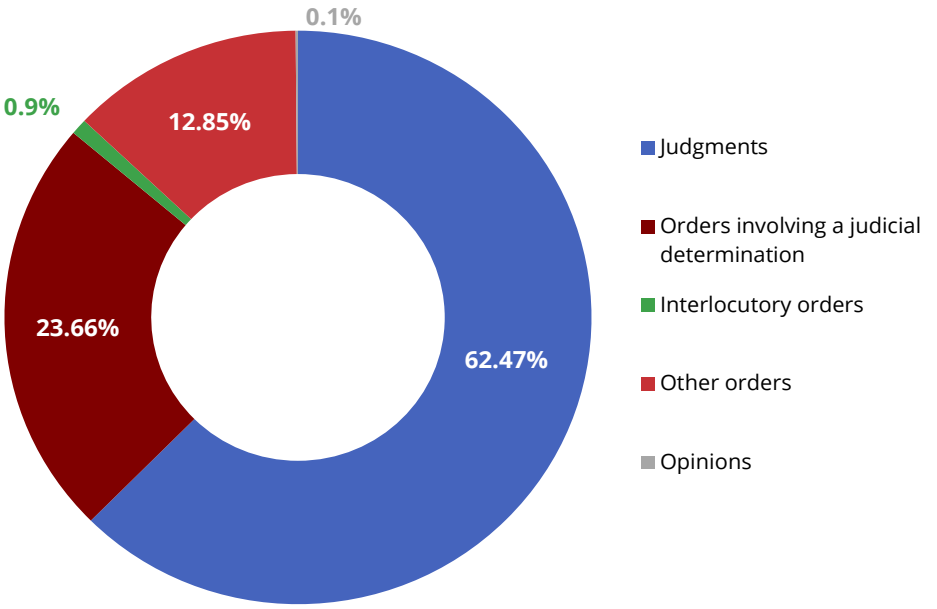


	2015	2016	2017	2018	2019
References for a preliminary ruling	404	453	447	520	601
Direct actions	70	49	37	60	42
Appeals	127	182	194	155	204
Appeals concerning interim measures or interventions	7	7	4	10	6
Requests for an opinion	1		3		1
Special forms of procedure [2]	7	13	14	15	11
Total	**616**	**704**	**699**	**760**	**865**

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.

VIII. Completed cases — Judgments, opinions, orders (2019) [1]



	Judgments	Orders involving a judicial determination [2]	Interlocutory orders [3]	Other orders [4]	Opinions	Total
References for a preliminary	375	70		83		528
Direct actions	32			9		41
Appeals	84	106	1	8		199
Appeals concerning interim measures or interventions			6			6
Requests for an opinion					1	1
Special forms of procedure		10		1		11
Total	**491**	**186**	**7**	**101**	**1**	**786**

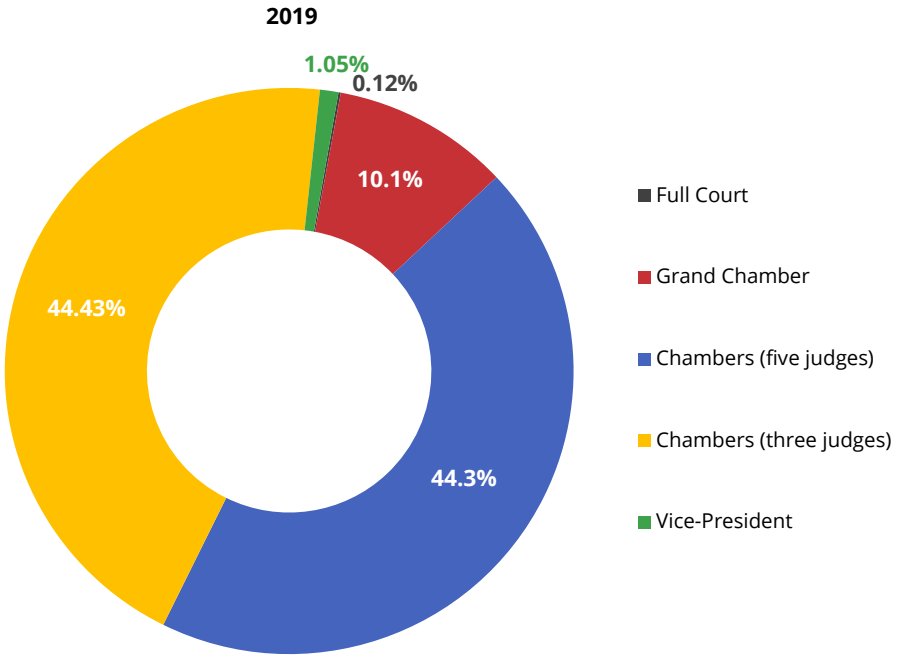
1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

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, 279 TFEU or 280 TFEU 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.

IX. Cases completed by judgments, by opinions or by orders involving a judicial determination — Bench hearing action (2015-2019) [1]



	2015			2016			2017			2018			2019		
	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	1		1
Grand Chamber	47		47	54		54	46		46	76		76	77		77
Chambers (five judges)	298	20	318	280	20	300	312	10	322	300	15	315	317	21	338
Chambers (three judges)	93	89	182	120	162	282	151	105	256	153	93	246	163	176	339
Vice-President		7	7		5	5		3	3		7	7		8	8
Total	**438**	**116**	**554**	**454**	**187**	**641**	**510**	**118**	**628**	**530**	**115**	**645**	**558**	**205**	**763**

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.

X. Cases completed by judgments, by opinions or by orders involving a judicial determination — Subject matter of the action (2015-2019) [1]

	2015	2016	2017	2018	2019
Access to documents	3	4	9	2	5
Accession of new States		1		1	
Agriculture	20	13	22	15	23
Approximation of laws	24	16	29	28	44
Arbitration clause				3	2
Area of freedom, security and justice	49	52	61	74	85
Citizenship of the Union	4	8	5	10	7
Commercial policy	4	14	14	6	11
Common fisheries policy	3	1	2	2	2
Common foreign and security policy	6	11	10	5	8
Company law	1	1	4	1	1
Competition	23	30	53	12	20
Consumer protection	29	33	20	19	38
Customs union and Common Customs Tariff	20	27	19	12	12
Economic and monetary policy	3	10	2	3	7
Economic, social and territorial cohesion	4	2		1	
Education, vocational training, youth and sport	1		2		
Employment	1				
Energy	2		2	1	9
Environment	27	53	27	33	50
External action by the European Union	1	5	1	3	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	1	2	7	2	6
Free movement of capital	8	7	1	13	8
Free movement of goods	9	5	2	6	2
Freedom of establishment	17	27	10	13	5
Freedom of movement for persons	13	12	17	24	25
Freedom to provide services	17	14	13	21	23
Industrial policy	9	10	8	2	7
Intellectual and industrial property	51	80	60	74	92
Law governing the institutions	27	20	27	28	28
Principles of EU law	12	13	14	10	17
Public health	5	4	5		6
Public procurement	14	31	15	22	20
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	1	1	7	1	1
Research and technological development and space	1	3	2	3	1
Social policy	30	23	26	42	36
Social security for migrant workers	14	5	6	10	12
State aid	26	26	33	29	20
Taxation	55	41	62	58	68
Trans-European networks		1			
Transport	9	20	17	38	25
TFEU	**544**	**626**	**614**	**627**	**730**
Protection of the general public	1				1
Euratom Treaty	**1**				**1**
Principles of EU law					1
EU Treaty					**1**
Law governing the institutions					2
Privileges and immunities	2	1		1	
Procedure	4	14	13	10	11
Staff Regulations	3		1	7	18
Others	**9**	**15**	**14**	**18**	**31**
OVERALL TOTAL	**554**	**641**	**628**	**645**	**763**

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).

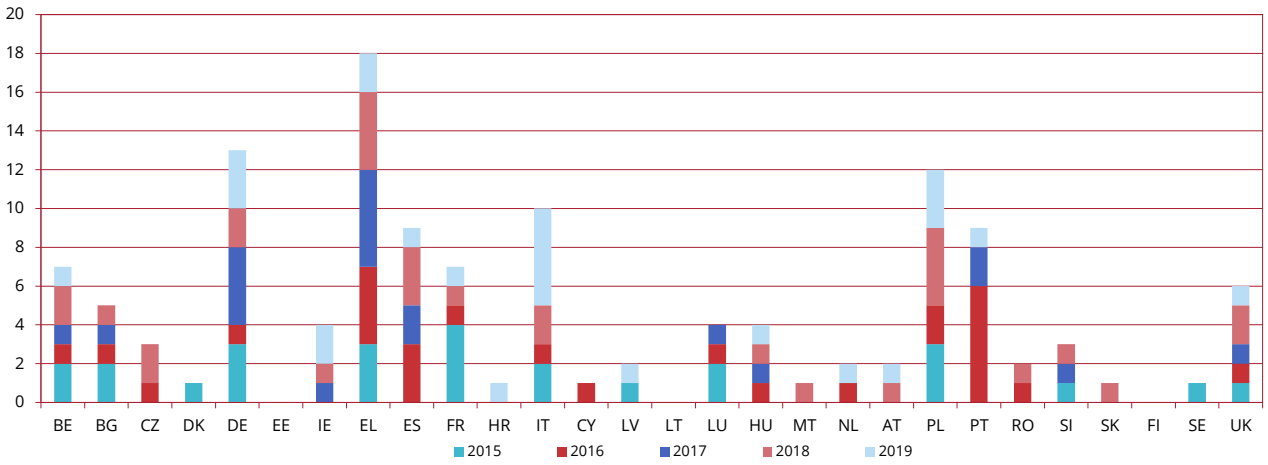
XI. Cases completed by judgments, by opinions or by orders involving a judicial determination — Subject matter of the action (2019) [1]

	Judgments/opinions	Orders [2]	Total
Access to documents	2	3	5
Agriculture	19	4	23
Approximation of laws	35	9	44
Arbitration clause	2		2
Area of freedom, security and justice	73	12	85
Citizenship of the Union	7		7
Commercial policy	11		11
Common fisheries policy	2		2
Common foreign and security policy	7	1	8
Company law		1	1
Competition	16	4	20
Consumer protection	29	9	38
Customs union and Common Customs Tariff	12		12
Economic and monetary policy	7		7
Energy	8	1	9
Environment	48	2	50
External action by the European Union	4		4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	6		6
Free movement of capital	4	4	8
Free movement of goods	2		2
Freedom of establishment	5		5
Freedom of movement for persons	16	9	25
Freedom to provide services	18	5	23
Industrial policy	7		7
Intellectual and industrial property	31	61	92
Law governing the institutions	8	20	28
Principles of EU law	10	7	17
Public health	6		6
Public procurement	15	5	20
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	1		1
Research and technological development and space	1		1
Social policy	28	8	36
Social security for migrant workers	11	1	12
State aid	12	8	20
Taxation	61	7	68
Transport	21	4	25
TFEU	**545**	**185**	**730**
Protection of the general public	1		1
Euratom Treaty	**1**		**1**
Principles of EU law	1		1
EU Treaty	**1**		**1**
Law governing the institutions	2		2
Procedure		11	11
Staff Regulations	9	9	18
Others	**11**	**20**	**31**
OVERALL TOTAL	**558**	**205**	**763**

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.

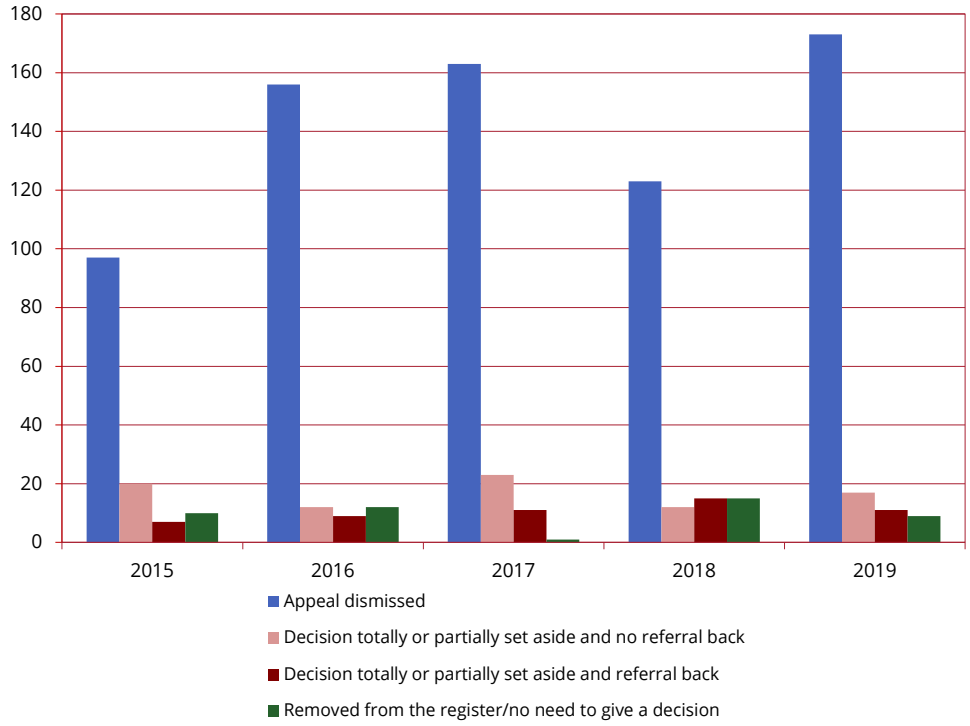
XII. Completed cases — Judgments concerning failure of a Member State to fulfil its obligations: outcome (2015-2019) [1]



	2015		2016		2017		2018		2019	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	2		1		1		2		1	
Bulgaria	2		1		1		1			
Czech Republic			1				2			1
Denmark	1							1		
Germany	3		1		4		2	1	3	
Estonia										
Ireland		1			1		1		2	
Greece	3		4		5		4		2	
Spain			3		2		3		1	1
France	4		1				1		1	
Croatia									1	
Italy	2		1				2		5	1
Cyprus			1							
Latvia	1								1	
Lithuania										
Luxembourg	2		1		1					
Hungary			1		1		1		1	
Malta				1			1			
Netherlands			1	1					1	
Austria				1			1	1	1	
Poland	3	1	2				4		3	
Portugal			6		2				1	
Romania			1				1			
Slovenia	1				1		1			
Slovakia		2					1			
Finland										
Sweden	1									
United Kingdom	1	1	1	1	1		2		1	
Total	**26**	**5**	**27**	**4**	**20**		**30**	**3**	**25**	**3**

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).

XIII. Completed cases — Appeals: outcome (2015-2019) [1] [2]
(judgments and orders involving a judicial determination)

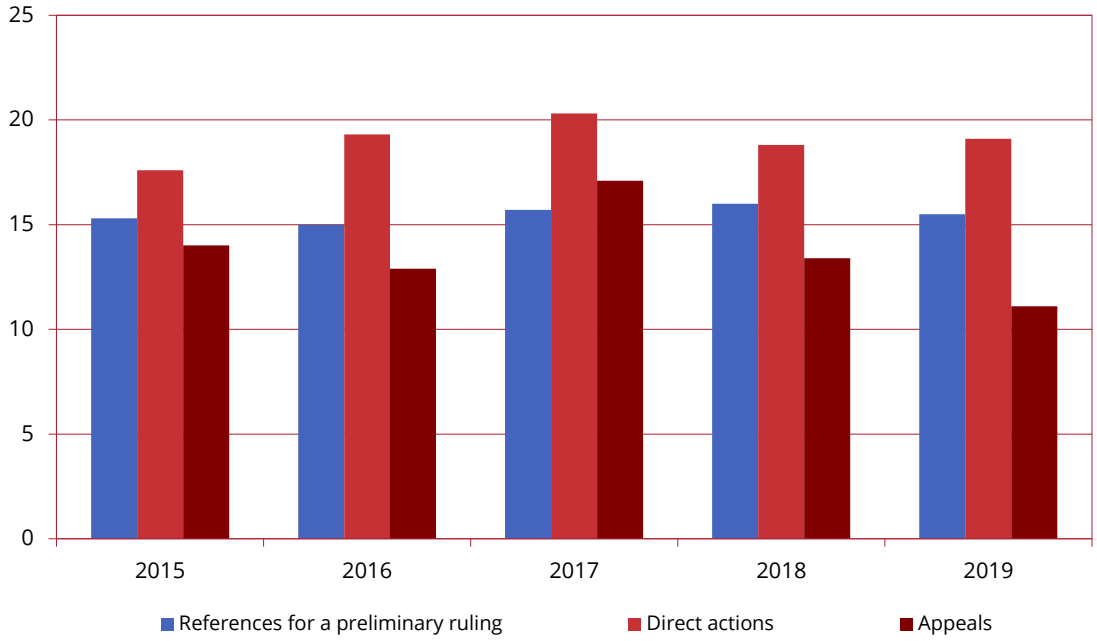


	2015			2016			2017			2018			2019		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Appeal dismissed	37	60	97	63	93	156	103	60	163	59	64	123	63	110	173
Decision totally or partially set aside and no referral back	19	1	20	12		12	23		23	11	1	12	17		17
Decision totally or partially set aside and referral back	6	1	7	9		9	11		11	14	1	15	9	2	11
Removed from the register/no need to give a decision		10	10		12	12		1	1		15	15		9	9
Total	**62**	**72**	**134**	**84**	**105**	**189**	**137**	**61**	**198**	**84**	**81**	**165**	**89**	**121**	**210**

1| More detailed information on appeals brought against the decisions of the General Court is included in the Statistics concerning the Judicial Activity of the General Court.

2| 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). They also include the appeals referred to in Article 58a of the Protocol on the Statute of the Court of Justice of the European Union and declared inadmissible or not allowed to proceed pursuant to Articles 170a or 170b of the Rules of Procedure. For more detailed information on the mechanism referred to in Article 58a of the Statute, see Table XX of the present report.

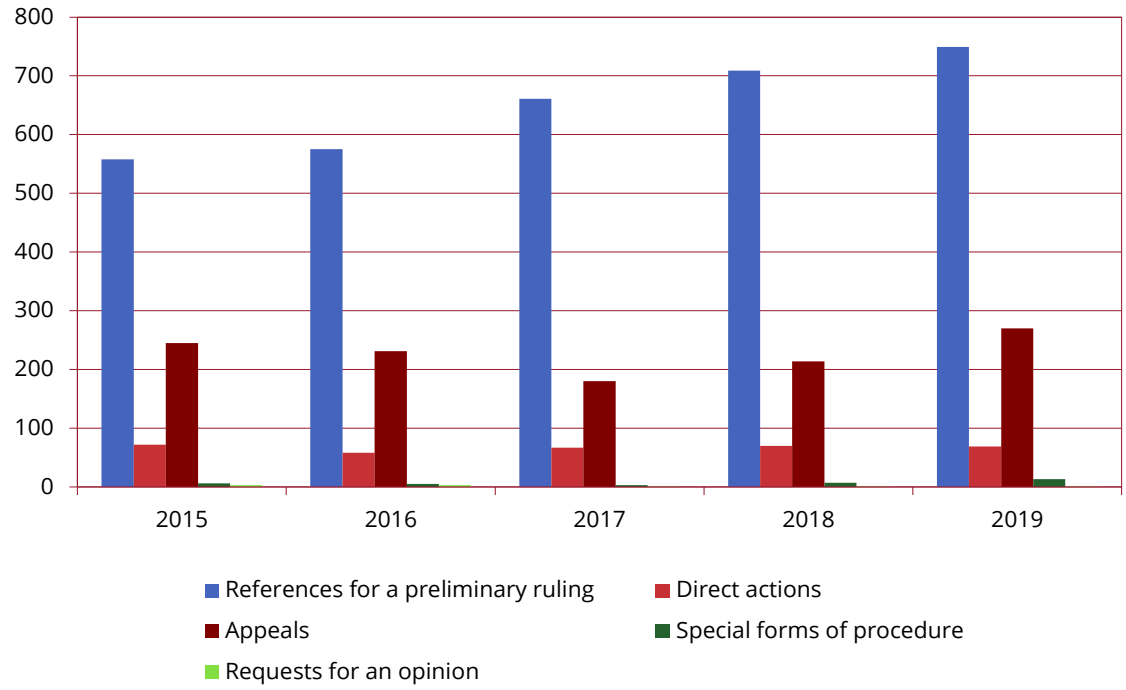
XIV. Completed cases — Duration of proceedings in months (2015-2019) [1] (judgments and orders involving a judicial determination)



	2015	2016	2017	2018	2019
References for a preliminary ruling	15.3	15	15.7	16	15.5
Urgent preliminary ruling procedure	1.9	2.7	2.9	3.1	3.7
Expedited procedures	5.3	4	8.1	2.2	9.9
Direct actions	17.6	19.3	20.3	18.8	19.1
Expedited procedures				9	10.3
Appeals	14	12.9	17.1	13.4	11.1
Expedited procedures		10.2			

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.

XV. Cases pending as at 31 December — Nature of proceedings (2015-2019) [1]

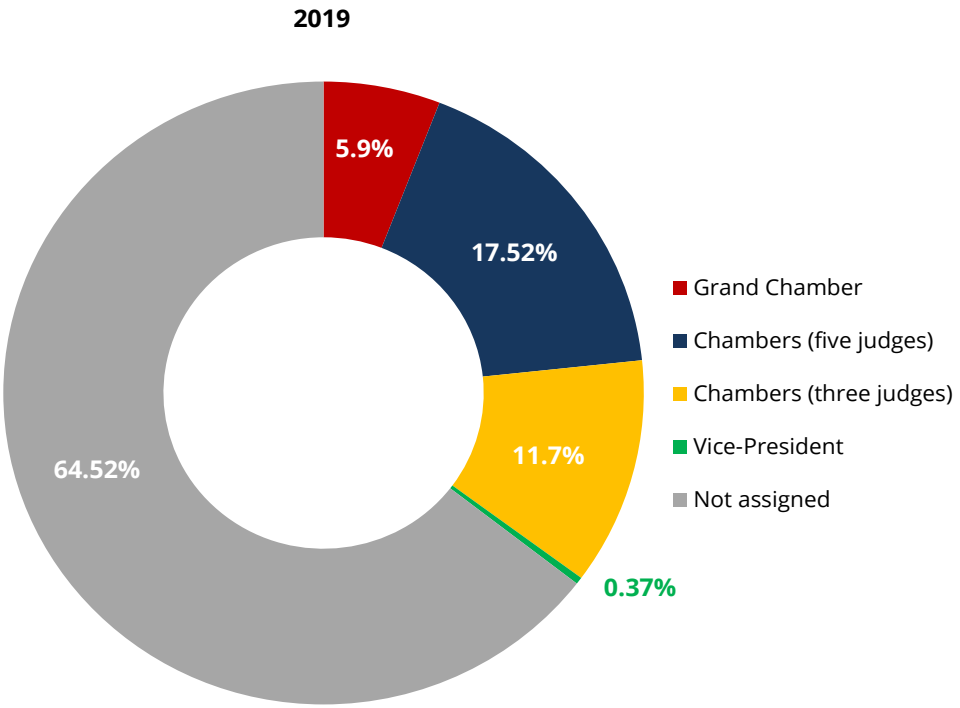


	2015	2016	2017	2018	2019
References for a preliminary ruling	558	575	661	709	749
Direct actions	72	58	67	70	69
Appeals	245	231	180	214	270
Special forms of procedure [2]	6	5	3	7	13
Requests for an opinion	3	3	1	1	1
Total	**884**	**872**	**912**	**1 001**	**1 102**

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.

XVI. Cases pending as at 31 December — Bench hearing action (2015-2019) [1]



	2015	2016	2017	2018	2019
Full Court		1		1	
Grand Chamber	38	40	76	68	65
Chambers (five judges)	203	215	194	236	192
Chambers (three judges)	54	75	76	77	130
Vice-President	2	2	4	1	4
Not assigned	587	539	562	618	711
Total	**884**	**872**	**912**	**1 001**	**1 102**

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).

XVII. Expedited procedures (2015-2019)

Requests for an expedited procedure [1]

	2015	2016	2017	2018	2019	Total
References for a preliminary	18	20	30	33	50	**151**
Direct actions			1	3	3	**7**
Appeals		1		1	4	**6**
Special forms of procedure					1	**1**
Total	**18**	**21**	**31**	**36**	**58**	**165**

Requests for an expedited procedure — outcome [2]

	2015	2016	2017	2018	2019	Total
Granted	1	4	4	9	3	**21**
Not granted	23	12	30	17	56	**138**
Not acted upon [3]		4	1	3	1	**9**
Decision pending	3	4		8	6	**21**
Total	**24**	**20**	**35**	**33**	**66**	**189**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning a request for the expedited procedure, irrespective of the year in which such a request was made.

3| There was no need to give a formal ruling on the request because the case was removed from the register or completed by judgment or order.

XVIII. Urgent preliminary ruling procedure (2015-2019)

Requests for the urgent preliminary ruling procedure to be applied [1]

	2015	2016	2017	2018	2019	Total
Judicial cooperation in civil matters	4		5	5		**14**
Judicial cooperation in criminal matters	5	7	6	8	10	**36**
Police cooperation					4	**4**
Borders, asylum and immigration	2	5	4	5	5	**21**
Others				1	1	**2**
Total	**11**	**12**	**15**	**19**	**20**	**77**

Requests for the urgent preliminary ruling procedure to be applied — outcome [2]

	2015	2016	2017	2018	2019	Total
Granted	5	9	4	12	11	**41**
Not granted	5	4	11	7	7	**34**
Decision pending	1				2	**3**
Total	**11**	**13**	**15**	**19**	**20**	**78**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning a request for the urgent procedure to be applied, irrespective of the year in which such a request was made.

XIX. Proceedings for interim measures (2015-2019)

Applications for interim measures [1]

	2015	2016	2017	2018	2019	Total
Agriculture		1			1	**2**
Competition	2			1	3	**6**
Environment		1	1			**2**
Industrial policy			1			**1**
Law governing the institutions				2		**2**
Principles of EU law				1		**1**
Public procurement			1			**1**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)					1	**1**
Research and technological development and space		1				**1**
State aid				2	1	**3**
Total	**2**	**3**	**3**	**6**	**6**	**20**

Applications for interim measures — outcome [2]

	2015	2016	2017	2018	2019	Total
Granted		2	1	5	1	**9**
Not granted		3		3	4	**10**
Decision pending	2		2		1	**5**
Total	**2**	**5**	**3**	**8**	**6**	**24**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning an application for interim measures, irrespective of the year in which such an application was made.

XX. Appeals referred to in Article 58a of the Statute (2019)

Appeals brought against a decision of the General Court concerning the decision of an independent board of appeal

	2019
European Union Intellectual Property Office	36
Community Plant Variety Office	2
Total	**38**

Decisions as to whether the appeal should be allowed to proceed [1]

	2019
Allowed to proceed	
Not allowed to proceed	27
Inadmissible	2
Not acted upon	
Total	**29**

1| The figures in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

XXI. General trend in the work of the Court (1952-2019) — New cases and judgments or opinions

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

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1| The figures mentioned in this table relate to all the cases brought before the Court with the exception of special forms of procedure.

2| The figures mentioned in this column refer to the number of judgments or opinions delivered by the Court, with account being taken of the joinder of cases on the ground of similarity (a set of joined cases = one case).

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
2018	568	63	193	6		830	6	462
2019	641	41	256	10	1	949	6	491
Total	**11 358**	**9 134**	**2 653**	**144**	**28**	**23 317**	**379**	**12 443**

1| The figures mentioned in this table relate to all the cases brought before the Court with the exception of special forms of procedure.

2| The figures mentioned in this column refer to the number of judgments or opinions delivered by the Court, with account being taken of the joinder of cases on the ground of similarity (a set of joined cases = one case).

XXII. General trend in the work of the Court (1952-2019) — New references for a preliminary ruling by Member State per year

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

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

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1993	22			7	57		1	5	7	22		24				1			43			3						12		**204**
1994	19			4	44		2		13	36		46				1			13			1						24		**203**
1995	14			8	51		3	10	10	43		58				2			19	2		5					6	20		**251**
1996	30			4	66			4	6	24		70				2			10	6		6				3	4	21		**256**
1997	19			7	46		1	2	9	10		50				3			24	35		2				6	7	18		**239**
1998	12			7	49		3	5	55	16		39				2			21	16		7				2	6	24		**264**
1999	13			3	49		2	3	4	17		43				4			23	56		7				4	5	22		**255**
2000	15			3	47		2	3	5	12		50							12	31		8				5	4	26	1	**224**
2001	10			5	53		1	4	4	15		40				2			14	57		4				3	4	21		**237**
2002	18			8	59			7	3	8		37				4			12	31		3				7	5	14		**216**
2003	18			3	43		2	4	8	9		45				4			28	15		1				4	4	22		**210**
2004	24			4	50		1	18	8	21		48				1	2		28	12		1				4	5	22		**249**
2005	21		1	4	51		2	11	10	17		18				2	3		36	15	1	2				4	11	12		**221**
2006	17		3	3	77		1	14	17	24		34			1	1	4		20	12	2	3			1	5	2	10		**251**
2007	22	1	2	5	59	2	2	8	14	26		43			1		2		19	20	7	3	1		1	5	6	16		**265**
2008	24		1	6	71	2	1	9	17	12		39	1	3	3	4	6		34	25	4	1				4	7	14		**288**
2009	35	8	5	3	59	2		11	11	28		29	1	4	3		10	1	24	15	10	3	1	2	1	2	5	28	1	**302**
2010	37	9	3	10	71		4	6	22	33		49		3	2	9	6		24	15	8	10	17	1	5	6	6	29		**385**
2011	34	22	5	6	83	1	7	9	27	31		44		10	1	2	13		22	24	11	11	14	1	3	12	4	26		**423**
2012	28	15	7	8	68	5	6	1	16	15		65		5	2	8	18	1	44	23	6	14	13		9	3	8	16		**404**
2013	26	10	7	6	97	3	4	5	26	24		62	3	5	10		20		46	19	11	14	17	1	4	4	12	14		**450**
2014	23	13	6	10	87		5	4	41	20	1	52	2	7	6		23		30	18	14	8	28	4	3	8	3	12		**428**
2015	32	5	8	7	79	2	8	2	36	25	5	47		9	8	7	14		40	23	15	8	18	5	5	4	7	16	1	**436**
2016	26	18	5	12	84	1	6	6	47	23	2	62		9	8	1	15	1	26	20	19	21	14	3	6	7	5	23		**470**
2017	21	16	4	8	149	7	12	4	23	25	3	57		5	10	1	22		38	31	19	21	16	3	6	13	8	11		**533**
2018	40	20	12	3	78	2	12	3	67	41	3	68	1	5	6	4	29		35	35	31	15	23	2	6	6	7	14		**568**
2019	38	24	5	1	114	3	10	5	64	32	10	70	1	12	7	6	20	1	28	37	39	14	49	5	10	7	11	18		**641**
Total	**919**	**161**	**74**	**196**	**2 641**	**30**	**125**	**190**	**591**	**1 052**	**24**	**1 583**	**9**	**77**	**68**	**102**	**207**	**4**	**1 076**	**593**	**197**	**203**	**211**	**27**	**60**	**128**	**152**	**655**	**3**	**11 358**

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

XXIII. General trend in the work of the Court (1952-2019) — New references for a preliminary ruling by Member State and by court or tribunal

			Total
Belgium	Cour constitutionnelle	42	
	Cour de cassation	100	
	Conseil d'État	95	
	Other courts or tribunals	682	**919**
Bulgaria	Върховен касационен съд	6	
	Върховен административен съд	24	
	Other courts or tribunals	131	**161**
Czech Republic	Ústavní soud		
	Nejvyšší soud	10	
	Nejvyšší správní soud	33	
	Other courts or tribunals	31	**74**
Denmark	Højesteret	36	
	Other courts or tribunals	160	**196**
Germany	Bundesverfassungsgericht	2	
	Bundesgerichtshof	248	
	Bundesverwaltungsgericht	149	
	Bundesfinanzhof	336	
	Bundesarbeitsgericht	44	
	Bundessozialgericht	77	
	Other courts or tribunals	1 785	**2 641**
Estonia	Riigikohus	14	
	Other courts or tribunals	16	**30**
Ireland	Supreme Court	39	
	High Court	46	
	Other courts or tribunals	40	**125**
Greece	Άρειος Πάγος	13	
	Συμβούλιο της Επικρατείας	61	
	Other courts or tribunals	116	**190**
Spain	Tribunal Constitucional	1	
	Tribunal Supremo	107	
	Other courts or tribunals	483	**591**
France	Conseil constitutionnel	1	
	Cour de cassation	140	
	Conseil d'État	149	
	Other courts or tribunals	762	**1 052**
Croatia	Ustavni sud		
	Vrhovni sud	1	
	Visoki upravni sud	1	
	Visoki prekršajni sud		
	Other courts or tribunals	22	**24**

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Italy	Corte Costituzionale	4	
	Corte suprema di Cassazione	170	
	Consiglio di Stato	204	
	Other courts or tribunals	1 205	**1 583**
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	5	**9**
Latvia	Augstākā tiesa	21	
	Satversmes tiesa	2	
	Other courts or tribunals	54	**77**
Lithuania	Konstitucinis Teismas	2	
	Aukščiausiasis Teismas	23	
	Vyriausiasis administracinis teismas	25	
	Other courts or tribunals	18	**68**
Luxembourg	Cour constitutionnelle	1	
	Cour de cassation	28	
	Cour administrative	33	
	Other courts or tribunals	40	**102**
Hungary	Kúria	31	
	Fővárosi Ítélőtábla	8	
	Szegedi Ítélötábla	4	
	Other courts or tribunals	164	**207**
Malta	Qorti Kostituzzjonali		
	Qorti tal-Appell		
	Other courts or tribunals	4	**4**
Netherlands	Hoge Raad	301	
	Raad van State	131	
	Centrale Raad van Beroep	69	
	College van Beroep voor het Bedrijfsleven	166	
	Tariefcommissie	35	
	Other courts or tribunals	374	**1 076**
Austria	Verfassungsgerichtshof	5	
	Oberster Gerichtshof	137	
	Verwaltungsgerichtshof	111	
	Other courts or tribunals	340	**593**
Poland	Trybunał Konstytucyjny	1	
	Sąd Najwyższy	29	
	Naczelny Sąd Administracyjny	53	
	Other courts or tribunals	114	**197**
Portugal	Supremo Tribunal de Justiça	16	
	Supremo Tribunal Administrativo	65	
	Other courts or tribunals	122	**203**
Romania	Înalta Curte de Casație și Justiție	22	
	Curtea de Apel	102	
	Other courts or tribunals	87	**211**

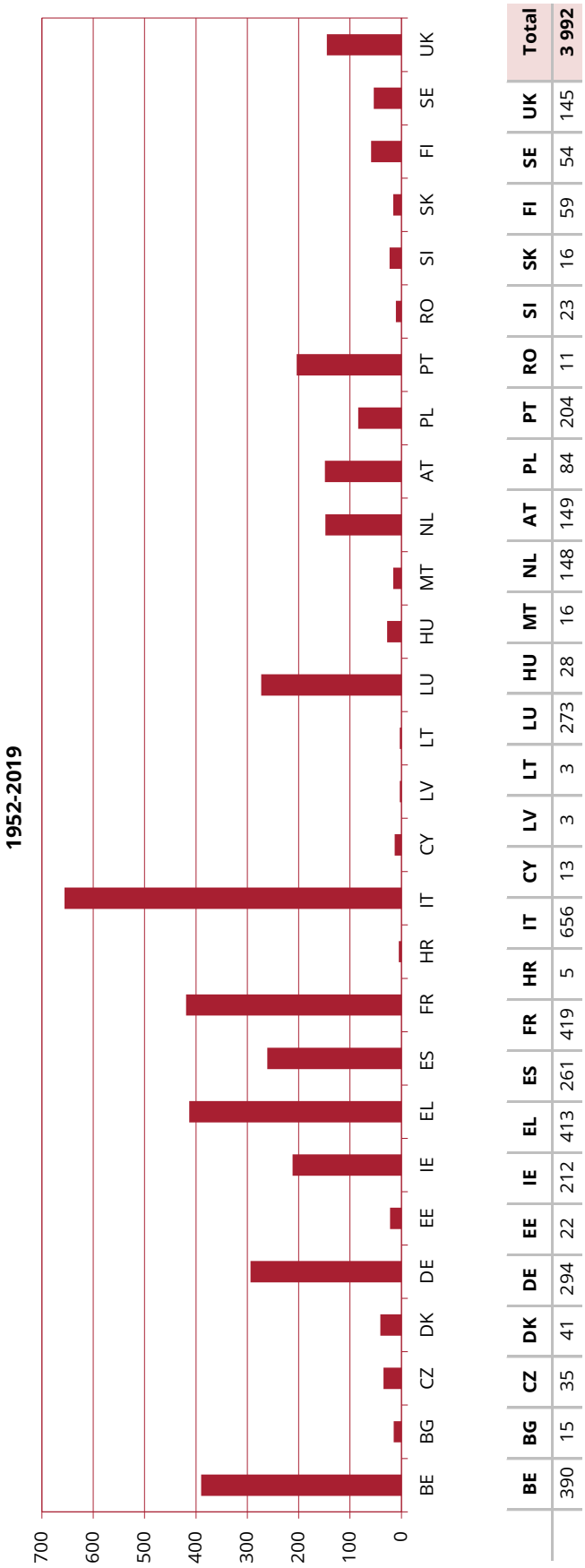
>>>

Slovenia	Ustavno sodišče	1	
	Vrhovno sodišče	19	
	Other courts or tribunals	7	**27**
Slovakia	Ústavný súd	1	
	Najvyšší súd	22	
	Other courts or tribunals	37	**60**
Finland	Korkein oikeus	26	
	Korkein hallinto-oikeus	63	
	Työtuomioistuin	5	
	Other courts or tribunals	34	**128**
Sweden	Högsta Domstolen	25	
	Högsta förvaltningsdomstolen	37	
	Marknadsdomstolen	5	
	Arbetsdomstolen	4	
	Other courts or tribunals	81	**152**
United Kingdom	House of Lords	40	
	Supreme Court	18	
	Court of Appeal	94	
	Other courts or tribunals	503	**655**
Others	Cour de justice Benelux/Benelux Gerechtshof [1]	2	
	Complaints Board of the European Schools [2]	1	**3**
Total			**11 358**

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

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

XXIV. **General trend in the work of the Court (1952-2019) — 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
	390	15	35	41	294	22	212	413	261	419	5	656	13	3	3	273	28	16	148	149	84	204	11	23	16	59	54	145	**3 992**

XXV. Activity of the Registry of the Court of Justice (2015-2019)

Type of intervention	2015	2016	2017	2018	2019
Documents entered in the register of the Registry	89 328	93 215	99 266	108 247	113 563
Procedural documents lodged by e-Curia (percentage)	69%	75%	73%	75%	80%
Hearings convened and organised	256	270	263	295	270
Sittings for the delivery of Opinions convened and organised	239	319	301	305	296
Judgments, opinions and orders terminating the proceedings served on the parties	570	645	654	684	785
Minutes of hearings drawn up (oral submissions, Opinions and judgments)	894	1 001	1 033	1 062	1 058
Notices in the OJ concerning new cases	639	660	679	695	818
Notices in the OJ concerning completed cases	546	522	637	661	682

E Composition of the Court of Justice

(Order of precedence as at 31 December 2019)

First row, from left to right:

M. Szpunar, First Advocate General; M. Vilaras, President of Chamber; A. Arabadjiev, President of Chamber; R. Silva de Lapuerta, Vice-President of the Court; K. Lenaerts, President of the Court; J.C. Bonichot, President of Chamber; A. Prechal, President of Chamber; E. Regan, President of Chamber; M. Safjan, President of Chamber

Second row, from left to right:

M. Ilešič, Judge; J. Kokott, Advocate General; L.S. Rossi, President of Chamber; S. Rodin, President of Chamber; P.G. Xuereb, President of Chamber; I. Jarukaitis, President of Chamber; E. Juhász, Judge; J. Malenovský, Judge

Third row, from left to right:

F. Biltgen, Judge; D. Šváby, Judge; T. von Danwitz, Judge; L. Bay Larsen, Judge; E. Sharpston, Advocate General; C. Toader, Judge; C. Vajda, Judge; K. Jürimäe, Judge

Fourth row, from left to right:

N.J. Piçarra, Judge; M. Bobek, Advocate General; M. Campos Sánchez-Bordona, Advocate General; C. Lycourgos, Judge; H. Saugmandsgaard Øe, Advocate General; E. Tanchev, Advocate General; G. Hogan, Advocate General

Fifth row, from left to right:

N. Jääskinen, Judge; P. Pikamäe, Advocate General; G. Pitruzzella, Advocate General; A. Kumin, Judge; N. Wahl, Judge; A. Calot Escobar, Registrar

1. Changes in the Composition of the Court of Justice in 2019

Formal sitting on 6 February 2019

By decision of 1 February 2019, the representatives of the governments of the Member States appointed Priit Pikamäe, replacing Nils Wahl as Advocate General at the Court of Justice, for the period from 5 February 2019 to 6 October 2024.

A formal sitting took place at the Court of Justice on 6 February 2019 on the occasion of the departure from office of Nils Wahl and the taking of the oath and entry into office of Priit Pikamäe.

Formal sitting on 20 March 2019

By decision of 6 March 2019, the representatives of the governments of the Member States appointed Andreas Kumin, replacing Maria Berger as Judge at the Court of Justice, for the period from 20 March 2019 to 6 October 2024.

A formal sitting took place at the Court of Justice on 20 March 2019, on the occasion of the departure from office of Maria Berger and the taking of the oath and entry into office of Andreas Kumin.

9 June 2019

Death of Yves Bot, Advocate General at Court of Justice since 7 October 2006.

17 June 2019

On 29 May 2019, Egils Levits, Judge at the Court of Justice since 11 May 2004, was elected President of the Republic of Lithuania by the Parliament of the Republic of Lithuania. Consequently, Egils Levits presented his resignation from office as Judge at the Court of Justice, with effect from 17 June 2019.

Formal sitting on 7 October 2019

By decision of 1 February 2019, Niilo Jääskinen, replacing Allan Rosas, was appointed as Judge at the Court of Justice, for the period from 7 October 2019 to 6 October 2021.

In addition, by decision of 10 July 2019, Nils Wahl, replacing Carl Gustav Fernlund, was appointed as Judge at the Court of Justice, for the period from 7 October 2019 to 6 October 2024.

On the occasion of, first, the departure from office of Allan Rosas and Carl Gustav Fernlund and, secondly, the taking of the oath and entry into office of Niilo Jääskinen and Nils Wahl, a formal sitting took place at the Court of Justice on 7 October 2019.

2. Order of Precedence

As at 31 December 2019

K. LENAERTS, President
R. SILVA de LAPUERTA, Vice-President
J.C. BONICHOT, President of the First Chamber
A. ARABADJIEV, President of the Second Chamber
A. PRECHAL, President of the Third Chamber
M. VILARAS, President of the Fourth Chamber
E. REGAN, President of the Fifth Chamber
M. SZPUNAR, First Advocate General
M. SAFJAN, President of the Sixth Chamber
S. RODIN, President of the Ninth Chamber
P.G. XUEREB, President of the Seventh Chamber
L.S. ROSSI, President of the Eighth Chamber
I. JARUKAITIS, President of the Tenth Chamber
J. KOKOTT, Advocate General
E. JUHÁSZ, Judge
M. ILEŠIČ, Judge
J. MALENOVSKÝ, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General
T. von DANWITZ, Judge
C. TOADER, Judge
D. ŠVÁBY, Judge
C. VAJDA, Judge
F. BILTGEN, Judge
K. JÜRIMÄE, Judge
C. LYCOURGOS, Judge
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
H. Saugmandsgaard ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General
N. PIÇARRA, Judge
G. HOGAN, Advocate General
G. PITRUZZELLA, Advocate General
P. PIKAMÄE, Advocate General
A. KUMIN, Judge
N. JÄÄSKINEN, Judge
N. WAHL, Judge

A. CALOT ESCOBAR, Registrar

3. Former Members of the Court of Justice

(in order of their entry into office)

Judges and Advocate Generals

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 (1958-1961) (†)
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 Ó DÁLAIGH, 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) (†)
Simone ROZÈS, Advocate General (1981-1984)
Pieter VERLOREN van THEMAAT, Advocate General (1981-1986) (†)
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), Judge (2012-2018)
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), Advocate General (2012-2018)
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)
Antonio TIZZANO, Advocate General (2000-2006), then Judge (2006-2018), Vice-President from 2015 to 2018
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) (†)
Allan ROSAS, Judge (2002-2019)
Luís Miguel POIARES PESSOA MADURO, Advocate General (2003-2009)
Konrad Hermann Theodor SCHIEMANN, Judge (2004-2012)
Jerzy MAKARCZYK, Judge (2004-2009)
Pranas KŪRIS, Judge (2004-2010)

Georges ARESTIS, Judge (2004-2014)
Anthony BORG BARTHET, Judge (2004-2018)
Ján KLUČKA, Judge (2004-2009)
Uno LÕHMUS, Judge (2004-2013)
Egils LEVITS, Judge (2004-2019)
Aindrias Ó CAOIMH, Judge (2004-2015)
Paolo MENGOZZI, Advocate General (2006-2018)
Pernilla LINDH, Judge (2006-2011)
Yves BOT, Advocate General (2006-2019) (†)
Ján MAZÁK, Advocate General (2006-2012)
Verica TRSTENJAK, Advocate General (2006-2012)
Jean-Jacques KASEL, Judge (2008-2013)
Maria BERGER, Judge (2009-2019)
Niilo JÄÄSKINEN, Advocate General (2009-2015)
Pedro CRUZ VILLALÓN, Advocate General (2009-2015)
Egidijus JARAŠIŪNAS, Judge (2010-2018)
Carl Gustav FERNLUND, Judge (2011-2019)
Nils WAHL, Advocate General (2012-2019)

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 IGLÉSIAS (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 2
The General Court

A | Activity of the General Court in 2019

By Mr Marc van der Woude, President of the General Court

In many respects, 2019 was a particularly important year for the General Court.

First, in 2019 the Court celebrated 30 years of its existence. The first members of the Court, which was created by the Council Decision of 24 October 1988, took up office on 25 September 1989. To mark that anniversary, the Court held a symposium called 'The General Court of the European Union in the Digital Age', structured around two themes: 'Accessible justice' and 'Efficient and quality justice'. The Court welcomed on that occasion a large number of representatives of the European, national and international institutions, together with law professors, judges and lawyers from all the Member States. The documents from that high-quality symposium are available on the Curia website.

Secondly, the Court underwent significant changes regarding its composition, on account of both the partial renewal of the Court and the implementation of the third stage of the reform of the judicial architecture of the institution. The Court first of all welcomed Judge Frendo on 20 March 2019, to replace Judge Xuereb, who was appointed to the Court of Justice on 8 October 2018. At a ceremony held on 26 September 2019, the Court paid tribute to eight judges who were leaving the General Court, namely Judges Pelikánová, Berardis, Bieliūnas, Calvo-Sotelo Ibáñez-Martín, Dittrich, Perillo, Prek and Ulloa Rubio. At the solemn hearing held on the same day, the Court welcomed 14 new members, namely Judges Perišin, Porchia, Pynnä, Škvařilová-Pelzl, Stancu, Steinfatt, Hesse, Laitenberger, Mastroianni, Martín y Pérez de Nanclares, Nõmm, Norkus, Sampol Pucurull and Truchot. As at 31 December 2019, the Court is composed of 52 Members.

Thirdly, in order to prepare for the implementation of that third stage of the reform, the Court adopted a series of measures designed to ensure that high-quality justice would be delivered within a reasonable time. The first measure concerns the number of Chambers of the Court, which, owing to the increase in the number of judges, had to be raised from 9 to 10, each Chamber comprising 5 judges. [1] In addition, in order to encourage exchanges between the judges of those Chambers, they no longer sit in two sub-formations of three judges presided over by the same President of Chamber, but in six sub-formations of three judges according to a system of rotation.

The second measure put in place since 30 September 2019 concerns the introduction of a degree of specialisation in the chambers in the areas of intellectual property and the civil service. It was thus decided that six chambers will deal with the former category of cases and that four chambers will be responsible for the latter category of cases. All the other categories of proceedings will continue to be allocated among all the chambers. Further, the allocation of all cases to the chambers, both in the areas subject to specialisation and in the other areas, will continue to be made according to a 'rota' system, which in practice may be adjusted to take account of the workload and any connection between cases. This latter derogation means that cases relating to the same contested act or those that raise a similar problem are, in principle, assigned to the same chamber, and indeed to the same Judge-Rapporteur.

1| Where necessary, two of these Chambers will be able to accommodate six judges.

The third measure concerns the composition of the Grand Chamber, which was amended to give judges who are not Presidents of Chambers more opportunity to sit in that formation of 15 judges. Since 26 September 2019, the Grand Chamber has been composed of the President, the Vice-President, a limited number of Presidents of Chambers, the judges of the Chamber to which the case was initially assigned and other judges chosen alternatively according to seniority and reverse seniority.

Fourthly, the Court considered it was important that the President and the Vice-President should be more involved in the judicial activity, in line with their special responsibilities, which are incompatible with the activity of a full-time judge. Thus, the President replaces a judge who is prevented from acting in the extended formations of five judges and the Vice-President participates in the extended formations of five judges at the rate of one case per chamber per year. In that context, it should be emphasised that the Court has confirmed that the Vice-President's main task is to ensure the consistency and the quality of the case-law.

Taken as a whole, those measures should enable the Court to ensure that the final stage of the reform bears fruit, in particular as regards the aim of reducing the duration of proceedings and systematically referring cases to extended formations of 5 or 15 judges.

Fifthly, in spite of the challenges created by the implementation of the final stage of the reform and the partial renewal of the Court, the Court has achieved satisfactory results. Statistically, the number of cases lodged (939) and the number of cases closed (874) are, having regard to the fact that a large number of connected cases were lodged at the end of the year, balanced overall, with 1 398 cases pending. That satisfactory situation is reflected in the time taken to deal with cases, which continues to fall. In fact, the duration of the proceedings in cases determined by judgment and by order was 17 months in 2019, by comparison with 20 months in 2018 and around 26 months during the first years of the last decade. This net improvement is one of the advantages of the reform of the judicial architecture of the European Union. A further benefit concerns the possibility for the Court to sit more in formations composed of five judges in deserving cases and thus to enhance the authority of its judgments. Since 2016, the number of cases decided by extended formations has been in the vicinity of 60 cases per year, contrasted with less than 10 at the beginning of the decade.

B | Case-law of the General Court in 2019

By Vice-President **Savvas Papasavvas**

Trends in case-law

An analysis of the decisions handed down by the General Court in 2019 shows, once again, the breadth of the fields covered by those decisions and the significance of the disputes resolved by the Court. In order to meet the challenges they present, the General Court made proper and frequent use of the option, available to it under Article 50 of the Statute of the Court of Justice of the European Union, of sitting as a chamber of five judges, as it had done in the previous year. On a number of occasions, when considering the matters before it, the General Court was led to issue penalties for failures to adhere to the principles and fundamental rights protected by EU law. The year 2019 also presented the General Court with the opportunity to clarify several procedural points. In its role as court of first instance, it was also required to examine matters that had previously never been considered, as well as cases that were of fundamental significance from both a legal and an economic standpoint.

As guarantor charged with ensuring observance of the principles of EU law, the General Court, in its judgment of 10 January 2019, ***RY v Commission*** (T-160/17, EU:T:2019:1), annulled a decision of the European Commission terminating the contract for an indefinite period of a member of the temporary staff owing to a breakdown in the relationship of trust on the basis that the Commission had infringed that member of staff's right to be heard, as enshrined in Article 41(2)(a) of the Charter of Fundamental Rights of the European Union. Furthermore, in the judgments of 11 July 2019, ***Yanukovych v Council*** (T-244/16 and T-285/17, EU:T:2019:502) and ***Klymenko v Council*** (T-274/18, EU:T:2019:509), the General Court annulled a number of acts of the Council of the European Union [1] relating to restrictive measures adopted in the light of the situation in Ukraine in so far as the names of the applicants, who are the former President and former Minister for Revenue and Tax of Ukraine, had been maintained on the list of persons, entities and bodies subject to those restrictive measures. The General Court, applying the principles of case-law established in the judgment of 19 December 2018, ***Azarov v Council*** (C-530/17 P, EU:C:2018:1031), found that it had not been established that the Council had, prior to adopting the contested acts, verified whether the Ukrainian judicial authorities had respected the applicants' rights of defence and right to effective judicial protection. On that basis, it annulled those acts.

The General Court had also cause to provide clarification in respect of certain aspects of the admissibility of actions. Thus, in the order of 30 April 2019, ***Romania v Commission*** (T-530/18, under appeal, [2] EU:T:2019:269), the General Court specified the starting point of the period for instituting proceedings for the annulment of an act of individual relevance where that act has not only been notified to its addressee, but has also been published. The General Court held that the date to be taken into account for the purpose of determining the starting point of that period is the date of publication in the Official Journal, when such publication, which is

1| The applicant in Cases T-244/16 and T-285/17 sought the annulment of Council Decision (CFSP) 2016/318 of 4 March 2016 (OJ 2016 L 60, p. 76), Council Implementing Regulation (EU) 2016/311 of 4 March 2016 (OJ 2016 L 60, p. 1), Council Decision (CFSP) 2017/381 of 3 March 2017 (OJ 2017 L 58, p. 34), and Council Implementing Regulation (EU) 2017/374 of 3 March 2017 (OJ 2017 L 58, p. 1), while the applicant in Case T-274/18 sought the annulment of Council Decision (CFSP) 2018/333 of 5 March 2018 (OJ 2018, L 63, p. 48) and Council Implementing Regulation (EU) 2018/326 of 5 March 2018 (OJ 2018, L 63, p. 5).

2| Case C-498/19 P, ***Romania v Commission.***

a precondition for the coming into force of the act, is provided for in the FEU Treaty, and the date of notification in the other cases referred to in the third subparagraph of Article 297(2) TFEU, amongst which is that of decisions which specify those to whom they are addressed. The General Court, applying those principles, found that the action brought by Romania on 7 September 2018 was out of time and had to be dismissed as inadmissible. In addition, in the judgment of 20 September 2019, ***Venezuela v Council*** (T-65/18, under appeal, [3] EU:T:2019:649), the General Court examined the issue of the admissibility of actions brought by third States. After finding that the Bolivarian Republic of Venezuela was not, as a State, explicitly and specifically referred to in the contested provisions and that it could not, moreover, be treated in the same way as an operator usually carrying out an economic activity, the General Court concluded that the legal situation of that State was not directly affected by the contested provisions and dismissed the action as inadmissible.

The General Court was also faced with novel points of law, such as those that arose in the judgment of 10 September 2019, ***Poland v Commission*** (T-883/16, under appeal, [4] EU:T:2019:567), in which it upheld an action for annulment brought by the Republic of Poland against the Commission's decision approving the variation to the exemption regime for the OPAL pipeline proposed by the German regulatory authority [5] on the basis that the Commission had breached the principle of energy solidarity, as provided for in Article 194(1) TFEU, which it was examining for the first time. Likewise, by judgment of 12 December 2019, ***Conte v EUIPO (CANNABIS STORE AMSTERDAM)*** (T-683/18, EU:T:2019:855), the General Court dismissed the action brought against the decision of a Board of Appeal of the European Union Intellectual Property Office (EUIPO) which had refused to register the trade mark CANNABIS STORE AMSTERDAM on the basis that it was contrary to public policy. The General Court had never previously analysed a trade mark that could be understood as referring to an illegal narcotic substance in the context of Article 7(1)(f) of Regulation 2017/1001. [6] In addition, on 20 September 2019, in the judgment in ***BASF Grenzach v ECHA*** (T-125/17, EU:T:2019:638), the General Court delivered a judgment shedding new light on the task and powers of the Board of Appeal of the European Chemicals Agency (ECHA). Specifically, the General Court determined the scope and intensity of the review conducted by that board in the context of an action brought before it against a decision of the ECHA requesting additional information concerning the evaluation of the substance triclosan in application of Regulation (EC) No 1907/2006. [7] Lastly, reference should also be made to the judgment of 8 May 2019, ***Stemcor London and Samac Steel Supplies v Commission*** (T-749/16, EU:T:2019:310), in which the General Court dismissed an action seeking annulment of Implementing Regulation (EU) 2016/1329, [8] which provides for the retroactive collection of definitive anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation. In that judgment, the General Court ruled for the first time

3| Case C-872/19 P, ***Venezuela v Council.***

4| Case C-848/19 P, ***Germany v Poland***.

5| Commission Decision C(2016) 6950 final of 28 October 2016 on the review of the conditions for exemption of the OPAL pipeline, granted under Directive 2003/55/EC, from the rules on third party access and tariff regulation.

6| Article 7(1)(f) of 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) provides that trade marks which are contrary to public policy or to accepted principles of morality are not to be registered.

7| 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).

8| Commission Implementing Regulation (EU) 2016/1329 of 29 July 2016 levying the definitive anti-dumping duty on the registered imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation (OJ 2016 L 210, p. 27).

on the mechanism established in Article 10(4) of the basic regulation on anti-dumping, [9] which allows the Commission, under certain conditions, to levy retroactively an anti-dumping duty on products which were entered for consumption no more than 90 days prior to the date of application of provisional measures (but not prior to the initiation of the investigation).

Finally, the General Court resolved the so-called 'tax rulings' cases. In the judgment of 14 February 2019, ***Belgium and Magnetrol International v Commission*** (T-131/16 and T-263/16, under appeal, [10] EU:T:2019:91), it annulled, in the context of an action brought under Article 263 TFEU, Decision 2016/1699 in which the Commission declared the excess profit exemption scheme for Belgian entities of multinational corporate groups applied by Belgium since 2004 to be State aid that was unlawful and incompatible with the internal market and ordered recovery of the aid granted. [11] By contrast, in the judgment of 24 September 2019, ***Luxembourg and Fiat Chrysler Finance Europe v Commission*** (T-755/15 and T-759/15, EU:T:2019:670), the General Court dismissed as unfounded actions for annulment brought by the Grand Duchy of Luxembourg and by the company Fiat Chrysler Finance Europe against the Commission's decision classifying as State aid a tax ruling issued by the Luxembourg tax authorities to the company Fiat Chrysler Finance Europe. [12]

I. Judicial proceedings

1. Concept of a measure against which an action may be brought

In the order of 15 March 2019, ***Silgan Closures and Silgan Holdings* v *Commission*** (T-410/18, under appeal, [13] EU:T:2019:166), the Court dismissed the action for annulment of the Commission's decision to initiate, in accordance with Article 2(1) of Regulation No 773/2004, [14] a proceeding under Article 101 TFEU against several companies active in the metal packaging sector, including the applicants. The Court upheld the plea of inadmissibility raised by the Commission and ruled that the contested decision was a preparatory act which did not produce legal effects vis-à-vis the applicants for the purposes of Article 263 TFEU.

The Court, first of all, recalled that the effects and legal character of the contested decision must be determined in the light of the purpose of that decision in the context of the procedure resulting in a decision pursuant to Chapter III of Regulation No 1/2003. [15]

9| Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

10| Case C-337/19 P, ***Commission v Belgium and Magnetrol International***.

11| Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61).

12| Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1).

13| Case C-418/19 P, ***Silgan Closures and Silgan Holdings* v *Commission***.

14| 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).

15| 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).

Regarding, more specifically, the consequence provided for in Article 11(6) of Regulation No 1/2003 — that the initiation of the proceeding referred to in the contested decision relieves the competition authorities of the Member States of their competence to apply Article 101 TFEU in respect of the acts that are the subject of that proceeding — the Court concluded that that consequence does not adversely affect the applicants' interests, but has the effect of protecting them from parallel proceedings brought by those authorities.

The Court found that that holds true not only when no national authority has opened a relevant proceeding, but also, a fortiori, when such an authority has initiated such a proceeding and is relieved of its competence by virtue of Article 11(6) of Regulation No 1/2003. While a decision to initiate a proceeding under Article 101 TFEU does not affect the legal position of the undertaking concerned when it is not, until that point, the subject of any other proceeding, this is particularly the case when a proceeding has already been initiated against the undertaking in question in an investigation opened by a national authority.

According to the Court, the applicants therefore incorrectly rely on Articles 104 and 105 TFEU, which provide for a certain number of interactions between the Commission's competence and that of the Member States regarding the implementation, inter alia, of Article 101 TFEU. Those provisions concern only potential cases which are not covered by a regulation implementing Article 101 TFEU, adopted on the basis of Article 103 TFEU, such as Regulation No 1/2003.

The Court noted that there is nothing to prevent the applicants from requesting that the Commission notice on immunity from fines and reduction of fines in cartel cases be applied to them. Moreover, in the case of a cartel the anticompetitive effects of which are liable to manifest themselves in several Member States and, consequently, may give rise to the intervention of various national competition authorities, as well as the Commission, it is in the interest of an undertaking which wishes to benefit from the leniency system to submit applications for immunity, not only to the national authorities potentially competent to apply Article 101 TFEU, but also to the Commission.

In such circumstances, it therefore falls to the undertaking concerned wishing to benefit from such a programme to undertake the necessary steps so that, if the Commission were to exercise its competence under Regulation No 1/2003, the potential leniency advantages to that undertaking would be affected as little as possible, or even not at all.

Furthermore, the Court ruled that the interruption of the limitation period brought about by the adoption of the contested decision amounted to no more than the ordinary effects of a procedural step affecting exclusively the procedural, and not the legal, position of the undertaking concerned by the investigation. That assessment relating to the purely procedural nature of those effects is valid not only in the light of the interruption of the limitation period laid down in Article 25 of Regulation No 1/2003, but also in the light of the interruption of the limitation period in respect of the powers of the national authorities to impose any penalties that may be provided for by national law.

In the case that gave rise to the order of 6 May 2019, ***ABLV Bank* v *ECB*** (T-281/18, under appeal, [16] EU:T:2019:296), an application had been made to the Court for annulment of the decisions of the ECB declaring that the applicant and its subsidiary, ABLV Bank Luxembourg SA, were failing or were likely to fail within the meaning of Article 18(1) of Regulation No 806/2014. [17] In the course of those proceedings, the ECB raised two pleas of inadmissibility. In the first plea of inadmissibility, the ECB argued, in essence, that an assessment concerning

16| Case C-551/19 P, ***ABLV Bank* v *ECB***.

17| Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

whether an entity is failing or is likely to fail ('a FOLTF assessment') was a preparatory measure that did not contain any obligations and that that regulation did not envisage the possibility of bringing an action for annulment of a FOLTF assessment. In addition, it claimed that Article 86(2) of that regulation expressly established that decisions of the Single Resolution Board (SRB) may be the subject of such an action. In its second plea of inadmissibility, the ECB claimed that the applicant was not directly concerned by the FOLTF assessments because, first, those assessments did not directly affect its legal situation and, secondly, those assessments left a wide margin of discretion to the implementing authorities.

As regards the first plea of inadmissibility, the Court noted, first of all, its settled case-law according to which a natural or legal person may challenge only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his or her legal position. In the case of acts adopted by a procedure involving several stages of an internal procedure, in principle an act is open to challenge only if it is a measure which definitively lays down the position of the institution on the conclusion of that procedure, and not a provisional measure that is intended to pave the way for the final decision, and the illegality of which could reasonably be raised in an action brought against it. By contrast, an intermediate measure is not capable of forming the subject matter of an action if it is established that the illegality attaching to that measure can be relied on in support of an action against the final decision for which it represents a preparatory step. In such circumstances, the action brought against the decision terminating the procedure will provide sufficient judicial protection.

The Court then pointed out that the contested acts contain a FOLTF assessment issued by the ECB and that the latter had no decision-making power within the framework for the adoption of a resolution scheme. According to recital 26 of Regulation No 806/2014, while the ECB and the SRB must be able to assess whether a credit institution is failing or is likely to fail, the SRB has the exclusive power to assess the conditions required for a resolution and to adopt a resolution scheme if it considers that all the conditions are met. Further, the Court concluded that it follows expressly from Article 18(1) of that regulation that it was for the SRB to assess whether the three conditions set out in that provision were met. While the ECB did have the power to send an assessment with regard to the first condition, namely whether the entity was failing or was likely to fail, this nevertheless constitutes a mere assessment, which did not in any way bind the SRB.

Finally, according to the Court, the contested acts must be considered to be preparatory measures in the procedure, which are designed to allow the SRB to take a decision regarding the resolution of the banks in question, and cannot, for that reason, form the subject of an action for annulment. They do not change the legal situation of the applicant. They set out a factual assessment carried out by the ECB as to whether the applicant and its subsidiary are failing or are likely to fail, which is in no way binding, but which constitutes the basis for the adoption by the SRB of resolution schemes or decisions establishing that resolution is not in the public interest. Thus, the contested acts are not capable of being challenged under Article 263 TFEU, and the Court must therefore dismiss the action in its entirety as inadmissible, without there being any need to examine the second plea of inadmissibility raised by the ECB.

In the order in ***RATP* v *Commission*** (T-422/18, EU:T:2019:339), the Court dismissed the action for annulment of an initial decision by the Commission to grant access to documents as inadmissible on the ground that the contested decision had been withdrawn and replaced before the action was brought.

On 5 March 2018, the Directorate-General for Mobility and Transport of the Commission granted partial access to the author of an initial application seeking access to letters that the Chief Executive Officer of the Régie autonome des transports parisiens (RATP) had addressed to the Commission. Following a confirmatory application for access, the Secretary-General of the Commission adopted, on 7 June 2018, a decision in which he refused to disclose any of the documents at issue.

After the RATP became aware of the initial application for access and of the fact that a redacted version of the documents at issue had been disclosed to the applicant, it brought, on 6 July 2018, an action for the annulment of the initial decision to grant partial access to those documents.

The Court held that since the contested decision merely constituted an initial position on the part of the Commission, which has been entirely replaced by the decision of 7 June 2018, it is that latter decision that closed the proceedings and thus constitutes a decision. Therefore, at the time when the action was brought, the decision of 7 June 2018 had already replaced the contested decision and had removed it from the EU legal order, with the result that it no longer had any effect. As a result, the action was devoid of purpose on the date on which it was brought and had to be declared inadmissible.

Furthermore, the applicant did not have an interest in bringing proceedings, since the annulment of the contested decision would not reverse the effects of the disclosure of the documents at issue.

The Court's decision to dismiss as inadmissible the action for annulment of the contested decision for lack of purpose does not, however, alter the fact that the applicant may bring an action for damages.

2. *Locus standi*

In the order in ***Associazione GranoSalus* v *Commission*** (T-125/18, under appeal, [18] EU:T:2019:92), made on 14 February 2019, the Court dismissed an application seeking annulment of Implementing Regulation 2017/2324. [19]

The background to that case is the renewal by the European Commission of the approval of glyphosate, an active substance used, in particular, as a herbicide. The applicant, an association of wheat producers and consumers, together with their protection associations, asked the Court to annul Implementing Regulation 2017/2324 and to order a measure of inquiry seeking the production of the passages of the European Food Safety Agency (EFSA) report in which the studies on the potential effects of glyphosate on human health are re-examined, in order to compare them with other documents relating to the subject at issue.

As regards, first, the question whether the applicant could prove an interest of its own, the Court held that as it had not mentioned playing a role in the drafting of Implementing Regulation 2017/2324 or having specific rights in the procedure which had led to the adoption of that act, the applicant did not have such an interest which would have entitled it to bring an action for annulment in its name before the Court.

As regards, next, the *locus standi* of the members of the applicant, the Court held that, in that case, the applicant's members could not be regarded as addressees of Implementing Regulation 2017/2324, since they were not designated in that act as addressees. The Court considered, with regard to whether some of the applicant's members were individually affected by that act, by reason of their objective status as consumers or citizens of the EU, that that act affected the applicant's members by reason of their objective status as consumers, citizens of the EU or wheat producers in the same way as any other consumer, citizen of the EU or wheat producer who was actually or potentially in the same situation. As regards the characterisation of Implementing Regulation 2017/2324 as a regulatory act which does not entail implementing measures, the

18| Case C-313/19 P, ***Associazione GranoSalus* v *Commission***.

19| Commission Implementing Regulation (EU) 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2017 L 333, p. 10).

Court observed that the assessment of glyphosate was carried out in two stages. In the first stage, the substance is submitted to the Commission for approval. In the second stage, each Member State authorises the placing on the market of products containing that substance. The same applies to the renewal of the approval of the substance. As a result of this procedure, the effects of Implementing Regulation 2017/2324 are felt by the renewal of marketing authorisations issued by the national authorities, which constitute, therefore, implementing measures.

In the judgment in ***Air France* v *Commission*** (T-894/16, EU:T:2019:508), delivered on 11 July 2019, the Court dismissed as inadmissible the action brought by the airline Air France for annulment of a State aid decision adopted by the Commission concerning measures implemented by French authorities in favour of Marseille Provence Airport and airlines using that airport. [20]

Marseille Provence Airport is one of the largest airports in France. In 2004, with a view to revitalising its traffic and redirecting its development towards European destinations, the operator of that airport decided to set up, next to the main terminal, a new terminal for 'low-cost' flights. In order to finance the construction of that new terminal, the operator, inter alia, received an investment subsidy from the French State. Specific rules providing for reduced passenger charges were, furthermore, implemented for the new terminal. Finally, an agreement to purchase advertising space was concluded for a renewable five-year period in order to publicise Marseilles as a destination with a view to attracting high passenger numbers.

After examining those various measures in the light of State aid rules, the Commission concluded that Marseille Provence Airport had benefited from investment aid that was compatible with the internal market by virtue of Article 107(3)(c) TFEU. As regards the reduced charges applicable to the new terminal for 'low-cost' flights and the agreement to purchase advertising space, the Commission, however, concluded that there was no State aid within the meaning of Article 107(1) TFEU. That Commission decision was the subject of an action for annulment brought by Air France, which complained, inter alia, that 'low-cost' airlines, such as Ryanair, gained a competitive advantage by using the new terminal dedicated to that type of flight.

However, the Court rejected Air France's action as inadmissible, on the ground that it did not have standing to bring proceedings under the fourth paragraph of Article 263 TFEU.

In that regard, the Court pointed out, first, that, under that provision, an applicant, such as Air France, had to satisfy the dual requirement of being directly and individually concerned by the contested decision. In accordance with settled case-law, Air France's individual concern could, furthermore, be confirmed only if it were in competition with the beneficiary of the aid measures which form the subject matter of the decision contested before the Court and if its market position had been substantially affected by those measures.

In the light of those principles, the Court then noted that the investment subsidy allocated for the financing of the construction of the new terminal at Marseille Provence Airport had been granted solely to the operator of that airport, which was the sole beneficiary. Since there was no competitive relationship between that operator and Air France, the latter was, consequently, not individually concerned by the Commission decision declaring that subsidy compatible with the internal market.

Finally, as regards the reduced charges applicable to the new terminal for 'low-cost' flights and the agreement to purchase advertising space, the Court stated that the relevant market on which the effect of those measures was to be examined comprised all the routes operated from and to that airport, irrespective of the terminal used. Thus, it was for Air France to show, as the applicant, that its competitive position on that market was

20| Commission Decision (EU) 2016/1698 of 20 February 2014 concerning measures SA.22932 (11/C) (ex NN 37/07) implemented by France in favour of Marseille Provence Airport and airlines using the airport (OJ 2016 L 260, p. 1).

substantially affected by the reduced charges and by the agreement to purchase advertising space. Even if those measures had directly affected the competitive position of Air France on the relevant market, given its competition with Ryanair, it had not adduced evidence to permit the view that such an effect was substantial. Its action therefore had to be dismissed as inadmissible in its entirety.

In the judgment in ***Venezuela* v *Council*** (T-65/18, under appeal, [21] EU:T:2019:649), delivered on 20 September 2019, the Court held that the action brought by the Bolivarian Republic of Venezuela ('Venezuela') for annulment of three acts adopted by the Council under the common foreign and security policy (CFSP) imposing restrictive measures in view of the situation in Venezuela was inadmissible. [22]

Having recalled that the fourth paragraph of Article 263 TFEU provides, inter alia, that a natural or legal person must be directly concerned by the decision which is the subject of an action for annulment in order for that action to be admissible, the Court observed that the provisions of the contested acts referred to in that case ('the contested provisions') lay down a prohibition on the sale or supply to any natural or legal person, entity or body in Venezuela of certain weapons, equipment and technology, and a prohibition on the provision of certain services to such natural or legal persons, entities or bodies in Venezuela. In that regard, the Court observed that the application of the abovementioned prohibitions is limited to the territory of the European Union, to natural persons who are nationals of a Member State and to legal persons constituted under the law of one of them, as well as to legal persons, entities and bodies in respect of any business done in whole or in part within the European Union. Finally, the Court noted that Venezuela is not, as a State, explicitly and specifically referred to in the contested provisions.

In addition, the Court considered that Venezuela cannot be treated in the same way as an operator usually carrying out an economic activity. As a State, Venezuela is required to exercise public authority prerogatives, in particular in the context of sovereign activities such as defence, police and surveillance tasks.

Furthermore, unlike an operator whose capacity is limited by its purpose, in its capacity as a State, Venezuela has a field of action that is characterised by extreme diversity. That very wide range of competences thus distinguishes it from an operator usually carrying out a specific economic activity. In that regard, the Court noted that the data produced before it by Venezuela, as compiled by Eurostat, which relate to the total value of the commercial transactions concerning the goods covered by the contested provisions, were not such as to show that, in purchasing the goods and services in question, Venezuela acted as an entity comparable to an economic operator active on the markets in question and not in the context of its sovereign activities. Nor does the fact that the contested provisions prohibit operators established in the European Union from having economic and financial relations with any natural or legal person, entity or body in Venezuela permit the conclusion that those provisions are of direct concern to Venezuela for the purposes of the fourth paragraph of Article 263 TFEU. Moreover, as the contested provisions do not directly prohibit Venezuela from purchasing and importing the equipment and services covered by those provisions and do not affect its ability to exercise its sovereign rights over the areas and property under its jurisdiction, the Court concluded that there was nothing to suggest that the Council's intention was to reduce the legal capacity of Venezuela, with the result that those provisions could not be regarded as directly affecting the applicant's legal situation.

21| Case C-872/19 P, ***Venezuela* v *Council***.

22| In that case, the applicant sought annulment of Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21), of Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation 2017/2063 (OJ 2018 L 276, p. 1) and of Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10).

Finally, as regards Venezuela's argument that, in the absence of *locus standi*, and in the absence of national implementing measures, it would be unable to bring proceedings before the courts of the Member States and would be deprived of all judicial protection, the Court recalled that, while the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU must indeed be interpreted in the light of the right to effective judicial protection, that right cannot, in any event, have the effect of setting aside those conditions, which are expressly laid down in the FEU Treaty.

In the light of the foregoing, the Court found that the action was inadmissible in its entirety, in so far as it was directed against the contested acts.

3. Time limits for bringing proceedings

In the case that gave rise to the order in ***Romania* v *Commission*** (T-530/18, under appeal, [23] EU:T:2019:269), made on 30 April 2019, Romania had brought an action before the Court for annulment in part of a Commission Implementing Decision excluding from European Union financing certain expenditure incurred by the Member States under European agricultural funds. [24] By that decision, the Commission had, inter alia, applied to Romania a financial correction of a sum of over EUR 90 million. That case allowed the Court to clarify the starting point of the period for instituting proceedings for the annulment of an act of individual relevance, such as a decision taken under the third subparagraph of Article 297(2) TFEU, where that act has been brought to the knowledge of its addressee by two different means. In that case, the contested decision was both notified to the Permanent Representation of Romania to the European Union on 14 June 2018 and published in the *Official Journal of the European Union* on 15 June 2018.

First of all, the Court recalled that, under the sixth paragraph of Article 263 TFEU, annulment proceedings must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. In addition, pursuant to Article 60 of the Rules of Procedure of the General Court, the procedural time limits are to be extended on account of distance by a single period of 10 days, and pursuant to Article 59 of the Rules of Procedure, where the time limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure in the Official Journal, that time limit is to be calculated from the end of the 14th day after such publication.

Next, the Court stated that the date to be taken into account for the purposes of determining the starting point of the period prescribed for instituting annulment proceedings is the date of publication in the Official Journal, when such publication, which is a precondition for the coming into force of the act, is provided for in the TFEU, and the date of notification in the other cases referred to in the third subparagraph of Article 297(2) TFEU, which include those involving decisions which specify those to whom they are addressed. Thus, as regards an act specifying those to whom it is addressed, only the text which is notified to those addressees is authentic, even if that act may also have been published in the Official Journal. In that case, in so far as the contested decision expressly designates Romania as an addressee, that decision took effect with regard to Romania by means of its notification. Further, the period prescribed for instituting proceedings began to run

23| Case C-498/19 P, ***Romania* v *Commission***.

24| Commission Implementing Decision (EU) 2018/873 of 13 June 2018 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2018 L 152, p. 29).

from the time of that notification and, Article 59 of the Rules of Procedure not being applicable, that period, including the extension on account of distance, expired on 24 August 2018. Therefore, the Court held that the action brought by Romania on 7 September 2018 was out of time and must be dismissed as inadmissible.

Finally, the Court observed that that conclusion could not be invalidated by the arguments put forward by the applicant.

In that regard, first, Romania claimed that, in the absence of an automatic correlation between the starting point of the time period prescribed for instituting annulment proceedings against a measure adopted by an institution and the time when that measure enters into force or takes legal effect, in that case, the date of publication of the contested decision in the Official Journal could be accepted as the starting point of that period, even if that decision had already produced effects with regard to Romania, as a result of its previous notification. The Court stated, inter alia, that those arguments were premissed on a confusion between the conditions relating to the admissibility of an action for annulment, referred to in Article 263 TFEU, and those relating to the validity of the act challenged by such an action.

Secondly, Romania relied on the existence of a long established practice on the part of the Commission to publish in the Official Journal decisions such as that at issue in that case, while also notifying them to their addressees. Romania claimed that, in those atypical circumstances, the starting point of the period for instituting proceedings must be the publication of those decisions. The Court stated that, even if such a practice exists, since the decision was previously notified, it is necessary to take into account that date, rather than the subsequent publication in the Official Journal, for the purposes of calculating the period for instituting proceedings. Further, the adoption of the sole criterion of notification as the starting point of the period for instituting annulment proceedings against acts which designate their addressees guarantees legal certainty and effective judicial protection, unlike in the case of a hybrid solution, where the addressee of an act who has been duly notified thereof must make further enquiries as to the publication of the act in the Official Journal, which, not being mandatory, is merely a possibility and thus uncertain.

Thirdly, as regards the argument that there are differences between the text published in the Official Journal and the notified text, which is alleged to be incomplete, the Court recalled that notification is the operation by which the author of a decision of individual relevance communicates the decision to the addressees and thus puts them in a position to take cognisance of its content and the grounds on which it was based. As they are small, those differences were not such as to prevent Romania from becoming acquainted, with sufficient clarity and precision, with the content of the contested decision and the grounds on which it was based. Therefore, they have no effect on the application of the period for instituting annulment proceedings.

4. Legal aid

In the order in ***OP* v *Commission*** (T-630/18 AJ, EU:T:2019:365), made on 23 May 2019, the Court dismissed the applicant's application under Article 147 of the Rules of Procedure of the General Court for legal aid, on account of insufficient information and supporting documents to make it possible to assess her financial situation.

As regards the assessment of the applicant's financial situation, Article 147(3) of the Rules of Procedure provides that the information and supporting documents accompanying the application for legal aid must make it possible to assess whether, in view of that situation, the applicant is wholly or partly unable to meet the costs involved in legal assistance and representation by a lawyer before the Court. In the Court's view, such an assessment necessarily requires that the applicant should provide information and documents with a date sufficiently close to the date on which the application was made for it to be possible to assess, objectively, the applicant's financial capacity to meet those costs.

Here, the Court found that, in accordance with the instructions set out in the legal aid application form, the applicant should have provided information concerning her financial resources in 2017, or even 2018.

In that regard, the Court held, first, that the documents provided in connection with a previous application for legal aid for 2016 could not be taken into account with regard to the relevant period. Moreover, the Court characterised as sketchy and ambiguous the applicant's statement in which she asserted that her needs would be covered through reimbursement of the costs she has incurred in connection with ongoing legal proceedings since revenue of that type is not the same as a financial resource that enables a person to meet their everyday needs. The Court noted that the applicant in her application for legal aid failed to specify the professional activity she seemed to have exercised during the relevant period. The Court stated that, in the absence of any explanation, it was incumbent on the applicant to explain the material and financial conditions under which she exercised that activity and to provide information and evidence making it possible to assess her current resources.

In that context, the Court held that it was not possible to identify the resources that enabled the applicant to support herself during the relevant period. In the light of those factors, the Court concluded that the applicant had not established to the requisite legal standard that, because of her financial situation, she was wholly or partly unable to meet the costs involved in legal assistance and representation by a lawyer in proceedings before the Court. In those circumstances, since the condition laid down in Article 146(1) of the Rules of Procedure is not met, the Court dismissed the application for legal aid, without ruling on whether the proposed action appears to be manifestly inadmissible or manifestly lacking any foundation in law.

In the judgment in ***Frank* v *Commission*** (T-478/16, EU:T:2019:399), delivered on 11 June 2019, the Court dismissed the action brought by Ms Regine Frank seeking the annulment of the Commission's decisions of 17 June 2016 and 16 September 2016 rejecting, respectively, implicitly and explicitly, the applicant's grant application for a research project.

Following a call for proposals under the Horizon 2020 framework programme, [25] Ms Regine Frank filed a grant application with the European Research Council Executive Agency (ERCEA) for a project relating to the transport of light in quasi-crystals and non-periodic structures. The applicant made that application on behalf of the Technische Universität Kaiserslautern (Kaiserslautern Technical University). However, that university stated to ERCEA that it was not available as a host institution for the project proposed by the applicant. The university also stated that the applicant had, without its authorisation, used for the 2016 call for proposals a commitment letter issued for the 2015 call for proposals. In the absence of a valid commitment letter, the grant application was rejected by ERCEA. The Commission confirmed that rejection, initially implicitly and subsequently in an explicit rejection decision.

In the first place, the Court was called upon to rule on the consequences of a decision by a lawyer no longer to represent an applicant benefiting from legal aid during the proceedings before the Court. In that case, by order of 16 February 2017, the Court had decided to grant the applicant legal aid and approved her choice of representative. However, on 5 March 2018, the applicant's representative informed the Registrar of the General Court that he no longer agreed to represent the applicant. Subsequently, the Court informed the applicant that she had to appoint a different lawyer to represent her at the hearing on 31 January 2019. By the day of the hearing, the applicant had not acted on that request by the Court. She then requested, in person, that Article 148(5) of the Rules of Procedure of the Court be applied, which lays down the conditions in which a lawyer can be appointed, at the initiative of the Registrar of the General Court, to represent a party before the Court.

25| Calls for proposals and related activities under the European Research Council (ERC) Work Programme 2016 under Horizon 2020 — the Framework Programme for Research and Innovation (2014-2020) (OJ 2015 C 253, p. 12).

In that regard, the Court held that, where the person concerned has proposed a lawyer himself or herself, this means, first, that if Article 148(5) of the Rules of Procedure is applied in order to replace that lawyer with another, a new legal aid application must be made in accordance with Article 147(2) and (3) of the Rules of Procedure. Secondly, a lawyer is to be replaced in that way under Article 148(5) of the Rules of Procedure only when it becomes necessary to do so owing to objective circumstances unconnected with the behaviour of and beyond the control of the person concerned, such as the death or retirement of the lawyer or where the lawyer has breached professional or ethical obligations. The fact that a lawyer declines to represent a party in proceedings on grounds of behaviour by that party that is likely drastically to constrain his or her duties as a representative cannot therefore be regarded as a valid reason capable of justifying the application of Article 148(5) of the Rules of Procedure.

In the second place, the Court dismissed as inadmissible the application for annulment of the Commission's implicit rejection decision. In that context, the Court held that the Commission's failure to respond is to be taken as a decision implicitly rejecting the administrative appeal, against which an action for annulment may be brought. However, before the action in that case was brought before the Court, the Commission adopted a decision explicitly rejecting the administrative appeal, thus withdrawing the implicit rejection decision.

In the third place, as regards the eligibility criteria for the grant application, the Court pointed out that, in the circumstances of that case, the applicant should have submitted a valid commitment letter from a host university for the purposes of the assessment of her grant application. Finally, the Court stated that the identity of the host institution can in fact be seen as an essential factor in the context of a grant application and, as such, cannot be replaced or added to without substantially changing that application. The applicant therefore cannot criticise ERCEA for not having allowed her to seek a new host institution.

II. Institutional law

In the judgment in ***RE* v *Commission*** (T-903/16, EU:T:2019:96), delivered on 14 February 2019, the Court ruled on an application by a Commission employee for annulment of a note rejecting a request for access to personal data. In that case, the applicant was the subject of an administrative investigation carried out by the Security Directorate of the Commission. [26] That directorate, by the contested note, rejected the applicant's request seeking, on the basis of Regulation No 45/2001, [27] access to his personal data. The Commission submitted inter alia, first, that that note was purely confirmatory of a previous refusal to grant access that had not been challenged by the applicant within the time limit for lodging an appeal and, secondly, that the applicant had no interest in bringing proceedings against that note since it related to personal data to which he had already had access.

As regards the admissibility of the claim for annulment, the Court, in the first place, held that, under Regulation No 45/2001, a person may, at any time, make a new request for access to personal data to which access has previously been refused. Such a request requires the institution concerned to examine whether the earlier refusal of access remains justified. Therefore, a fresh examination seeking to verify whether a previously adopted refusal to grant access to personal data remains justified leads to the adoption of an act which is not purely confirmatory of the earlier act, but constitutes an act that may be the subject of an action for

26| The Security Directorate of the Directorate-General for Human Resources and Security of the Commission.

27| 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).

annulment. First, it follows from Article 13(c) of Regulation No 45/2001, which allows the data subject to access his or her personal data 'at any time', that that person has a continuous and permanent right of access to those data. Secondly, the exemptions and restrictions laid down in Article 20(1) of Regulation No 45/2001 are applicable only in the period during which they remain necessary. Furthermore, in the context of the processing of personal data, the factual and legal situation of the data subject is, by its nature, liable to change over time, since the mere passage of time is capable of rendering the processing of data, which was initially lawful, unnecessary or even unlawful.

In the second place, the Court observed that there was no provision in Regulation No 45/2001 that requires the data subject to set out the reasons for, or to justify, his or her request for access to his or her personal data. It follows that, as regards access to personal data, an applicant may rely on the existence of substantial new facts justifying a new examination, even if he or she failed to refer to those facts in the request. In that case, since the reasons on which the earlier refusal to grant access were based were connected with the administrative investigation relating to the applicant, the Court concluded that the closure of the administrative investigation constituted a substantial new fact justifying the re-examination of the applicant's right of access to his or her personal data. That examination was all the more justified since the applicant had allowed a reasonable time (more than six months) to elapse before presenting the Security Directorate with a fresh request for access to his personal data.

In the third place, the Court concluded that, in the context of Regulation No 45/2001, the data subject has a continuous and permanent right of access to his or her personal data; that right enables him or her, among other things, to make a request for access to personal data, including where the data subject has already been able to access all or part of those data. In those circumstances, the annulment of the contested note, including in so far as it relates to personal data to which the applicant has already had access, may have legal consequences for the applicant and procure a benefit for him.

Having regard to those considerations, the Court held that the claim for annulment was admissible.

In the examination of the merits of the claim for annulment, the Court upheld the plea alleging a breach of the obligation to state reasons. As regards a new refusal that was required to be taken after a re-examination, the reference to earlier decisions cannot constitute sufficient reasoning. Therefore, the Court annulled the contested note, in so far as it rejected the applicant's request to be granted access to some of his personal data.

In the judgment in ***EPSU and Goudriaan* v *Commission*** (T-310/18, EU:T:2019:757), delivered on 24 October 2019, the Court dismissed an action for annulment challenging the Commission's decision refusing to submit to the Council a proposal for a decision implementing, at EU level, an agreement signed by the European social partners.

In December 2015, the social partners signed an agreement entitled 'General framework for informing and consulting civil servants and employees of central government administrations' ('the Agreement') on the basis of Article 155(1) TFEU. They then jointly requested the Commission to submit a proposal for the implementation of the Agreement at EU level by a decision of the Council adopted on the basis of Article 155(2) TFEU. However, in March 2018, the Commission informed the social partners of its refusal to submit such a proposal for a decision to the Council. The reasons for that refusal were, first, the specific nature of central government administrations, given that they exercise the powers of a public authority; secondly, the fact that provisions of national law concerning information and consultation of staff in that sector are already in place in many Member States; and, thirdly, the existence of significant differences between the Member States as to the definition and perimeters of those administrations, such that a decision of the Council implementing the Agreement would have a greater or lesser scope of application depending on the Member State in question.

The Court held, first of all, that the Commission's refusal decision was an act open to challenge. First, it could not be classified as a preparatory act and, secondly, a possible broad discretion did not preclude the admissibility of the action.

Next, the Court emphasised that, where the social partners have negotiated and concluded an agreement on the basis of Article 155(1) TFEU and the signatory parties submit a joint request for the implementation of that agreement at EU level by a decision of the Council adopted on the basis of Article 155(2) TFEU, the Commission is not required to give effect to that request and it is for that institution to determine whether it is appropriate for it to submit a proposal to that effect to the Council.

The Court added, in that regard, that the Commission must not only verify the strict legality of the clauses of that agreement, but also take into account the general interest of the European Union and, consequently, assess whether implementation of the agreement at EU level is appropriate, including by having regard to political, economic and social considerations.

Finally, the Court held that the Commission has a broad discretion and, in the event of a refusal, the decision taken by the Commission must undergo a limited review by the Court.

III. Competition rules applicable to undertakings

1. Developments in the area of Article 101 TFEU

In the judgment in ***Pometon* v *Commission*** (T-433/16, under appeal, [28] EU:T:2019:201), delivered on 28 March 2019, the Court, having annulled in part Decision C(2016) 3121 final of the European Commission relating to proceedings under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA), reviewed the amount of the fine imposed by that decision on the company Pometon SpA for having participated in a cartel consisting of agreements or concerted practices with four other undertakings, essentially designed to coordinate the prices of steel abrasives throughout the EEA. The contested decision had been adopted following a hybrid procedure staggered over time, in that the four other undertakings party to the cartel were covered by settlement decision C(2014) 2074 final, adopted on the basis of Articles 7 and 23 of Regulation No 1/2003, [29] whereas Pometon had decided to withdraw from the settlement procedure.

With regard to the complaint raised by Pometon that the Commission had already prejudged its guilt by making several references to its conduct in the settlement decision, the Court first of all observed that the administrative procedure relating to restrictive practices before the Commission is governed by Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter') and that the principle of the presumption of innocence laid down in Article 48(1) of the Charter also applies *mutatis mutandis* to the administrative procedures relating to compliance with EU competition rules, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties. Next, the Court stated that compliance with the duty of impartiality enshrined in Article 41 of the Charter requires the Commission, in a procedure that has acquired a hybrid nature, to draw up and state the reasons for the settlement decision, exercising all necessary drafting precautions to ensure that that decision, while not

28 | Case C-440/19 P, ***Pometon* v *Commission***.

29 | 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).

addressed to the undertaking which withdrew from the settlement procedure, does not undermine the body of procedural safeguards which it must enjoy in the subsequent adversarial procedure. Therefore, referring to the interpretation criteria developed by the European Court of Human Rights in its judgment of 27 February 2014, *Karaman v Germany*, the Court examined, first, whether in the settlement decision the drafting precautions accompanying the reference to some of the Pometon's conduct made it possible to avoid any suspicion that the Commission deliberately prejudged the guilt and liability of that undertaking and, secondly, whether the references to that conduct were necessary in order to establish the liability of the addressees of the settlement decision. In doing so, the Court found that the disputed references to Pometon's conduct cannot be regarded as evidence of either a lack of impartiality on the part of the Commission towards Pometon or a lack of respect for the presumption of innocence in the contested decision.

After outlining the rules relating to the burden of proof of an infringement of Article 101(1) TFEU and to the taking of evidence of such an infringement, the Court then confirmed that the Commission had proved, to the requisite legal standard, both Pometon's participation in a single and continuous infringement of Article 101(1) TFEU, comprising the different limbs of the cartel at issue, and its duration. All of the evidence examined by the Commission demonstrated that Pometon was fully aware not only of the essential characteristics of the cartel, which it did not dispute was a single and continuous infringement, but also of its geographic scope, and that it therefore intended to participate in that infringement. In the absence of the slightest evidence that Pometon had distanced itself from the cartel, the Commission had, in addition, proved to the requisite legal standard that that undertaking had not interrupted its participation in the single and continuous infringement at issue, even though it had no direct evidence of collusive contact for a period of around 16 months.

Finally, the Court examined the application for annulment of the contested decision or for a variation of the fine of EUR 6 197 000 imposed on Pometon. In that regard, Pometon claimed that the adaptation of the basic amount of the fine, which the Commission had determined under point 37 of the Guidelines on the method of setting fines, [30] was not sufficiently reasoned and that that adaptation did not comply with the principles of proportionality and equal treatment.

With regard to the annulment application, the Court found that the reasons for the contested decision did not provide sufficiently precise information on the calculation method used and the assessment criteria taken into account in order to differentiate, on the basis of each undertaking's liability, the reduction of the basic amount granted to Pometon from the reductions applied to the other parties to the cartel which agreed to settle. The Commission essentially referred, in general terms, to the existence of differences between the individual participation of Pometon and that of the other participants in the cartel, and also to the need to set the fine at a level that is proportionate to the infringement committed by that undertaking and which also achieves a sufficiently deterrent effect. Therefore, the Court found that the contested decision was vitiated by a breach of the obligation to state reasons as regards the exceptional reduction granted to Pometon under point 37 of the Guidelines and annulled Article 2 of that decision, which set the amount of the fine imposed on Pometon.

As regards the application for a variation of the amount of the fine, the Court stated that, following the explanations provided by the Commission in its pleadings, it was able to determine the calculation method and the criteria applied by the Commission, both in the contested decision and in the settlement decision, and therefore to assess, in the exercise of its unlimited jurisdiction, whether they were appropriate. In addition, it recalled that the Courts of the European Union may vary the contested decision, even without annulling it, so as to cancel, reduce or increase the fine imposed, the exercise of that jurisdiction entailing

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

the definitive transfer to those Courts of the power to impose penalties. It therefore fell to the Court to determine the appropriate amount of the fine, since the Court's discretion is limited only by the criteria relating to the gravity and the duration of the infringement, set out in Article 23(3) of Regulation No 1/2003, and the ceiling of 10% of the total turnover of the undertaking concerned in the preceding business year, subject to compliance with the principles of proportionality, the individualisation of penalties and equal treatment, and its duty to state reasons.

With regard to the criterion relating to the duration of Pometon's participation in the single and continuous infringement at issue, the Court, first of all, found that that condition had already been duly taken into account when the Commission set the basic amount of the fine, which was not challenged by Pometon. Next, as regards the application of the legal criterion of the gravity of the infringement, the Court observed that it had to determine the level of the adjustment of the basic amount of the fine that would be proportionate, in the light of the criteria which it deems appropriate, to the gravity of the infringement committed by Pometon and that would also have a sufficiently deterrent effect. In that regard, the Court took the view that it was appropriate to take into consideration, in the exercise of its unlimited jurisdiction, first, the individual liability of Pometon for participating in the cartel at issue; next, the capacity of that undertaking to undermine competition in the steel abrasives market by its unlawful conduct; and, finally, its size, by comparing, for each of those different factors, the individual liability and situation of Pometon with the individual liability and situation of the other parties to the cartel. In the circumstances of the case, those factors led the Court to grant Pometon an exceptional reduction of 75% of the basic amount of the fine adjusted on account of mitigating circumstances as determined in the contested decision, and thus to set the amount of the fine imposed on Pometon at EUR 3 873 375.

By its judgment in ***Recylex and Others* v *Commission*** (T-222/17, under appeal, [31] EU:T:2019:356), of 23 May 2019, the Court dismissed the action brought by Recylex SA, Fonderie et Manufacture de Métaux SA and Harz-Metall GmbH ('Recylex'), companies that are active in the production of recycled lead and other products, for a reduction of the fine imposed by the Commission in its decision [32] relating to an infringement of Article 101 TFEU. That infringement took the form of agreements or concerted practices between four groups of undertakings covering the territories of Belgium, Germany, France and the Netherlands. It consisted in the coordination of purchase prices for scrap lead-acid car batteries used for the production of recycled lead.

The administrative procedure which led to the contested decision had been initiated following an application for immunity by JCI, one of the groups of undertakings concerned. Eco-Bat, another group of undertakings, and finally Recylex had, in turn, applied for immunity or, failing that, for a reduction of the fine under the Commission's 2006 Leniency Notice. [33] JCI had then been granted immunity while Eco-Bat had been granted a 50% reduction of the fine on the ground that it had been the first undertaking to provide evidence of significant added value. Recylex, the second undertaking to produce such evidence, had been granted a reduction of 30%.

In that context, the Court was required to determine whether, where two undertakings have provided evidence of significant added value, the undertaking which provided that evidence second could take the place of the first undertaking, if it transpired that the latter's cooperation did not meet the requirements of point 12 of the 2006 Leniency Notice.

31| Case C-563/19 P, ***Recylex and Others* v *Commission***.

32| Commission Decision C(2017) 900 final of 8 February 2017 relating to a proceeding under Article 101 TFEU (Case AT.40018 — Car battery recycling).

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

In that regard, the Court stated that it is apparent in particular from the very logic of the 2006 Leniency Notice that the effect sought is to create a climate of uncertainty within cartels by encouraging those participating in them to report the cartels to the Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from fines by reporting the other participants in the infringement, thereby exposing them to the risk of being fined. In the context of that system, and according to the same logic, the undertakings that are quickest to provide their cooperation are supposed to benefit from greater reductions of the fines that would otherwise be imposed on them than those granted to the undertakings that are less quick to cooperate. The chronological order and the speed of the cooperation provided by the members of the cartel therefore constitute fundamental elements of the system put in place by the 2006 Leniency Notice.

In the judgment in ***Hitachi-LG Data Storage and Hitachi-LG Data Storage Korea* v *Commission*** (T-1/16, EU:T:2019:514), [34] delivered on 12 July 2019, the Court dismissed the application lodged by Hitachi-LG Data Storage, Inc. and its subsidiary Hitachi-LG Data Storage Korea, Inc. ('the applicants') seeking a reduction of the fine imposed on them by Commission Decision C(2015) 7135 final of 21 October 2015 [35] for an infringement of the competition rules in the sector of manufacture and supply of optical disk drives (ODDs).

Following an administrative investigation, opened in response to a complaint, the Commission concluded that 13 companies had participated in a cartel on the market for ODDs. In the contested decision, the Commission found that, at least from 23 June 2004 to 25 November 2008, the participants in that prohibited cartel had orchestrated their conduct with regard to procurement procedures organised by the computer manufacturers Dell and Hewlett Packard. According to the Commission, the companies involved had sought, through a network of parallel bilateral contacts, to ensure that the prices of ODD products remained at levels higher than they would have been in the absence of those bilateral contacts. The Commission therefore imposed a fine of EUR 37 121 000 on the applicants for infringing Article 101 TFEU and Article 53 of the EEA Agreement.

The applicants raised two pleas in law in support of their action for a reduction of the fine, alleging (i) that the Commission had breached the principle of good administration and the obligation to state reasons and (ii) that it had erred in law in not derogating from the general method set out in the Guidelines on the method for setting fines in order to reduce the amount of the fine imposed on them in the light of the particular characteristics of the case and the applicants' role in the market for ODDs. In their reply to the measures of organisation of procedure adopted by the Court, the applicants stated that they were requesting that the Court exercise its unlimited jurisdiction by reviewing the Commission's implicit decision to reject their request for a reduction of the amount of the fine and by reviewing the substance of that request.

In that regard, the Court first observed that the Treaty does not recognise the 'action under the Court's unlimited jurisdiction' as an autonomous remedy, which means that unlimited jurisdiction can be exercised by the Courts of the European Union only in the context of the review of acts of the institutions, more particularly of an action for annulment. Accordingly, the Court first of all established that the action comprised (i) a claim for annulment in part of the contested decision, in so far as the Commission had rejected the applicants' request for a reduction of the fine imposed on them, and (ii) a claim for variation of that decision asking the Court itself to uphold that request and, consequently, to reduce that amount.

34| See, also, on the same topic, judgments of 12 July 2019, ***Sony and Sony Electronics* v *Commission*** (T-762/15, EU:T:2019:515), and of 12 July 2019, ***Quanta Storage* v *Commission*** (T-772/15, EU:T:2019:519).

35| Commission Decision C(2015) 7135 final of 21 October 2015 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives).

Next, with regard to the first plea, the Court rejected the applicants' arguments that the Commission had breached its obligation to state reasons for its refusal to have recourse to the exception provided for in point 37 of the Guidelines on the method of setting fines, which permits the Commission to depart from the methodology set out in those Guidelines and which the applicants had requested it to apply. In that regard, the Court concluded that the Commission was required only to state the reasons, in the contested decision, relating to the methodology applied to calculate the amount of the fine and not the factors that it had not taken into account in that calculation and, in particular, the reasons for which it had not had recourse to the exception provided for in point 37 of the Guidelines.

The Court also dismissed the objections alleging breach of the principle of good administration. In particular, it confirmed that the Commission had been diligent during the administrative procedure since it had (i) heard the applicants and examined their observations before the Advisory Committee on Restrictive Practices and Dominant Positions delivered a written opinion on the preliminary draft decision and (ii) communicated to that committee the most important information for the calculation of the amount of the fine under Article 14(3) of Regulation No 1/2003.

Finally, with regard to the second plea in law, the Court observed that a reduction in the amount of a fine may be granted under point 37 of the Guidelines on the method for setting fines only in exceptional circumstances, where the particularities of a given case or the need to achieve deterrence in a particular case may justify the Commission departing from the methodology set out in those guidelines. In this respect, the Court held that none of the circumstances alleged by the applicants warranted such a reduction of the fine under the exception provided for in point 37 of the Guidelines.

In the judgment in ***Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea v Commission*** (T-8/16, under appeal, [36] EU:T:2019:522), delivered on 12 July 2019, the Court dismissed the application by Toshiba Samsung Storage Technology Corp. and its subsidiary Toshiba Samsung Storage Technology Korea Corp. ('the applicants') seeking, principally, annulment of Commission Decision C(2015) 7135 final of 21 October 2015 or, in the alternative, a reduction of the fine imposed on them by that decision for infringement of the competition rules in the sector for the manufacture and supply of ODDs.

Following an administrative investigation, opened in response to a complaint, the Commission concluded that 13 companies had participated in a cartel on the market for ODDs. In the contested decision, the Commission found that, at least from 23 June 2004 to 25 November 2008, the participants in that prohibited cartel had orchestrated their conduct with regard to procurement procedures organised by the computer manufacturers Dell and Hewlett Packard. According to the Commission, the companies involved had sought, through a network of parallel bilateral contacts, to ensure that the prices of ODD products remained at levels higher than they would have been in the absence of those bilateral contacts. The Commission therefore imposed a fine of EUR 41 304 000 on the applicants for infringing Article 101 TFEU and Article 53 of the EEA Agreement.

The applicants raised several pleas in law, alleging in particular breach of essential procedural requirements and of the rights of the defence and also errors of fact and of law in the determination of the geographic scope of the infringement and in the finding of a single and continuous infringement.

As regards the concept of a single and continuous infringement, the Court observed that this presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim. It is therefore apparent from the very concept of a single and continuous infringement that such an infringement presupposes a 'complex of practices or infringements'. Accordingly, the applicants could not claim that the

36| Case C-700/19 P, ***Toshiba Samsung Storage Technology and Toshiba Samsung Storage Technology Korea v Commission***.

Commission had included an additional legal characterisation in the contested decision by finding, in addition to the single and continuous infringement identified in the statement of objections, that that infringement was composed of several 'separate infringements', given that those various instances of anticompetitive conduct were precisely what constituted that single infringement.

In addition, the Court concluded that the fact that certain characteristics of the cartel had evolved over time, such as the inclusion of new participants, a reduction in their number or the expansion of the cartel to include Hewlett Packard also, could not preclude the Commission from classifying that cartel as a single and continuous infringement, given that the objective of the cartel had remained the same.

By its judgment in ***Printeos and Others* v *Commission*** (T-466/17, EU:T:2019:671), of 24 September 2019, the Court dismissed the action brought by a number of companies dealing in stock/catalogue and special printed envelopes ('the applicants') seeking, primarily, the annulment in part of a decision of the European Commission [37] imposing on them a fine for infringement of Article 101 TFEU ('the contested decision'). That infringement took the form of agreements or concerted practices between the applicants and four other groups of undertakings in the territories of several European countries.

The contested decision was adopted following the annulment in part, [38] for failure to state adequate reasons, of a previous Commission decision [39] imposing on the applicants a fine of EUR 4 729 000, adopted under a settlement procedure ('the original decision'). Following that judgment, the Commission adopted the contested decision, amending the initial decision while imposing a fine of the same amount.

The Court held, in the first place, that, where the annulment of an EU act was based on a procedural defect, such as a failure to state adequate reasons, and the Courts of the European Union had not used their unlimited jurisdiction to vary the fine imposed, the Commission could adopt a new decision imposing a fine on the applicants without exposing itself to the complaints in the plea alleging breach of the principles of legal certainty, protection of legitimate expectations and *ne bis in idem*. In that regard, the Court stated that the application of the principle *ne bis in idem* presupposed that a ruling had been given on the question whether the infringement had in fact taken place or that the legality of the assessment thereof had been reviewed. Consequently, the principle *ne bis in idem* did not in itself preclude the resumption of proceedings in respect of the same anticompetitive conduct where the first decision had been annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, since the annulment decision cannot in such circumstances be regarded as an 'acquittal' in the sense given to that expression in penal matters. The Court concluded that this approach also applied in the event of annulment for failure to state adequate reasons of a decision imposing a fine, when that decision had been adopted under a settlement procedure.

As regards, in the second place, the plea alleging breach of the principle of equality of treatment in determining the amount of the fine, the Court concluded that, for the purposes of reviewing compliance with that principle, it was necessary to draw a distinction between, first, the requirement to determine in a fair way the basic amount of the fines to be imposed on the undertakings concerned and, secondly, the application with respect to those undertakings of the 10% ceiling pursuant to the second subparagraph of Article 23(2) of Regulation No 1/2003, which is likely to vary according to their respective total turnovers. Indeed, although the Commission

37| Commission Decision C(2017) 4112 final of 16 June 2017 amending Commission Decision C(2014) 9295 final of 10 December 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (AT.39780 — Envelopes).

38| Judgment of the Court of 13 December 2016, ***Printeos and Others* v *Commission*** (T-95/15, EU:T:2016:722).

39| Commission Decision C(2014) 9295 final of 10 December 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement(AT.39780 — Envelopes).

could reasonably choose a method of calculating the basic amount based on the value of sales made over the course of a full year covered by the infringement for the purpose of determining the economic importance of the infringement and the relative weight of each undertaking participating in it, it was required, in that context, to observe the principle of equal treatment. By contrast, application of the 10% ceiling for the purpose of determining the final amount of the fines was, in principle, not dependent on the economic importance of the infringement, or on the relative weight of each participating undertaking or the gravity or duration of the infringement committed by that undertaking, but was purely automatic in nature, being linked exclusively to its total turnover, and therefore the application of that ceiling was *ipso facto* consistent with the principle of equal treatment.

However, the Court held that the Commission was mistaken in its analysis that the application of the 10% ceiling at an intermediate stage of the calculation of the fines to be imposed *ipso facto* produced results which were consistent with the principle of equal treatment. In that regard, the Court noted that, in adopting such an approach, which did not fall within the scope of Article 23(2) of Regulation No 1/2003, the Commission was using its discretion under paragraph 37 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Following an examination of the adjustment of the basic amounts made in accordance with that approach in relation to the various groups of undertakings to which the contested decision was addressed, the Court concluded that one of those groups had benefited, without objective justification, from more favourable treatment. However, the Court held that the applicants could not rely, to their own advantage, on the unlawful act resulting from such inequality of treatment.

As regards the parallel application of Article 101 TFEU and national competition law, in this case regarding the effects of the applicants' conduct on Spanish territory, which was the subject matter of the third plea in law, alleging breach of the principle of fairness, the Court noted at the outset that the contested decision did not relate to that territory and that the Spanish competition authority had penalised conduct which occurred during a different period. The Court held that, in such circumstances, a comprehensive and sufficiently deterrent penalty for the applicants' anticompetitive conduct necessarily involved taking into account all the effects of that conduct on those different territories, including over time, and that the Commission could not therefore be criticised for not having reduced, on the same grounds, the fine imposed on the applicants in the initial and contested decisions.

2. Developments in the area of mergers

In the judgment in ***KPN* v *Commission*** (T-370/17, EU:T:2019:354), delivered on 23 May 2019, the Court ruled on European Commission Decision C(2016) 5165 final of 3 August 2016 declaring the concentration involving the acquisition by Vodafone Group and Liberty Global Europe Holding ('the notifying parties') of joint control of a full-function joint venture in the Netherlands telecommunications sector to be compatible with the internal market and the Agreement on the European Economic Area. The applicant, a Netherlands undertaking competing with the notifying parties, active inter alia in the sector of cable networks for television services in the Netherlands, challenged that decision. Its action concerned in particular the existence of vertical competition problems throughout the distribution chain for television content.

The Court first ruled on a plea alleging a manifest error of assessment regarding the definition of the relevant market. In that regard, the Court recalled that the question whether two products or services are part of the same market involves determining whether they are regarded as interchangeable or substitutable by reason of their characteristics, their prices and intended use, primarily from the customer's point of view. In this instance, the Court found that the Commission had not made a manifest error of assessment by not further segmenting the market for the wholesale supply and acquisition of premium pay TV channels, in view of the substitutability of those channels from the point of view of retail television service providers, because of a similar customer base and content of those channels.

Next, the Court examined the existence of a manifest error of assessment regarding the vertical effects of the merger, in particular the input foreclosure effect concerning the Ziggo Sport Totaal channel on the market for the wholesale supply and acquisition of premium pay TV sports channels. The Court first recalled that, according to the Guidelines on non-horizontal mergers, input foreclosure arises where, post-merger, the new entity would be likely to restrict access to the goods or services that it would have otherwise supplied had the merger not taken place. In assessing the likelihood of an anticompetitive foreclosure scenario, it is for the Commission to examine, first, whether the merged entity would have, post-merger, the ability to foreclose access to inputs substantially; secondly, whether it would have the incentive to do so; and, thirdly, whether a foreclosure strategy would have a significant detrimental effect on competition downstream. Those three conditions are cumulative, so that the absence of any of them is sufficient to rule out the likelihood of anticompetitive input foreclosure. The first of those conditions can be fulfilled only where the vertically integrated firm resulting from the merger has a significant degree of market power in the upstream market, namely, the market for the wholesale supply of premium pay TV sports channels in that case. The Court held, however, that the Commission had not made a manifest error of assessment in concluding in the contested decision that the merged entity would not have the ability to engage in an input foreclosure strategy since its relevant market share was less than 10%.

IV. State aid

1. Admissibility

In its judgments in ***NeXovation* v *Commission*** (T-353/15, under appeal, [40] EU:T:2019:434) and ***Ja zum Nürburgring* v *Commission*** (T-373/15, under appeal, [41] EU:T:2019:432), delivered on 19 June 2019, the First Chamber, Extended Composition, of the Court dismissed two actions seeking annulment in part of a decision of the European Commission on State aid in favour of the Nürburgring complex in Germany for the construction of a leisure park, hotels and restaurants and for the organisation of motor races. [42]

Between 2002 and 2012, the public undertakings owning the Nürburgring complex ('the sellers') were the beneficiaries of aid, mainly from the German *Land* Rhineland-Palatinate. That aid was the subject matter of a formal investigation procedure under Article 108(2) TFEU, initiated by the Commission in 2012. That same year, the sellers were found to be insolvent and it was decided to proceed to the sale of their assets. A tender process was launched, leading to the sale of those assets to Capricorn Nürburgring Besitzgesellschaft GmbH ('Capricorn').

A tenderer, namely NeXovation, Inc., and a German motorsport association, namely Ja zum Nürburgring eV, filed complaints with the Commission on the ground that the tender process had not been transparent or non-discriminatory and that it had not achieved a market price. By its decision, the Commission found that certain support measures in favour of the sellers were unlawful and incompatible with the internal market. It also decided that any potential recovery of the aid would not concern Capricorn and that the sale of the

40| Case C-665/19 P, ***NeXovation* v *Commission***.

41| Case C-647/19 P, ***Ja zum Nürburgring* v *Commission***.

42| Commission Decision (EU) 2016/151 of 1 October 2014 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring (OJ 2016 L 34, p. 1).

Nürburgring assets to Capricorn did not constitute State aid. The Commission found that the tender process was transparent and non-discriminatory. NeXovation, Inc. and Ja zum Nürburgring eV brought an action against the Commission decision.

First of all, as regards the decision on the economic continuity between the sellers and Capricorn, the Court recalled that a decision on economic continuity must be regarded as a decision which is 'related and complementary' to the final decision preceding it on the aid concerned. In so far as the contested decision is a decision which is 'related and complementary' to the decision on the aid to the sellers, taken after the formal investigation procedure, the applicants may claim to be individually concerned by that decision only if it distinguishes them individually just as in the case of the person to whom that decision is addressed, which was not the case here.

Next, as regards the decision on the sale of the assets to Capricorn, a decision adopted after the preliminary stage of the procedure for reviewing aid, rather than after a formal investigation procedure, the Court found that, in principle, any undertaking invoking the existence of an actual or potential competitive relationship may be regarded as having the status of interested party for the purposes of Article 108(2) TFEU. Therefore the Court concluded, with regard to that decision, that the applicants have standing to bring an action, as interested parties, and maintain a legal interest in bringing an action, arising from the safeguard of the procedural rights available to them, in that same capacity, under Article 108(2) TFEU.

Finally, the Court recalled that where an undertaking is sold by way of an open, transparent and unconditional tender process, it can be presumed that the market price corresponds to the highest offer, provided that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified.

2. Concept of State aid

a. Existence of an economic advantage

By the judgment in ***Fútbol Club Barcelona* v *Commission*** (T-865/16, under appeal, [43] EU:T:2019:113), [44] delivered on 26 February 2019, the Court annulled Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs on the ground that the Commission had not established, to the requisite legal standard, that the disputed measure conferred an economic advantage on its beneficiaries.

The contested decision related to a Spanish law adopted in 1990 which required all Spanish professional sport clubs to convert into public limited sports companies, with the exception of those professional sport clubs that had achieved a positive financial balance during the financial years preceding the adoption of that law. The applicant, Fútbol Club Barcelona, and three other professional football clubs that fell within the scope of that exception had chosen to continue operating in the form of non-profit legal persons and enjoyed, in that capacity, a special rate of income tax. As that specific tax rate remained, until 2016, below the rate applicable to public limited sports companies, the Commission took the view, by the contested decision, that

43| Case C-362/19 P, ***Commission* v *Fútbol Club Barcelona***.

44| See, also, on the same topic, judgments of 20 March 2019, ***Hércules Club de Fútbol* v *Commission*** (T-766/16, EU:T:2019:173); of 22 May 2019, ***Real Madrid Club de Fútbol* v *Commission*** (T-791/16, EU:T:2019:346); and of 26 February 2019, ***Athletic Club* v *Commission*** (T-679/16, not published, EU:T:2019:112).

that legislation, by introducing a preferential corporate tax rate for the four clubs concerned, constituted unlawful and incompatible State aid and ordered the Kingdom of Spain to discontinue it and to recover the individual aid provided to the beneficiaries of that scheme.

In its judgment, the Court first of all rejected the plea alleging infringement of Article 49 TFEU, in that the Commission should, according to the applicant, have found that the obligation imposed on professional sport clubs to convert into public limited sports companies was contrary to that article. In that regard, the Court observed that, in State aid procedures, except in the situation where the incompatibility of the aid measure at issue arises from the infringement of Article 49 TFEU, the Commission does not have the power to find that there has been an independent infringement of Article 49 TFEU and to draw the appropriate legal conclusions.

Next, the Court examined the plea alleging that the Commission had made errors during its examination of the advantage conferred by the legislation on the four clubs concerned. After observing that the Commission has a duty to consider complex measures in their entirety in order to determine whether they confer on recipient undertakings an economic advantage which they would not have obtained under normal market conditions, the Court noted that that also applies in relation to the assessment of an aid scheme. In that regard, although, in the case of an aid scheme, the Commission may confine itself to examining the general and abstract characteristics of the scheme in question, without being required to examine each particular case in which it applies, in order to determine whether that scheme comprises aid elements, that assessment must nevertheless include an assessment of the various implications, both advantageous and disadvantageous for its beneficiaries, of the scheme at issue, when the nature of the alleged advantage is unclear as a result of the inherent characteristics of the scheme.

Since the national legislation that is the subject of the contested decision amounts to a tightening-up, within the Spanish professional sports sector, of the scope *ratione personae* of the tax regime for non-profit entities, the Court thus examined whether, in the contested decision, the Commission had established to the requisite legal standard that the tax regime for non-profit entities, considered as a whole, was liable to place its beneficiaries in a more advantageous position than if they had had to operate in the form of public limited sports companies. According to the Court, that was not the case. In fact, after stating that, at the time the contested decision was adopted, the Commission had at its disposal information highlighting the specific nature of the tax regime for non-profit entities as regards the extent of the tax deduction for the reinvestment of extraordinary profits at a level less beneficial than that applicable to public limited sports companies, the Court concluded that the arguments put forward by the Commission could not rule out the possibility that the fact that there were fewer opportunities for tax deductions under the regime for non-profit entities might offset the advantage derived from the lower nominal tax rate that those entities enjoyed. As the Commission had not discharged, to the requisite legal standard, the burden of proving that the disputed measure conferred an advantage on its beneficiaries, the Court found that there had been an infringement of Article 107(1) TFEU and annulled the contested decision.

b. Imputability — use of State resources

In the judgment in ***Italy and Others* v *Commission*** (T-98/16, T-196/16 and T-198/16, under appeal, [45] EU:T:2019:167), delivered on 19 March 2019, the Court, in an action for annulment under Article 263 TFEU, annulled Commission Decision 2016/1208 [46] on State aid granted by Italy to an Italian bank, Banca Tercas, holding that the Commission was wrong to find that the measures at issue were imputable to the State and that they involved the use of State resources.

In 2013, an Italian bank, Banca Popolare di Bari (BPB), had expressed interest in subscribing to a capital increase in another Italian bank, Banca Tercas, which had been placed in special administration since 2012 after the central bank of the Italian Republic, Banca d'Italia ('Bank of Italy'), had discovered irregularities. One of the transaction conditions dictated by BPB was that the Fondo Interbancario di Tutela dei Depositi (FITD) was to cover Banca Tercas's deficit, in respect of which an audit was also sought. The FITD is a consortium of cooperative banks governed by Italian private law, which has the power to adopt intervention measures for the benefit of its members, not only in respect of the statutory deposit guarantee provided for in case of the compulsory liquidation of one of its members (mandatory intervention), but also on a voluntary basis, in accordance with its statutes, if such measures help to reduce the burden its members may have to bear as a result of the deposit guarantee (voluntary interventions, including the voluntary preventative or support intervention at issue).

In 2014, after having satisfied itself that adopting measures in support of Banca Tercas would be economically more advantageous than reimbursing that bank's depositors, the FITD decided to cover the bank's negative equity and to grant it certain guarantees. Those measures were approved by the Bank of Italy. The European Commission opened an in-depth investigation into those measures because it had doubts as to whether they were compatible with EU rules on State aid. By Decision 2016/1208, against which those proceedings were brought, it came to the conclusion that the measures in question constituted State aid granted by the Italian Republic to Banca Tercas.

After recalling the case-law of the Court of Justice concerning classification as State aid for the purposes of Article 107 TFEU, the General Court assessed, in the first place, whether those measures were imputable to the Italian State and, in the second place, whether they had been financed by State resources.

The Court found, in the first place, that the Commission had been wrong to conclude that it had demonstrated that the Italian authorities had exercised substantial public control in establishing the measures adopted by the FITD for the benefit of Banca Tercas, since it had not proved to the requisite legal standard that the Italian public authorities had been involved in the adoption of the measure at issue, or, consequently, that that measure was imputable to the State for the purposes of Article 107(1) TFEU. Pointing out that, in cases where a measure is issued by a private entity, it is for the Commission to establish the existence of sufficient evidence for it to be concluded that the measure was adopted under the influence or actual control of the public authorities, the Court assessed, first, the scope of the public mandate conferred on the FITD and, subsequently, the FITD's autonomy when adopting the measure.

On the first point, the Court concluded, first, that the FITD's support measures sought mainly to pursue the private interests of the consortium's members and, secondly, that those measures did not implement any public mandate conferred on it by Italian law. It stated, in that regard, that the mandate conferred on the

45| Case C-425/19 P, ***Commission v Italy and Others***.

46| Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid SA.39451(2015/C) (ex 2015/NN) granted by Italy to Banca Tercas (OJ 2016 L 203, p.1).

FITD by Italian law consisted only in refunding depositors (up to EUR 100 000 per depositor), as a deposit guarantee scheme, when a bank that is a member of the consortium was subject to compulsory liquidation and that, outside that framework, the FITD did not act in implementation of a public objective imposed by Italian law. It concluded from this that the support measures therefore had a purpose that was different from that of the reimbursement of deposits in the event of compulsory liquidation and did not constitute the implementation of a public mandate.

On the second point, the Court concluded that the Commission had not proved that the Italian public authorities had been involved in the adoption of the measure in question. In that regard, the Court noted that the FITD was a consortium governed by private law which acted, in accordance with its statutes, 'on behalf of and in the interests' of its members, and that its management bodies were elected by the FITD's General Assembly and were exclusively made up of representatives of the member banks of the consortium, as was the General Assembly. In those circumstances, the Court found, inter alia, that the Bank of Italy's authorisation of the intervention measures adopted by the FITD for the benefit of Banca Tercas did not constitute evidence that would permit the measure in question to be imputed to the Italian State, since, in that regard, the Bank of Italy was merely monitoring the conformity of those measures with the regulatory framework for the purposes of prudential supervision. It also found that the presence of representatives of the Bank of Italy at the meetings of the FITD's management bodies also did not constitute evidence that the measure in question was imputable to the State, since those representatives were merely observers with no voting rights and no advisory capacity. Moreover, it concluded that the Commission had not provided any evidence proving that the Bank of Italy had influenced decisively the negotiations between, on the one hand, the FITD and, on the other hand, BPB and the special commissioner, since those negotiations were merely an expression of legitimate normal dialogue with the competent supervisory authorities allowing the Bank of Italy to be informed of developments in order to be able to make its decision more quickly on the authorisation of the measure in question once adopted by the FITD's management bodies. In addition, the Commission had not established that the invitation addressed by the Bank of Italy to the FITD with the aim of reaching a balanced agreement with BPB as regards covering Banca Tercas' negative equity had the slightest impact on the FITD's decision to adopt measures for the benefit of Banca Tercas. Finally, the Court observed that the fact that the special administrator has the power to initiate the procedure that may lead to the adoption of a support measure by the FITD by sending it a non-binding request to that effect also did not affect the autonomy of the latter since, (i) the submission of such a request imposes no obligation on the FITD to agree to it, (ii) the FITD decides the contents of such measures independently and (iii) the FITD asserts that it is able to take the initiative to initiate the procedure for implementing a support measure and that assertion is not contradicted by the FITD's statutes or by Italian legislation.

In the second place, examining the three pieces of evidence on which the Commission concluded that the FITD's intervention was financed by State resources, the Court held that the Commission had not established that the funds granted to Banca Tercas were controlled by the Italian public authorities and were therefore available to them.

The Court therefore rejected, first, the finding that the FITD had a public mandate and that its intervention in favour of Banca Tercas had been made in order to protect the deposits lodged by depositors, referring in that regard to the analysis carried out in the context of the imputability of the FITD's intervention to the State. It concluded, secondly, that the Commission had not been able to establish that the Bank of Italy had sought, by means of formal control of the rules concerning the use of resources by the FITD, to steer the private resources made available to the latter. It held, thirdly, that the fact that the contributions used by the FITD to finance the intervention measures were obligatory, since its member banks have in practice no choice but to participate and cannot veto its decisions or disassociate themselves from the intervention measures decided upon, remained essentially theoretical in nature and had no impact on those measures. It held in particular in this regard that the funds used for the intervention by the FITD were private resources provided by the consortium's member banks, that the obligation placed on the FITD's members to contribute to the

intervention originated not in a legislative provision but in a private provision found in its statutes preserving the decision-making autonomy of those members, and that, before deciding on the intervention measures and mobilising the private resources of its members, the FITD had satisfied itself that the cost of adopting those measures was lower than the cost that would be incurred as a result of the liquidation of Banca Tercas and thus of calling on the statutory deposit guarantee, with the result that the adoption of those measures was in the interest of BPB, Banca Tercas and all its members.

3. National fiscal measures

a. Measures in favour of national ports

In the judgment in ***UPF* v *Commission*** (T-747/17, EU:T:2019:271), delivered on 30 April 2019, the Court dismissed as unfounded the action for annulment brought by the Union des ports de France (UPF) against the decision of the European Commission of 27 July 2017, [47] declaring that the corporate tax exemption scheme implemented by France in favour of its ports was incompatible with the internal market, under the provisions of the Treaty relating to existing State aid, [48] and requiring that it be abolished for the future.

The contested decision, which was adopted following a survey conducted in 2013 in all the Member States in order to obtain an overview of the functioning and tax treatment of their ports, found that the measure exempting operators active in the port sector from corporate tax constituted an existing State aid scheme that was incompatible with the internal market. Accordingly, the decision ordered that that measure be abolished and that the income from the economic activities of the scheme's beneficiaries be subject to corporate tax from the start of the tax year following the date of its adoption.

The Court found, first of all, that although the contested decision could not produce legal effects in respect of the aid scheme's beneficiaries without the adoption of implementing measures by the French authorities, UPF, as a trade association set up to protect and represent its members, nevertheless had *locus standi* to bring proceedings against the contested decision, provided that its members had not themselves brought their own action. It noted, in that regard, that the members of UPF were all seaports or major seaports in France or chambers of commerce managing those ports who lawfully benefited from the exemption scheme. Furthermore, since those members were legal persons governed by public law and established by decree whose creation was not a private initiative, they formed part of a closed class of operators which were identifiable at the time when the contested decision was adopted, and could rely on the status of actual beneficiaries of the existing aid scheme.

The Court found, however, that the contested decision was not vitiated by any error of law and rejected all of the complaints put forward by UPF, inter alia those alleging that the Commission erred in its assessment of the economic nature of the activities of the French ports and of their classification as undertakings. The Court stated, in that regard, that it was clear from the contested decision that it related only to income from the economic activities of the beneficiaries of the exemption and that it was only in respect of those activities that the beneficiaries were regarded as undertakings. It also regarded as well founded the assessment that the activities carried out by French ports, apart from those carried out in the performance of public authority

47| Commission Decision (EU) 2017/2116 of 27 July 2017 on aid scheme SA.38398 (2016/C, ex 2015/E) implemented by Belgium — Taxation of ports in Belgium (OJ 2017 L 332, p.24) ('the contested decision').

48| Article 107(1) TFEU.

tasks, such as maritime traffic control and safety or anti-pollution surveillance, were economic in nature. The fact that, for the exercise of part of its activities, an entity is vested with public powers did not, in itself, preclude its being classified as an undertaking for the remainder of its economic activities. Moreover, if an entity's economic activity could be separated from the exercise of its public powers, that entity must be classified as an undertaking for that part of its activities.

The Court also held that the Commission did not err in its assessment of the conditions relating to the distortion of competition and the effect on trade. It noted in particular that, even if the individual situation of some island or overseas ports were to show that those conditions were not satisfied, that examination must, in the case of an aid scheme, be carried out by the Member State at the stage of recovery of the aid or at a later stage, in accordance with the principle of sincere cooperation between that Member State and the Commission.

The Court also concluded that the Commission did not err in the conduct of the existing aid review procedure by requiring the French authorities to demonstrate that the tax exemption measure was compatible with the internal market. It pointed out, in that regard, that there was no reason either to draw a distinction, at the stage of the formal investigation procedure, between the procedure applicable to new aid and that applicable to existing aid, or to conclude that the burden of proof would be reversed with regard to the examination of whether an existing aid scheme is compatible with the internal market.

Finally, the Court held that the Commission had not breached the principle of sound administration by initiating proceedings against only three Member States, whilst not initiating proceedings against the Member States covered by its 2013 survey which had admitted having established exclusively for their ports exceptional tax regimes derogating from the ordinary rules of law. It stated, inter alia, that the Commission's duty of impartiality did not require it to conduct investigations simultaneously or to take binding decisions in State aid proceedings. Furthermore, no breach by a Member State of an obligation under the Treaty could be justified by the fact that other Member States were also failing to fulfil that obligation.

In the judgment in ***Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission*** (T-696/17, EU:T:2019:652), delivered on 20 September 2019, the Court dismissed the action for annulment brought by the ports of Antwerp and Zeebrugge against the decision of the European Commission of 27 July 2017 classifying the arrangements for exemption from corporation tax from which those ports benefited as State aid incompatible with the Treaty and ordering the abolition of that aid. [49]

The contested decision, which was adopted following an investigation carried out in 2013 in all the Member States in order to obtain an overall view of the functioning and taxation of their ports, found that the measure exempting from corporation tax the Belgian ports referred to in Article 180(2) of the Code des impôts sur les revenus coordonné en 1992 (Income Tax Code Coordinated in 1992; 'the CIR') constituted an existing State aid scheme that was incompatible with the internal market. It therefore ordered that that exemption be abolished and that the income from the activities of those ports be subject to corporation tax from the beginning of the year following the date of its adoption.

49| Commission Decision (EU) 2017/2115 of 27 July 2017 on aid scheme SA.38393 (2016/C, ex 2015/E) implemented by Belgium — Taxation of ports in Belgium (OJ 2017 L 332, p.1) ('the contested decision').

In that case, the Court dismissed the action as unfounded, holding that the Commission had been fully entitled to conclude that the two ports had to be classified as undertakings, in so far as they carried out economic activities, and that the exemption from which they benefited had the effect of placing them at an advantage and was, therefore, selective in the light of the law on State aid. [50]

In the first place, the Court held that the Commission had rightly concluded that the ports carried out, at least in part, economic activities, in that they provided their users with access services for ships to the port infrastructure in exchange for a 'port charge' and special services in exchange for remuneration, such as piloting, lifting, handling or mooring, and in so far as they made certain infrastructure or land available to undertakings for their own needs or for the purposes of providing those special services. In that regard, the Court stated, first, that the fact that the ports are vested with non-economic public powers, such as maritime traffic control and safety or anti-pollution surveillance, or entrusted with services in the public interest did not, in itself, prevent them from being classified as undertakings, since they were also carrying out economic activities consisting in offering goods and services on the market for remuneration. It found, secondly, that it had not been shown that the economic activities of the ports were purely ancillary and inseparable from the exercise of their public powers. Finally, it held that, even if it were to be concluded that the ports enjoyed a legal monopoly and if there were no private port operators in Belgium with which they were in competition, there was nevertheless a market for port services, on which the various seaports in the European Union, in particular on the Hamburg-Rotterdam-Antwerp axis, were in competition.

In the second place, the Court held that the Commission had been correct to conclude that the exemption from corporation tax from which the two ports benefited, under Article 180(2) of the CIR, conferred on them a selective advantage for the purposes of Article 107(1) TFEU. In that regard, it recalled, first of all, that the review to be carried out for the purposes of ruling on selectivity involved identifying, first, the reference framework, that is to say, the common or 'normal' tax regime applicable, and then demonstrating, secondly, that the tax measure at issue derogated from the common regime, in so far as it differentiated between operators which, in the light of the objective pursued by that regime, were in a comparable legal and factual situation.

In this instance, Article 1 of the CIR provided that companies were subject to corporation tax and legal persons other than companies, to tax on legal persons. Article 2(5)(a) of the CIR, moreover, defined a company as any entity having legal personality which engages in business or transactions of a profit-making nature.

In that context, the Court held, first of all, that the Commission was justified in concluding that the ports were in principle 'companies' as regards the bulk of their economic activities, and that, in the absence of Article 180(2) of the CIR, they would be subject to corporation tax, in so far as they engaged in transactions of a profit-making nature, and not to tax on legal persons, pursuant to Articles 1 and 2 of the CIR. Since Article 180(2) of the CIR thus established an unconditional exemption from corporation tax in favour of ports, even though they engaged in business or operations of a profit-making nature, within the meaning of Article 2(5) of the CIR, its provisions did not fall within the logic of the reference framework and therefore constituted a derogation from that framework. It found, next, that the Commission had been correct to conclude that that derogation introduced a distinction between companies subject to corporation tax and the ports, even though, in the light of the objective of the reference framework, which was to tax the profits of companies engaged in business or transactions of a profit-making nature, they were in a comparable situation. Finally, the Court concluded that that derogation was not justified by the nature and general scheme of the income tax system. In that regard, it noted in particular that, since the decisive criterion for liability to corporation tax was the fact that the entity in question engaged in business or transactions of a profit-making

50| Article 107(1) TFEU.

nature, the fact that the ports did not distribute their profit but reinvested it, that they pursued an objective going beyond their individual interest, that they did not have as their statutory objective the objective of the pursuit of profit, that they were public authorities and that they carried out tasks in the general interest did not suffice, in the light of the guiding principles of the tax system, to justify more favourable tax treatment than that of other companies.

b. Taxation of companies forming part of a multinational group

In the judgment in ***Belgium and Magnetrol International* v *Commission*** (T-131/16 and T-263/16, under appeal, [51] EU:T:2019:91), delivered on 14 February 2019 in the context of an action for annulment under Article 263 TFEU, the Court annulled Commission Decision 2016/1699, which classified the scheme of exemption of excess profits of Belgian entities of multinational corporate groups applied by Belgium since 2004 as unlawful State aid and incompatible with the internal market and consequently ordered the recovery of that aid. [52]

Under Article 185(2)(b) of the Code des impôts sur les revenus 1992 (Income Tax Code 1992; 'the CIR 92') — based on the arm's length principle established by Article 9 of the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development (OECD) — the tax base of companies which are part of a multinational group subject to taxation in Belgium may be adjusted, upward or downward, on a case-by-case basis in the light of the available information provided by the taxpayer, by adjustments to the profit resulting from intra-group cross-border transactions, where the transfer prices applied do not reflect market mechanisms and the arm's length principle. The upward adjustment allows the profit made by a resident company that is part of a multinational group to be increased in order to include the profit that the resident company would have made from a transaction carried out at arm's length. Conversely, the downward adjustment is intended to avoid or undo double taxation. These adjustments may be approved by the Belgian tax authorities by way of an advance tax ruling.

The Court rejected, in the first place, the plea alleging that the Commission encroached upon Belgium's exclusive jurisdiction in the field of direct taxation. In that respect, it noted that, although direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nevertheless exercise that competence consistently with EU law. A measure by which the public authorities grant certain undertakings advantageous tax treatment which places the beneficiaries in a more favourable position than other taxpayers is capable of constituting State aid. Since the Commission is competent to ensure compliance with the State aid rules, it cannot therefore be accused of having exceeded its powers.

In the second place, the Court found that the Commission was wrong to conclude, in this instance, that there was an aid scheme within the meaning of Article 1(d) of Regulation 2015/1589. [53] Under that provision, 'aid scheme' is to mean 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'. According to the Court, that definition means, first, that, if individual aid awards are made without further implementing measures being adopted, the essential elements of the aid scheme in question must necessarily emerge from the provisions identified as the basis for the scheme. It means, secondly, that the national authorities applying that scheme

51| Case C-337/19 P, ***Commission* v *Belgium and Magnetrol International***.

52| Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (notified under document C(2015) 9837) (OJ 2016 L 260, p. 61).

53| Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

have no margin of discretion as regards the determination of the essential elements of the aid in question and whether it should be awarded and that their power should be limited to the technical application of the provisions that allegedly constitute the scheme in question, if necessary after verifying that the applicants meet the preconditions for benefiting from that scheme. Thirdly, and finally, the acts on which the aid scheme is based must define the beneficiaries in a general and abstract manner, even if the aid granted to them remains indefinite.

In that case, the Court found, first, that although some of the essential elements of the scheme identified by the Commission in Decision 2016/1699 may emerge from the acts identified in that decision, that is not the case however for all of those essential elements, such as the two-step methodology for calculating the excess profit, including the transactional net margin method (TNMM), and the requirement for investments, the creation of jobs or the centralisation or increase of activities in Belgium. Accordingly, the implementation of those acts and thus the grant of the alleged aid necessarily depends on the adoption of further implementing measures. Secondly, the Court concluded that, when the Belgian tax authorities adopted the advance rulings on excess profits, they had a degree of discretion over all the essential elements of the exemption system at issue, enabling them to influence the characteristics, the amount and the conditions under which the exemption was granted, which also excludes the existence of an aid scheme. In that respect, the Court noted that, when they adopted a decision making a downward adjustment, those authorities did not carry out a technical application of the applicable regulatory framework, but, rather, carried out a qualitative and quantitative assessment of each request on a 'case-by-case' basis, in the light of the reports and evidence provided by the entity concerned, in order to decide whether it was justified to grant that adjustment. Thirdly, the Court observed that the beneficiaries of the alleged aid scheme — which, under Article 185(2)(b) of the CIR 92, is to apply to companies which are part of a multinational group, in the context of their reciprocal cross-border relationships — are not defined in a general and abstract manner by the acts on which, according to the Commission, the aid scheme was based, with the result that they necessarily had to be defined by further implementing measures. Fourthly, and finally, the Court found that the Commission had not succeeded in demonstrating that the systematic approach of the Belgian tax authorities identified by the Commission met the requirements of Article 1(d) of Regulation 2015/1589.

In the judgment of 24 September 2019, ***Luxembourg and Fiat Chrysler Finance Europe* v *Commission*** (T-755/15 and T-759/15, EU:T:2019:670), delivered on 24 September 2019, the Seventh Chamber, Extended Composition, of the Court dismissed as unfounded the actions brought by the Grand Duchy of Luxembourg and by the undertaking Fiat Chrysler Finance Europe for the annulment of the decision of the European Commission classifying a tax ruling issued to Fiat Chrysler Finance Europe by the Luxembourg tax authorities as State aid. [54]

Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd (FFT), is part of the Fiat/Chrysler automobile group and provides treasury services and financing to the Fiat/Chrysler group companies established in Europe. With its head office located in Luxembourg, FTT had requested a tax ruling from the Luxembourg tax authorities ('the tax ruling'). Following that request, the Luxembourg authorities issued the tax ruling, which endorsed a method for the determination of FFT's remuneration for the financial services provided to other Fiat/Chrysler group companies, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis.

54 | Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1).

In the contested decision, the Commission concluded that the tax ruling constituted State aid within the meaning of Article 107 TFEU, specifically operating aid which is incompatible with the internal market. Moreover, it observed that the Grand Duchy of Luxembourg had not notified it, in accordance with Article 108(3) TFEU, of any plan to grant the tax ruling at issue, nor had it complied with the standstill obligation laid down in that provision. Accordingly, the Commission ordered the recovery of that unlawful and incompatible aid. The Grand Duchy of Luxembourg and FFT both brought an action for the annulment of that decision.

Direct taxation being a matter that falls within the exclusive competence of the Member States, the Court noted in the first place that, when examining whether the tax ruling at issue complied with the rules on State aid, the Commission did not engage in any 'tax harmonisation in disguise' but exercised the power conferred on it by EU law. Since the Commission has the power to monitor compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers when it examined the tax ruling at issue in order to determine whether it constituted State aid and, if it did, whether it was compatible with the internal market.

In the second place, the Court stated that where national tax law is intended to tax the profit arising from the economic activity of an integrated undertaking as though it had arisen from transactions carried out under market conditions, the Commission may use the arm's length principle to check that intra-group transactions are remunerated as though they had been negotiated between independent undertakings and, accordingly, whether a tax ruling confers an economic advantage on its recipient within the meaning of Article 107(1) TFEU. In that regard, the Court stated that the arm's length principle, as identified by the Commission in the contested decision, is a tool for checking that intra-group transactions are remunerated as though they had been negotiated between independent undertakings. It thus found that, under Luxembourg tax law, that tool is used in the exercise of the Commission's powers under Article 107 TFEU. In that case, the Commission was therefore in a position to verify whether the level of pricing for intra-group transactions accepted by the tax ruling at issue corresponded to prices that would have been charged under market conditions.

In the third place, as regards establishing the existence of an advantage, the Court concluded that the methodology for determining FFT's remuneration, accepted by the tax ruling, could not result in an arm's length outcome and that, on the contrary, the methodology minimised FFT's remuneration, on the basis of which FFT's tax liability is determined.

In the fourth place, with regard to the examination of the selectivity of the advantage granted to FFT by the tax ruling, the Court held that the Commission had not erred in finding that the advantage conferred on FFT was selective, since the tax ruling was considered to constitute individual aid and that the conditions attached to the presumption of selectivity were fulfilled in that case. The Court added that, in any event, the Commission had also demonstrated on the basis of the three-step analysis of selectivity that the measure at issue was selective.

In the fifth place, so far as concerns the recovery of the aid, the Court confirmed that, in that case, the recovery of the aid was not contrary to the principle of legal certainty or the rights of the defence of the Grand Duchy of Luxembourg.

In the judgment of 24 September 2019, ***Netherlands and Others* v *Commission*** (T-760/15 and T-636/16, EU:T:2019:669), the Seventh Chamber, Extended Composition, of the Court annulled the decision of the European Commission classifying as State aid an advance pricing arrangement concluded by the Netherlands tax authorities with the undertaking Starbucks Manufacturing Emea BV (SMBV). [55]

55| Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks (OJ 2017 L 83, p. 38).

SMBV is a subsidiary of the Starbucks group and is responsible for certain production and distribution activities within that group. On 28 April 2008, the Netherlands tax authorities concluded an advance pricing arrangement with SMBV ('the advance arrangement'), the objective of which was to determine SMBV's remuneration for its activities within the Starbucks group. Thereafter, SMBV's remuneration served to determine annually its taxable profit for the purposes of Netherlands corporate income tax. On 21 October 2015, the Commission adopted its decision (i) classifying the advance arrangement as State aid incompatible with the internal market and (ii) ordering recovery of that aid. The Kingdom of the Netherlands, on the one hand, and Starbucks Corp. and SMBV, on the other hand, each brought an action for annulment against that decision.

As direct taxation falls within the competence of the Member States, the Court, in the first place, pointed out that the Member States were nevertheless required to exercise that competence consistently with EU law. Thus, intervention by the Member States in matters of direct taxation, even if it related to issues that had not been harmonised in the European Union, was not excluded from the scope of the rules on the monitoring of State aid. It follows that the Commission could classify a tax measure such as the advance arrangement as State aid provided that the conditions for such classification had been met.

In the second place, the Court observed that, where national tax law was intended to tax the profit arising from the economic activity of an integrated company as though it had arisen from transactions carried out under market conditions, the Commission could use the arm's length principle to ascertain that the intra-group transactions were remunerated as though they had been negotiated between independent companies and, accordingly, whether a tax ruling had conferred an advantage on its beneficiary for the purposes of Article 107(1) TFEU. In that regard, the Court observed that the arm's length principle, as identified by the Commission in its decision, constituted a tool enabling it to check that intra-group transactions were remunerated as though they had been negotiated between independent companies. It thus found that, having regard to Netherlands tax law, that tool came within the framework of the exercise of the Commission's powers under Article 107 TFEU. In that case, the Commission was therefore in a position to verify whether the price level for intra-group transactions accepted by the advance arrangement in question corresponded to the level that would have been negotiated under market conditions.

In the third place, as regards the demonstration as such of the existence of an advantage, the Court concluded, however, that the Commission had not succeeded in demonstrating that the advance arrangement at issue had conferred an advantage for the purposes of Article 107(1) TFEU by reducing SMBV's tax burden. More particularly, the Court rejected the various lines of reasoning whereby the Commission had sought to demonstrate that, by endorsing a transfer pricing method that did not enable an arm's length outcome to be reached, the advance arrangement had conferred an advantage on SMBV.

Thus, the Court first of all rejected the line of reasoning according to which the advance agreement conferred an advantage on SMBV on the ground that the very choice of the transfer pricing method for intra-group transactions did not result in a reliable approximation of a market-based outcome, in line with the arm's length principle. As mere non-compliance with methodological requirements does not necessarily lead to a reduction of the tax burden, it was further necessary for the Commission to demonstrate that the methodological errors that it had identified in the advance arrangement at issue did not allow a reliable approximation of an arm's length outcome to be reached and that those errors had led to a reduction in the taxable profit compared with the tax burden resulting from the application of normal taxation rules under national law on an undertaking placed in a comparable factual situation to SMBV and carrying out its activities under market conditions. However, such proof had not been adduced by the Commission.

In that regard, the Court observed, inter alia, that the Commission had invoked no element on which it might be concluded that the method applied in the advance arrangement for determining transfer pricing, namely the transactional net margin method (TNMM), necessarily led to a result that was too low, which would have

conferred an advantage on SMBV. Likewise, the Court observed that the mere finding by the Commission that the advance arrangement had not analysed the royalty paid back by SMBV to an undertaking in the Starbucks group for the use of its intellectual property rights, including in particular the roasting methods and other roasting know-how, did not suffice to demonstrate that that royalty was not in fact consistent with the arm's length principle. As regards the amount of that royalty paid by SMBV, according to an analysis of the functions of SMBV relating to the royalty and an analysis of comparable roasting agreements examined by the Commission, the Court further concluded that the Commission had not shown that it gave rise to an advantage within the meaning of Article 107(1) TFEU.

The Court then examined the Commission's subsidiary reasoning, according to which, even on the assumption that the TNMM could be used in that case to determine transfer pricing, the advance arrangement conferred an advantage on SMBV because the detailed rules for the application of that method accepted by the advance arrangement were erroneous. In that regard, the Court observed that the Commission had not shown that the various errors it had identified in the detailed rules for the application of the TNMM — whether the advance arrangement's validation of the identification of SMBV as a tested entity for the purposes of the application of the TNMM, of the choice of profit level indicator for the application of the TNMM or of certain adjustments made to that indicator — had conferred an advantage on SMBV.

4. Investment subsidies in favour of public transport undertakings

In the judgments of 12 July 2019, ***Keolis CIF and Others*** **v** ***Commission*** (T-289/17, EU:T:2019:537), ***Transdev and Others*** **v** ***Commission*** (T-291/17, EU:T:2019:534), ***Région Île-de-France*** **v** ***Commission*** (T-292/17, EU:T:2019:532), ***Optile*** **v** ***Commission*** (T-309/17, EU:T:2019:529), ***Ceobus and Others*** **v** ***Commission*** (T-330/17, EU:T:2019:527) and ***STIF-IDF*** **v** ***Commission*** (T-738/17, EU:T:2019:526), the Court dismissed a number of applications for annulment in part of the Commission Decision of 2 February 2017 on two aid schemes implemented by France in favour of bus transport undertakings in the Île-de-France Region. [56]

Those cases all arose in the context of two aid schemes in favour of bus transport undertakings in the Île-de-France Region, the first implemented by the Île-de-France Region between 1994 and 2008 and the second by the Syndicat Transport Île de France (Île-de-France Transport Authority) (STIF-IDF) from 2008 onwards. The aid paid under those schemes was intended to promote the purchase of equipment by undertakings providing scheduled public transport services in the Île-de-France Region and to compensate for the investment costs borne by them.

In the decision being challenged before the Court, the Commission initially took the view that the two aid schemes were compatible with the internal market. However, it subsequently concluded that the financial assistance awarded under those schemes had been unlawfully implemented, in so far as such assistance was 'new aid' and had not been notified to it. More particularly, the Commission found an infringement of Article 108(3) TFEU, which prohibits Member States that intend to grant or alter State aid from implementing the planned measures before the Commission has conducted a preliminary review of their plans. Article 108(3) TFEU therefore lays down a standstill obligation that applies to new aid, but not to existing aid.

56| Commission Decision (EU) 2017/1470 of 2 February 2017 on State aid schemes SA.26763 2014/C (ex 2012/NN) implemented by France in favour of bus transport undertakings in the Île-de-France region (OJ 2017 L 209, p. 24).

By the judgments in ***Keolis CIF and Others* v *Commission*, *Transdev and Others* v *Commission*, *Optile* v *Commission*** and ***Ceobus and Others* v *Commission***, the Court dismissed the actions brought by several operators of road-based passenger transport networks in the territory of that region seeking the annulment of the contested decision to the extent that it concerns the aid scheme implemented by the Île-de-France Region between 1994 and 2008. In that context, a number of applicants had put forward complaints alleging various infringements of the Commission's obligation to state reasons, all of which were rejected by the Court. In support of their actions, the applicants also challenged the categorisation of investment subsidies received by transport undertakings under the aid scheme at issue as new aid. Moreover, the road transport network operators claimed that there had been an infringement of the rules on limitation laid down in Article 17 of Regulation 2015/1589. [57]

As regards the categorisation of the aid scheme implemented by the Île-de-France Region between 1994 and 2008 as new aid, the Court, first, rejected the complaints alleging infringement of Article 1(b)(i) of Regulation 2015/1589, according to which aid introduced before the entry into force of the TFEU in the Member State concerned is to be regarded as existing aid. The applicants had not submitted sufficient evidence to the Court to prove that the aid scheme at issue had been introduced prior to the entry into force of the Treaty establishing the European Economic Community in France on 1 January 1958. Secondly, the Court rejected the complaints alleging infringement of Article 1(b)(v) of Regulation 2015/1589, under which aid is deemed to be existing aid if, at the time it was put into effect, it did not constitute aid but subsequently became aid due to the evolution of the internal market and without having been altered by the Member State. The Court pointed out that the transport companies in receipt of the award of aid had been likely to use, from the date of introduction of the aid scheme at issue, the equipment financed by that aid in connection with transport activities open to competition. As regards the period from 1994 to 2008, the transport undertakings concerned had also not challenged the categorisation of the subsidies granted as State aid, within the meaning of Article 107(1) TFEU. In addition, the Commission's finding that all the criteria laid down in that provision were met for the period in question was consistent with the analysis set out in a number of relevant decisions of the national courts.

Furthermore, the Court rejected the complaints alleging infringement of Article 17 of Regulation 2015/1589, which provides for a limitation period of 10 years for the recovery of aid. In that regard, the Court observed that the rules on limitation set out in that provision relate only to the powers of the Commission, so that they are not intended to apply where, as in that case, the Commission has acknowledged that aid unlawfully paid is compatible with the internal market after it was granted. The Court concluded, however, that the powers of the national authorities concerning the possible recovery of such aid are subject only to the national legal rules on limitation applicable before the national courts.

By the judgment in ***Région Île-de-France* v *Commission***, the Court dismissed the action brought by the Île-de-France Region. The Court found that the applicant was incorrect to criticise the Commission for having breached the obligation to state reasons in its assessments of the selective nature of the aid scheme implemented by the applicant between 1994 and 2008 and of the undue economic advantage granted to the beneficiaries of that scheme. In addition, the Court held that there was no reason to question the substance of the assessments in the contested decision concerning the existence of an economic advantage and the selectivity of the scheme. The Court made clear that undertakings from other Member States or other French regions were not eligible to receive the disputed subsidies, which were only open to undertakings active on the scheduled passenger transport market that carried on business in the applicant's territory. The Court also rejected the plea alleging infringement of Article 1(b)(i) and (v) of Regulation 2015/1589.

57| Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

By the judgment in ***STIF-IDF* v *Commission***, the Court dismissed the action brought by STIF-IDF for annulment of the contested decision in so far as it concerns the aid scheme implemented by the applicant from 2008 onwards. That part of the contested decision referred, in particular, to a series of contracts between STIF-IDF and private undertakings operating scheduled public transport services in the territory of the Île-de-France Region, which provided for the payment of a financial contribution by STIF-IDF to the signatory undertakings as compensation for the performance of the public service obligations to which the latter were subject under those contracts.

In support of its action for annulment, STIF-IDF relied on settled case-law according to which a State measure does not constitute State aid within the meaning of Article 107 TFEU when it represents compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them. In order for such compensation to escape categorisation as State aid in a particular case, the Altmark [58] criteria must be satisfied. The fourth Altmark criterion states that the level of State intervention must be determined on the basis of an analysis of the costs that a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations. In its action, STIF-IDF specifically criticised the Commission for having wrongly concluded in the contested decision that the aid scheme at issue did not satisfy that criterion and for having breached its obligation to state reasons in that respect.

After confirming that the Commission had provided sufficient details of the reasons for its finding that the aid scheme at issue did not satisfy the fourth Altmark criterion, the Court pointed out that the evidence adduced by STIF-IDF in support of its complaints consisted in essence of references to methodological tools it had used before fixing the amount of the financial contributions to be paid to the signatory companies and to the various *ex post* checks carried out to verify the investments made by them. Since that evidence was not relevant or, at the very least, was insufficient to determine whether the amount of compensation had been fixed in accordance with the fourth Altmark criterion, the Court found that the information provided by STIF-IDF did not demonstrate that the assessment of the aid scheme at issue carried out in the contested decision in the light of that criterion was vitiated by an error of law or of assessment.

5. Applicability *ratione temporis* of the provisions on State aid

In the judgment in ***European Food and Others* v *Commission*** (Joined Cases T-624/15, T-694/15 and T-704/15, under appeal, [59] EU:T:2019:423), delivered on 18 June 2019, the Court annulled in its entirety Commission Decision 2015/1470, [60] by which the Commission classified as aid incompatible with the internal market the payment of the compensation awarded by an arbitral tribunal established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID).

58| Namely four criteria for the application of that case-law, laid down in the judgment of the Court of Justice of 24 July 2003, ***Altmark Trans and Regierungspräsidium Magdeburg*** (C-280/00, EU:C:2003:415, paragraphs 88 to 93).

59| Case C-638/19 P, ***Commission* v *European Food and Others***.

60| Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013 (notified under document C(2015) 2112) (OJ 2015 L 232, p. 43; 'the contested decision').

On 29 May 2002, the Government of the Kingdom of Sweden and the Romanian Government concluded a bilateral investment treaty on the promotion and reciprocal protection of investments (BIT), which entered into force on 1 July 2003, Article 2(3) of which provided that each contracting party would at all times ensure fair and equitable treatment of the investments by investors of the other contracting party. In 2005, in the course of the negotiations on Romania's accession to the European Union (which ultimately took place on 1 January 2007), the Romanian Government repealed a national incentive scheme for investors in disadvantaged regions that had been adopted by Emergency Governmental Ordinance (EGO) No 24/1998. Claiming that, by repealing that scheme, Romania had infringed its obligation of fair and equitable treatment owed to the Swedish investors, five applicants benefiting from that scheme ('the arbitration applicants') initiated proceedings before an arbitral tribunal on 28 July 2005, in accordance with Article 7 of the BIT. By arbitral award of 11 December 2013, that tribunal awarded the arbitration applicants compensation payable by Romania in the amount of approximately EUR 178 million. By its decision, the Commission classified the payment of that compensation, plus the interest that had accrued since the arbitral award was made, as new State aid that was incompatible with the internal market and, accordingly, adopted the contested decision in order to prevent Romania from complying with the arbitral award. The companies directly concerned by that decision ('the applicants') brought an action for annulment, for the purposes of Article 263 TFEU.

As regards the plea raised by the applicants concerning the inapplicability of EU law to a situation preceding Romania's accession, the Court stated that the adoption of the incentive scheme and its repeal, the entry into force of the BIT, Romania's infringements and the initiation of the proceedings brought before the arbitral tribunal by the arbitration applicants all took place before that accession and that the repeal of the incentives constitutes the event giving rise to the damage for which the compensation at issue was awarded by the arbitral award. The Court concluded that the arbitration applicants' right to compensation arose at the time when Romania repealed the incentives in 2005 and, therefore, before its accession to the European Union. Since EU law was not applicable in Romania at that time, the Court ruled that the Commission could not exercise the powers conferred on it by the Treaty in the field of State aid. Finally, the Court made clear that, while it is true that new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule, it cannot however be concluded that the effects of the arbitral award constitute the future effects of a situation arising prior to accession, since that award retroactively produced definitively acquired effects which it merely 'stated' for the past, that is to say, effects which, in part, were already established before accession, given that, as stated by the Commission in its decision, the implementation of the arbitral award would re-establish the situation in which the applicants would have, in all likelihood, found themselves if EGO had never been repealed by Romania and given that this constituted operating aid.

The Court also recalled that compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid and that, therefore, in so far as EU law is not applicable to compensation intended to compensate for the withdrawal of the incentive scheme, that compensation cannot be regarded as compensation for the withdrawal of aid which is unlawful or incompatible with EU law. On that ground, the Court concluded that the Commission's decision was unlawful in so far as it classified that compensation as an advantage and aid within the meaning of Article 107 TFEU.

V. Intellectual property

1. European Union trade mark

a. Absolute grounds for refusal

In the case that gave rise to the judgment of 14 February 2019, ***Bayer Intellectual Property* v *EUIPO (Representation of a heart)*** (T-123/18, EU:T:2019:95), an action was brought before the Court against the decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) which dismissed the appeal filed against the decision of the examiner, who had refused registration of the figurative mark representing a heart. The Board of Appeal took the view that the mark applied for would be perceived by the relevant public as the representation of a heart and, therefore, as a reference to the fact that the services in question concern the field of cardiology.

The Court stated, first, that a mark must allow the relevant public to distinguish the products covered by that mark from those of other undertakings without paying particular attention, so that the distinctiveness threshold necessary for registration of a mark cannot depend on the public's level of attention.

Secondly, the Court stated that, in accordance with settled case-law, EUIPO is under a duty to exercise its powers in accordance with the general principles of EU law. Although, having regard to the principles of equal treatment and of sound administration, EUIPO must take into account the decisions previously taken in respect of similar applications and consider with special care whether it should decide in the same way or not, the way in which those principles are applied must be consistent with respect for the principle of legality. Moreover, for reasons of legal certainty and, indeed, of sound administration, the examination of any application for registration must be stringent and comprehensive, in order to prevent trade marks from being improperly registered or cancelled. Accordingly, such an examination must be undertaken in each individual case. The registration of a sign as a mark depends on specific criteria, which are applicable in the factual circumstances of the particular case and the purpose of which is to ascertain whether the sign at issue is caught by a ground for refusal.

The Court noted that it follows from those principles, first, that it is incumbent on the Boards of Appeal, when deciding to take a different view from the one adopted in decisions already taken in respect of similar applications relied on before them, to provide an explicit statement of their reasoning for departing from those decisions. However, such a duty to state reasons for diverging from previous decisions is less important in relation to an assessment which strictly depends on the mark applied for than to factual findings which do not depend on that same mark. Secondly, it observed that it also follows from that case-law that decisions concerning the registration of a sign as an EU trade mark that are taken by the Boards of Appeal pursuant to Regulation 2017/1001 [61] fall within the scope of circumscribed powers and are not a matter of discretion and, accordingly, the legality of those decisions must be assessed solely on the basis of that regulation, as interpreted by the Courts of the European Union. Accordingly, the Boards of Appeal cannot be bound by previous decisions of EUIPO.

61| 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).

In that case, the Court noted, first, that an examination of the distinctiveness of a mark applied for depends strictly on that mark, and not on findings of fact relied on by the applicant. Thus, the Board of Appeal was able to limit itself to indicating that the applicant was not entitled to rely on previous decisions of EUIPO in order to reject the finding that the mark applied for was caught by the ground of refusal based on Article 7(1)(b) of Regulation 2017/1001. The Court observes, moreover, that the Board of Appeal, in any event, explicitly stated the reason why it departed from the finding made in the previous decision relied on by the applicant. The Board of Appeal found, in essence, that the goods then at issue were not specifically related to cardiology, so that those goods did not, unlike the services at issue in those proceedings, have a 'directly and immediately recognisable relationship with a human heart'. Secondly, the Court concluded that the applicant could not challenge the merits of that reasoning without calling into question the merits of the refusal to register the mark applied for. However, the Court noted that the Board of Appeal was correct to find that the mark applied for was caught by the ground for refusal based on infringement of Article 7(1)(b) of Regulation 2017/1001.

In the judgment in ***adidas* v *EUIPO* — *Shoe Branding Europe (Representation of three parallel stripes)*** (T-307/17, EU:T:2019:427), delivered on 19 June 2019, the Court dismissed an action against the decision of EUIPO in which the latter declared a figurative mark representing three black parallel stripes on a white background invalid on the ground that it was devoid of any distinctive character, including distinctive character acquired by use.

In that case, adidas AG had registered a figurative mark consisting of three parallel equidistant stripes of identical width, applied on the product in any direction. Shoe Branding Europe BVBA had filed an application for a declaration of invalidity against that mark on the ground that it lacked distinctive character within the meaning of Article 52(1)(a) of Regulation No 207/2009, [62] in conjunction with Article 7(1)(b), of that regulation. EUIPO had granted the application for a declaration of invalidity on the ground that the mark at issue was devoid of any distinctive character, both inherent and acquired through use.

In the first place, the Court had to determine whether, as regards the forms of use of a mark which may be taken into account, the concept of 'use' of the mark, within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009, must be interpreted in the same way as the concept of 'genuine use' in Article 15(1) of that regulation.

In that regard, the Court held that the concept of use of a mark, within the meaning of Article 7(3) and Article 52(2) of Regulation No 207/2009, must be interpreted as referring not only to use of the mark in the form in which it was submitted for registration and, where relevant, registered, but also to the use of the trade mark in forms which differ from that form solely by insignificant variations and which are able, therefore, to be regarded as broadly equivalent to that form.

In the second place, the Court held that, where a trade mark is extremely simple, even minor alterations to that mark may constitute significant changes, so that the amended form may not be regarded as broadly equivalent to the mark as registered. Indeed, the simpler the mark, the less likely it is to have a distinctive character and the more likely it is for an alteration to that mark to affect one of its essential characteristics and the perception of that mark by the relevant public.

In the third place, the Court found that the registered form of the mark at issue was characterised by the use of three black stripes on a white background. It inferred that, having regard, in particular, to the extreme simplicity of the mark at issue and the colour scheme used in the registration, the act of reversing that colour scheme could not be described as an insignificant variation by comparison with the registered form of the

62| Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OJ 2009 L 78, p. 1).

mark at issue. Thus, the Court concluded that EUIPO was correct to reject the evidence which did not show the mark at issue but showed other signs consisting of three white (or light) stripes against a black (or dark) background.

By the judgment of 12 December 2019, ***Conte* v *EUIPO (CANNABIS STORE AMSTERDAM)*** (T-683/18, EU:T:2019:855), the Court dismissed the action brought against the decision of the Board of Appeal of EUIPO which had refused registration of the trade mark 'CANNABIS STORE AMSTERDAM' because it was contrary to public policy.

Santa Conte, the applicant, had applied for registration of the figurative sign comprising a word element 'CANNABIS STORE AMSTERDAM' and a figurative element depicting cannabis leaves, for goods and services in Classes 30, 32 and 43 (food, drink and services for providing food and drink). The Board of Appeal of EUIPO refused registration on the basis of Article 7(1)(f) of Regulation 2017/1001, [63] as it concluded that the sign was contrary to public policy.

First, the Court recalled that the decisive criterion for the purposes of assessing whether a sign is contrary to public policy is the perception which the relevant public will have of the trade mark; that perception may be based on inaccurate definitions from a scientific or technical point of view, which means that it is the specific and current perception of the sign that matters, irrespective of whether the consumer has all the information available. Thus, by stating that the 'the particular shape of the cannabis leaf [was] often used as a media symbol for marijuana', the Board of Appeal was correct to set out not a scientific fact, but the perception of the relevant public. Furthermore, the Court upheld the Board of Appeal's statement that the word 'amsterdam' would be understood by the relevant public as referring to the city in the Netherlands which tolerates the use of drugs and is known for its 'coffee shops'.

Secondly, as regards the relevant public, the Court stated that it is made up of the general public of the European Union, who do not necessarily have accurate scientific or technical knowledge regarding narcotics in general, and in particular the narcotic derived from cannabis, even if that situation is likely to vary according to the Member States within which that public is situated. Moreover, since the applicant refers in the trade mark application to everyday consumer goods and services, intended for the general public without distinction based on age, there is no valid reason to limit the relevant public to only the young public

Thirdly, the Court found that, in many countries of the European Union, products derived from cannabis with a tetrahydrocannabinol (THC) content exceeding 0.2% are regarded as illegal narcotics. Since signs likely to be perceived as being contrary to public policy or to accepted principles of morality are not the same in all Member States, inter alia for linguistic, historic, social and cultural reasons, the Court held that the Board of Appeal had been right to rely on the legislation of those Member States, not because of their normative value, but as evidence of facts which enabled it to assess the perception of the sign at issue by the relevant public within the Member States concerned. Furthermore, the Court held that the sign would be perceived by the relevant English-speaking public as meaning 'cannabis shop in Amsterdam' and by the relevant non-English-speaking public as 'cannabis in Amsterdam', which, in both cases, coupled with the image of the cannabis leaves, the media symbol for marijuana, is a clear and unequivocal reference to the narcotic substance which is sold there.

Fourthly, with regard to the concept of public policy, the Court pointed out that something being prohibited by the law is not necessarily the equivalent of its being contrary to public policy. It is also necessary that the prohibition affects an interest which the Member State or States concerned consider to be fundamental in accordance with their own systems of values. In that case, the Court found that in the Member States where

63| Article 7(1)(f) of 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) provides that trade marks which are contrary to public policy or to accepted principles of morality are not to be registered.

the consumption and use of the narcotic substance derived from cannabis remain prohibited, tackling the spread of cannabis is particularly sensitive, which meets a public health objective aimed at combating the harmful effects of that substance.

In the light of those considerations, the Court concluded that the sign at issue, which would be perceived by the relevant public as an indication that the food and drink items referred to in the trade mark application, and the related services, contain narcotic substances which are illegal in many Member States, was contrary to public policy.

b. Relative grounds for refusal

In the case that gave rise to the judgment of 7 February 2019, ***Swemac Innovation* v *UIPO-SWEMAC Medical Appliances (SWEMAC)*** (T-287/17, EU:T:2019:69), the proprietor of the EU trade mark SWEMAC lodged an application with the Court for annulment of the decision of the Board of Appeal declaring that trade mark invalid owing to the existence of an earlier sign, namely, the earlier Swedish company name Swemac Medical Appliances AB.

The case raised in particular the question whether, as the applicant claimed, the fact that the applicant could properly rely on a right even older than the earlier sign would mean that the applicant for a declaration of invalidity, who is the proprietor of the earlier sign, would not be entitled to prohibit the use of a later EU trade mark, such that the condition laid down in Article 8(4)(b) of Regulation No 207/2009 would not be fulfilled.

In that regard, the Court noted that, according to case-law, where the proprietor of the contested EU trade mark has an earlier right capable of invalidating an earlier mark on which an application for a declaration of invalidity is based, it is incumbent on him or her to contact the competent authority or national court, as the case may be, to secure the cancellation of that mark, if required.

In addition, it recalled the case-law established in the context of opposition proceedings, according to which the fact that the proprietor of a contested trade mark is the proprietor of an even earlier national trade mark does not in itself have any bearing in so far as opposition proceedings at EU level are not intended to regulate conflicts at national level.

According to case-law, the validity of a national trade mark may not be called into question in proceedings for registration of an EU trade mark, but only in cancellation proceedings brought in the Member State concerned. Moreover, although it is for EUIPO to ascertain, on the basis of evidence which it is up to the opponent to produce, the existence of the national mark relied on in support of the opposition, it is not for it to rule on a conflict between that mark and another mark at national level, such a conflict falling within the competence of the national authorities.

Therefore, according to case-law, as long as the earlier national mark is in fact protected, the existence of a national registration or another right predating that earlier mark is irrelevant in the context of opposition to an EU trade mark application, even if the EU trade mark applied for is the same as a national trade mark held by the applicant or another right predating the national mark on which the opposition is based.

The Court noted that it had already had occasion to hold that, even if rights over earlier domain names may be treated in the same way as an earlier national registration, in any event, it is not for it to rule on a conflict between an earlier national trade mark and rights over earlier domain names, as such a conflict does not come within the jurisdiction of the Court.

The Court concluded that it was appropriate to apply that case-law by analogy to that case. In that regard, it noted that, notwithstanding the obligations to which EUIPO is subject and the role of the Court, it must be stated that it is neither for EUIPO nor for the Court to settle a conflict between the earlier sign and another company name or non-registered national trade mark in invalidity proceedings against an EU trade mark.

According to the Court, it followed that the issue of the earlier right is examined by reference to the registration of the contested EU trade mark, and not by reference to the alleged earlier rights that the proprietor of the contested EU trade mark — in this case, the applicant — might have in respect of the applicant for a declaration of invalidity, proprietor of the earlier sign. Therefore, the only earlier right to be taken into consideration for the resolution of the dispute was the earlier sign.

The case that gave rise to the order in ***Puma* v *EUIPO* — *CMS (CMS Italy)*** (T-161/16, EU:T:2019:350), made on 22 May 2019, originated in PUMA's opposition to registration of the figurative mark CMS Italy, the main figurative element of which is a feline bounding to the right, on the basis of three international figurative mark registrations, the sole or main element of which is a feline bounding to the left, with effects in various Member States. The ground relied on in support of that opposition was that set out in Article 8(5) of Regulation No 207/2009 (now Article 8 (5) of Regulation 2017/1001).

That opposition had been rejected on the ground that the reputation of the earlier marks had not been established, the Opposition Division having refused in particular to take into consideration several previous decisions of EUIPO which had established the reputation of some of those marks, which the opponent had invoked as evidence, on the ground that the legality of EUIPO's decisions had to be assessed on the basis of Regulation No 207/2009 as interpreted by the Courts of the European Union, and not on the basis of previous decision-making practice. The appeal against that decision had been dismissed by the Board of Appeal, which had implicitly endorsed that assessment and rejected the evidence submitted by the applicant before it, on the ground, essentially, that it was not additional evidence, but main evidence.

By its reasoned order, made on the basis of Article 132 of the Rules of Procedure, the Court declared the action manifestly well founded, having regard to the judgment of 28 June 2018, ***EUIPO* v *Puma*** (C-564/16 P, EU:C:2018:509), the findings of which it summarised. In particular, the Court noted that, where previous decisions of EUIPO on which an opponent relies as evidence, in so far as they found that the earlier trade mark relied on in support of its opposition under Article 8(5) of Regulation No 207/2009 had a reputation, are detailed as regards the evidential basis and the facts on which that finding is based, those decisions constitute a strong indication that that mark may also be regarded as having a reputation for the purposes of that provision in the pending opposition proceedings.

In that case, the Court found that the applicant had specifically relied, as evidence of the reputation of the earlier marks, on three previous decisions of EUIPO which constituted a recent decision-making practice concluding that two of the three earlier marks enjoyed a reputation in relation to goods identical or similar to those in question and to some of the Member States concerned in that case. It was therefore incumbent on the Board of Appeal to take those decisions of EUIPO into account and to consider whether or not it should decide in the same way and, if not, to provide an explicit statement of its reasons for departing from those decisions. By denying that those decisions had any relevance, the Board of Appeal had breached the principle of sound administration. Consequently, the Court annulled the contested decision of the Board of Appeal.

In the judgment in ***Luciano Sandrone* v *EUIPO* — *J. García Carrión (Luciano Sandrone)*** (T-268/18, EU:T:2019:452), delivered on 27 June 2019, the Court annulled the decision of the Second Board of Appeal of EUIPO of 26 February 2018, whereby the Board of Appeal had annulled the decision of the Opposition Division of 12 April 2017 rejecting the opposition filed by the proprietor of the earlier word mark DON LUCIANO, registered for 'Alcoholic beverages (except beer)', to the application for registration of the word mark Luciano Sandrone for 'Alcoholic beverages (except beer); preparations for making alcoholic beverages'.

As regards the comparison of the signs, the Court, seeking first the existence of a dominant element, overturned the Board of Appeal's assessment that the first name Luciano, present in the sign covered by the application for a trade mark, would be perceived as rare by the relevant public in Germany and Finland. The Court drew a distinction here between the actual attribution of the first name and the extent to which it is known by the relevant public, in view of the numerous exchanges within the European Union and of current means of electronic communication. It also observed that, while it is well known that the first name Luciano is not very common among the population of Germany and Finland, that fact alone does not mean that that first name will be perceived as a rare first name in those Member States.

The Court therefore concluded that the Board of Appeal was correct in finding that 'luciano' was the dominant element in the earlier mark, but however erred when it failed to find that the element 'sandrone' was dominant in the sign covered by the trade mark application, as that family name was not perceived as common.

As regards the conceptual comparison, the Court observed that the Board of Appeal did not identify any concept with which the first name and the surname in question could be associated and, therefore, that the mere fact that the relevant public will associate the sign the registration of which is sought with a first name and a surname and thus with a specific, imaginary or real person, and that the earlier mark will be perceived as designating a person called Luciano, is irrelevant for the purposes of a conceptual comparison of the signs at issue. The Court therefore overturned the Board of Appeal's assessment and concluded, as did EUIPO — which departed in its written pleadings from the Board of Appeal's assessment on this point — that in that case a conceptual comparison is not possible, since the first names and surname contained in the signs at issue do not convey any concept.

As regards the global assessment of the likelihood of confusion, the Court observed that the Board of Appeal erred in not taking into account the dominant aspect of the element 'sandrone' in the sign covered by the trade mark application and the fact that it was impossible to make a conceptual comparison. It observed, moreover, that the Board of Appeal was wrong not to take into account the specific qualities of the goods at issue, namely that, in the wine-growing world, names carry great weight, whether surnames or names of vineyards, since they are used to reference and designate wines. Thus, the Court held that it is indeed the distinctive element 'sandrone' that will serve to identify the applicant's wines, or the name as a whole, that is to say, 'luciano sandrone', but not the element 'luciano' alone. The Court emphasised that the Board of Appeal also did not take into account the prevalence of real or assumed Spanish or Italian first names or surnames in the wine market, and the fact that consumers are used to trade marks which contain such names, which means that they will not assume that every time such a first name or surname occurs in a trade mark in conjunction with other elements the goods in question all emanate from the same source.

Therefore, the Court concluded that in the wine sector, where the use of signs consisting of surnames or first names is very common, it is implausible that the average consumer might believe that there is an economic link between the proprietors of the signs at issue merely because they share the Italian first name Luciano. It could not be concluded from that fact alone, as far as concerns trade marks covering wines, that there is a likelihood of confusion since the relevant public will not expect only one producer to use such a common first name as an element of a trade mark.

c. Procedural issues

In the judgment in ***mobile.de* v *EUIPO (Representation of a car in a speech bubble)*** (T-629/18, EU:T:2019:292), delivered on 7 May 2019, the Court ruled on the handling of a request for restriction of the list of goods and services for which registration as a mark had been sought. That request had been submitted by the applicant during the proceedings before the Board of Appeal which followed the EUIPO examiner's refusal to register the goods and services in part and covered all the goods and services in respect of which registration had been refused. Rather than ruling that there was no longer any need to adjudicate, the Board of Appeal had declared the appeal inadmissible, on the ground that the document filed by the applicant, which referred to that request for restriction, did not meet the criteria necessary to be admitted as a written statement setting out the grounds of appeal because it did not contain any argument justifying the annulment of the examiner's decision. EUIPO had endorsed the applicant's heads of claim seeking annulment of the Board of Appeal's decision.

In the first place, the Court pointed out that, despite the fact that EUIPO had agreed with the applicant's position, the Court was not relieved of the need to examine the lawfulness of the contested decision. The independence of the Boards of Appeal of EUIPO does not give EUIPO the power to amend or withdraw a decision taken by a Board of Appeal, or indeed to give it instructions to that effect.

In the second place, the Court recalled that a trade mark applicant may, at any time, restrict the list of goods or services contained in his or her trade mark application including, therefore, during proceedings before the Board of Appeal. Since the request for restriction of the list of goods and services was submitted within the prescribed period for filing a written statement setting out the grounds of appeal, the Board of Appeal was required to adjudicate on that request, irrespective of whether such a statement had been filed.

Therefore, the Court found that the Board of Appeal had, by failing to adjudicate on that request for restriction, infringed Article 49(1) of Regulation 2017/1001, in conjunction with Article 27(5) of Delegated Regulation 2018/625, [64] and annulled the contested decision.

2. Designs

By the judgment in ***Rietze* v *EUIPO* — *Volkswagen (Motor vehicle VW Caddy)*** (T-192/18, EU:T:2019:379), delivered on 6 June 2019, the Court confirmed the decision of EUIPO that the design representing the VW Caddy vehicle is new within the meaning of Article 5 of Regulation No 6/2002 [65] and enjoys individual character within the meaning of that regulation. That case originated in cancellation proceeding brought by the applicant, Rietze, a German company marketing miniature cars. The contested design was that of the VW Caddy motor vehicle marketed by Volkswagen in 2011. In order to prove the disclosure of a prior design, the applicant referred to a previous model of that car, namely the VW Caddy (2K) Life model, which was marketed in 2004.

In the first place, the Court rejected the applicant's argument that EUIPO should have, first, weighted the characteristics of the conflicting designs, secondly, analysed their commonalities and, thirdly, distinguished between their aesthetic and technical characteristics.

64| Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

65| Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

In the second place, the Court rejected the applicant's argument that EUIPO had failed to take into account certain evidence containing an illustration of the earlier design. The Court recalled that it is for the party who lodged the application for a declaration of invalidity to provide accurate and complete reproductions of the earlier design and that the Board of Appeal cannot be required to combine different representations of the product in which the earlier design was incorporated, or even to replace an element which appears in most representations with an element which appears in only one representation. The Court accordingly dismissed the action.

3. Plant varieties

In the judgment in ***Mema* v *CPVO (Braeburn 78 (11078))*** (T-177/16, EU:T:2019:57), delivered on 5 February 2019, the Court provided clarification as regards the scope of the examination which the Board of Appeal of the Community Plant Variety Office (CPVO) is required to carry out, inter alia, by drawing a parallel with the obligations of the Board of Appeal of EUIPO. In that case, the decision of the CPVO Board of Appeal had confirmed the decision of the CPVO rejecting the applicant's application for the grant of a Community plant variety right for the apple variety 'Braeburn 78'. The CPVO had concluded, in essence, that that variety was not sufficiently distinct from the variety 'Royal Braeburn'.

First, the Court noted that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for the grant of Community protection and, accordingly, it must be accorded a broad discretion in the exercise of its functions, which extends, in particular, to verifying whether that variety has distinctive character. However, the CPVO 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 addition, the provisions relating to procedures before the CPVO apply *mutatis mutandis* to appeal proceedings. Accordingly, the principle that the CPVO is to make investigations on the facts of its own motion laid down in Article 76 of Regulation No 2100/94 [66] also applies in proceedings before the Board of Appeal.

Secondly, the Court observed that Article 72 of Regulation No 2100/94, under which the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further action, is drafted in similar terms to Article 71(1) of Regulation 2017/1001. [67] However, it follows from that provision and from the scheme of Regulation 2017/1001 that in ruling on an appeal the Board of Appeal has the same powers as the department which was responsible for the decision appealed and that its examination concerns the dispute as a whole as it stands on the date of its ruling. It also follows from that article that there is continuity in terms of their functions between the different departments of EUIPO and the Boards of Appeal from which it follows that, in the context of the review which the Boards of Appeal must undertake of the decisions taken by the EUIPO departments which heard the application at first instance, the Boards are required to base their decisions on all the matters of fact and of law which the parties put forward either in the proceedings before the department which heard the application at first instance, or in the appeal. In addition, the extent of the examination which the Boards of Appeal of EUIPO are required to conduct with regard to the decision under appeal does not depend upon whether or not the party bringing the appeal has raised a specific ground of

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

67| 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).

appeal with regard to that decision, criticising the interpretation or application of a provision by the department of EUIPO which heard the application at first instance, or upon that department's assessment of a piece of evidence.

The Court therefore held that, in the light of the similarity of the provisions of Regulation 2017/1001 and Regulation No 2100/94, similar principles are applicable to the procedures applied by the CPVO.

Finally, the Court found that the reasons on which the contested decision was based were not stated or were, at least, inadequate and it annulled the decision.

VI. Common foreign and security policy — Restrictive measures

1. Fight against terrorism

On 6 March 2019, in the judgment in ***Hamas* v *Council*** (T-289/15, under appeal, [68] EU:T:2019:138), the Court ruled on the action for annulment brought in respect of Decision (CFSP) 2015/521 and Implementing Regulation (EU) 2015/513 [69] by Hamas, which had been entered on the list of groups and entities subject to specific restrictive measures directed against certain persons and entities with a view to combating terrorism. More specifically, while only the terrorist wing of Hamas ('Hamas-Izz al-Din al-Qassem') appeared on the original 2001 lists, [70] from 2003, when the 2001 measures were updated, the political wing of the organisation (Hamas) was also included. [71] In the statement of reasons relating to the contested measures, the Council stated that it had taken into account four national decisions, namely a decision adopted by a United Kingdom authority ('the Home Secretary's decision'), and three decisions adopted by authorities of the United States.

68| Case C-386/19 P, ***Hamas* v *Council***.

69| Council Decision (CFSP) 2015/521 of 26 March 2015 updating and amending the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision 2014/483/CFSP (OJ 2015 L 82, p. 107); Council Implementing Regulation (EU) 2015/513 of 26 March 2015 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 790/2014 (OJ 2015 L 82, p. 1).

70| The name of this terrorist wing appeared on the list annexed to 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), and on the list established by 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).

71| Council Common Position 2003/651/CFSP of 12 September 2003 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2003/482/CFSP (OJ 2003 L 229, p. 42); Council Decision 2003/646/EC of 12 September 2003 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 2003/480/EC (OJ 2003 L 229, p. 22).

In dismissing that action, as regards the latter decisions, the Court first of all noted that the concept of 'competent authority' referred to in Article 1(4) of Common Position 2001/931 [72] is not limited to the authorities of Member States but may, in principle, also include the authorities of third States, since the implementation of United Nations Security Council Resolution 1373 (2001), and the global fight against terrorism which it pursues, justify in particular such close cooperation of all States.

Next, with regard to the use of decisions from such authorities of third States, the Court stated that, when the Council relies on a decision of that kind, it must first check whether that decision has been taken in accordance with the rights of the defence and the right to effective judicial protection. More specifically, in the statements of reasons relating to its own acts, the Council is required to provide particulars from which it may be concluded that it did carry out that check. According to the Court, the Council must, to that end, refer in those statements of reasons to the reasons that caused it to consider that the decision of the third State on which it relies has been adopted in accordance with the principle of the rights of the defence and with the right to effective judicial protection, although the information in that regard may, if necessary, be brief. In that case, the Court held that the indication that a decision from an authority of a third State is published in an official journal of that State is not sufficient to conclude that the Council has fulfilled its obligation to verify whether, in that State, the rights of the defence have been respected. Accordingly, since the statement of reasons relating to the United States decisions was deemed insufficient, the Court found that those decisions could not serve as a basis for the contested measures. The Court went on to state that since Article 1(4) of Common Position 2001/931 does not require Council measures to be based on several decisions of competent authorities, the contested measures could refer to the Home Secretary's decision alone, concluding that it was appropriate for it to proceed in its examination of the action by limiting that examination to the contested measures in so far as they were based on that decision.

Furthermore, as regards the issue of the administrative nature of the Home Secretary's decision, the Court ruled that the administrative and non-judicial nature of a decision is not decisive for the application of Article 1(4) of Common Position 2001/931, since the actual wording of that provision expressly provides that a non-judicial authority may be classified as a competent authority for the purposes of that provision. Even if the second subparagraph of Article 1(4) of Common Position 2001/931 contains a preference for decisions from judicial authorities, according to the Court it does not exclude the taking into account of decisions from administrative authorities where (i) those authorities are actually vested, in national law, with the power to adopt decisions to combat terrorism and (ii) those authorities, although only administrative, may be regarded as 'equivalent' to judicial authorities, if their decisions are open to judicial review. In that case, the Court concluded that condition to have been met, since the Home Secretary's contested decision is open to judicial review, and thus took the view that that administrative authority must be regarded as a competent authority within the meaning of the aforementioned provision.

In addition, the Court stated that the Council's obligation, under the first subparagraph of Article 1(4) of Common Position 2001/931, to verify, before adding the names of persons or entities to fund-freezing lists on the basis of decisions taken by competent authorities, that those decisions are 'based on serious and credible evidence or clues' concerns only decisions to instigate investigations or prosecution, and not condemnation decisions. It then ruled that, in that case, the Home Secretary's decision does not constitute a decision in respect of the instigation of investigations or prosecution and must be treated as a condemnation

72| According to the first sentence of that provision, 'the list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds'.

decision, so that, pursuant to Article 1(4) of Common Position 2001/931, the Council was not required to indicate, in the statement of reasons relating to the contested measures, the serious evidence and clues underpinning that authority's decision.

Finally, the Court indicated that where the mere fact that the national decision that served as the basis for the original listing remained in force no longer supported the conclusion that there was an ongoing risk of the person or entity concerned being involved in terrorist activities, the Council was obliged to base the retention of the name of that person or entity on the list on an up-to-date assessment of the situation, and to take into account more recent facts which demonstrated that that risk still existed. In this instance, it found that that was the case, since the Council based the re-listing of the applicant's name in the lists at issue, first, on the fact that decisions classified as decisions of competent authorities within the meaning of Article 1(4) of Common Position 2001/931 remained in force and, secondly, on the facts that constituted the more recent information on which the Council independently relied and which demonstrated that the risk of Hamas being involved in terrorist organisations was ongoing.

2. Ukraine

In the judgments in ***Yanukovych* v *Council*** (T-244/16 and T-285/17, EU:T:2019:502) and ***Klymenko* v *Council*** (T-274/18, EU:T:2019:509), delivered on 11 July 2019, the Court annulled several acts of the Council [73] regarding restrictive measures adopted in view of the situation in Ukraine which had extended the duration of the list of persons, entities and bodies covered by those restrictive measures, [74] in so far as the names of the applicants, the former President and former Minister for Revenue and Duties of Ukraine, were maintained on that list. The listing had been decided on the ground that the applicants were subject to preliminary investigations in Ukraine concerning crimes in connection with the embezzlement of State funds and their illegal transfer outside Ukraine and was, subsequently, extended on the ground that the applicants were subject to criminal proceedings by the authorities of that country for misappropriation of public funds or assets.

The Court, applying the case-law principles laid down in the judgment of 19 December 2018, ***Azarov* v *Council***, [75] noted, first of all, in these two cases, that the Courts of the European Union must ensure the review of the lawfulness of all Union acts in the light of respect of fundamental rights. Even if the Council is able to base the adoption or maintenance of the restrictive measures on a decision of a third State, it must itself verify that such a decision has been taken in accordance with, inter alia, the rights of the defence and the right to effective judicial protection in that State. In that regard, it is stated that, even if the fact that the third State at issue has acceded to the European Convention on Human Rights and Fundamental Freedoms ('the ECHR') entails review, by the European Court of Human Rights ('the ECtHR'), of the fundamental rights guaranteed by the ECHR, that fact cannot render superfluous the verification requirement referred to above. Moreover, it is for the Council, in order to fulfil its obligation to state reasons, to show, in the acts imposing the restrictive

73| In that case, annulment was sought, in Cases T-244/16 and T-285/17, of Council Decision (CFSP) 2016/318 of 4 March 2016 (OJ 2016 L 60, p. 76) and of Council Implementing Regulation (EU) 2016/311 of 4 March 2016 (OJ 2016 L 60, p. 1), of Council Decision (CFSP) 2017/381 of 3 March 2017 (OJ 2017 L 58, p. 34) and of Council Implementing Regulation (EU) 2017/374 of 3 March 2017 (OJ 2017 L 58, p. 1), and, in Case T-274/18, of Council Decision (CFSP) 2018/333 of 5 March 2018 (OJ 2018 L 63, p. 48) and of Council Implementing Regulation (EU) 2018/326 of 5 March 2018 (OJ 2018 L 63, p. 5).

74| Namely persons, entities and bodies subject to Article 1 of Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26), as amended by Council Decision (CFSP) 2015/143 of 29 January 2015 (OJ 2015 L 24, p. 16), and Article 2 of Council Regulation (EU) No 208/2014 of 5 March 2014 (OJ 2014 L 66, p. 1), as amended by Council Regulation (EU) 2015/138 of 29 January 2015 (OJ 2015 L 24, p. 1).

75| Judgment of the Court of Justice of 19 December 2018, ***Azarov* v *Council*** (C-530/17 P, EU:C:2018:1031).

measures, that it has verified that the decision of the third State, on which those measures are based, was taken in accordance with those rights. Moreover, the Council is required to carry out that verification irrespective of any evidence adduced by the applicants.

Next, the Court noted that, even though the Council claims that judicial oversight had been exercised in Ukraine during the conduct of the criminal proceedings and that the existence of several judicial decisions adopted in that context shows that it was able to verify respect for the rights in question, such decisions are not capable, alone, of demonstrating that the decision of the Ukrainian authorities to conduct the criminal proceedings, on which the maintenance of the restrictive measures is based, was taken in accordance with the rights of the defence and the right to effective judicial protection. All the judicial decisions mentioned by the Council fall within the scope of the criminal proceedings which justified the listing and maintenance of the applicants' names on the list and are merely incidental in the light of those proceedings, since they are either restrictive or procedural in nature.

In the judgment in ***Klymenko* v *Council*** (T-274/18), the Court stated, in particular, that the Council did not explain how the existence of those decisions permitted the inference that the protection of the rights in question was guaranteed, even though the Ukrainian criminal proceedings which were the basis of the restrictive measures at issue in 2014 were still at the preliminary investigation stage. In that respect, the Court referred to the ECHR [76] and to the Charter, [77] according to which the principle of the right to effective judicial protection includes, inter alia, the right to a hearing within a reasonable time. The Court stated that the ECtHR had already observed that infringement of that principle could be established, inter alia, when the investigation stage of criminal proceedings was characterised by a certain number of periods of inactivity attributable to the authorities with competence to conduct that investigation. The Court also noted that, where a person has been subject to the restrictive measures at issue for several years, on account of the same criminal proceedings brought in the relevant third State, the Council is required to explore in greater detail the question of a possible breach by the authorities of that person's fundamental rights. Therefore, at the very least, the Council should have stated the reasons why it was entitled to take the view that those rights had been respected in terms of whether the applicant's case had been heard within a reasonable time.

Before ruling on the substance, the Court also rejected, in that same case, the plea of inadmissibility which the Council had raised with regard to the fact that the applicant, by relying on the judgment in ***Azarov* v *Council***, had put forward a new plea. In that regard, the General Court noted, in the first place, that, in the judgment in ***Azarov* v *Council***, the Court of Justice, after setting aside the judgment of 7 July 2017, ***Azarov* v *Council***, [78] held that the state of the proceedings was such as to permit judgment to be given and annulled the acts at issue, finding that there had been an infringement of the obligation to state reasons, which is a plea involving a matter of public policy which, as such, may be raised at any moment. The General Court noted, in the second place, that, in any event, the arguments put forward by the applicant relating to the judgment in ***Azarov* v *Council*** were closely connected with certain paragraphs of the application and, therefore, were also admissible on that basis. The General Court pointed out, in the third place, that because the Court of Justice had overturned the General Court's case-law which existed when the applicant had brought his action, the judgment in ***Azarov* v *Council*** constituted a matter of law capable of justifying the submission of a new plea or argument.

76| Article 6(1).

77| Article 47.

78| Judgment of the Court of 7 July 2017, ***Azarov* v *Council*** (T-215/15, EU:T:2017:479).

VII. Economic, social and territorial cohesion

In the judgment in ***Hungary* v *Commission*** (T-139/15, EU:T:2019:156), delivered on 12 March 2019, the Court dismissed the action for annulment brought by Hungary, under Article 263 TFEU, against Commission Implementing Decision (EU) 2015/103 [79] imposing on Hungary a financial correction equal to 25% of the total amount of restructuring aid for full dismantling of sugar production sites, which had been granted to Hungarian sugar producers in the framework of the temporary scheme for the restructuring of the sugar industry.

In the first place, the Court was required to determine when the assessment of whether silos constituted production facilities that were required to be dismantled had to be carried out in order for restructuring aid for full dismantling to be granted and whether the silos fell within one of the exceptions laid down by the Court of Justice in its judgment of 14 November 2013, ***SFIR and Others*** (C-187/12 to C-189/12, EU:C:2013:737).

The Court took the view that the classification of the silos had to be determined on the date of the application for aid and not at the end of the restructuring operations. In order to achieve the objective of reducing unprofitable sugar production capacity in the European Union, pursued by the relevant legislation, the EU legislature had established two different restructuring schemes depending on the type of dismantling carried out, namely full dismantling or partial dismantling, which gave rise to different amounts of restructuring aid. In the event of full dismantling, all facilities other than those that were necessary for the production of sugar, isoglucose or inulin syrup or that were directly related to their production, such as packaging facilities, could exceptionally be retained. On the other hand, in the event of partial dismantling, facilities that were necessary for the production of sugar, isoglucose or inulin syrup or that were directly related to their production could be retained, provided, inter alia, that they were no longer used for the production of products covered by the common market organisation for sugar.

First, if the classification of the silos had been assessed at the end of the restructuring process, it would have been possible, in the case of full and partial dismantling alike, to retain silos which, on the date the aid application was made, constituted production facilities. Therefore, retaining part of the production facilities would no longer have been characteristic of partial dismantling, but would also have been possible in the event of full dismantling, even though, due to the high costs associated with that type of dismantling, operators received 25% more restructuring aid than that granted in the case of partial dismantling. Secondly, silos that, by definition, were production facilities on the date the aid application was made would not have been mentioned in the restructuring plan as production facilities that were required to be dismantled, in breach of Article 4(3)(c) of Regulation No 320/2006. [80] Thirdly, the commitment to dismantle the production facilities in their entirety, which had to be attached to the application for restructuring aid for full dismantling, would have been invalidated because it would not have covered all production facilities existing on the date on which that commitment was made.

79| Commission Implementing Decision (EU) 2015/103 of 16 January 2015 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2015 L 16, p. 33).

80| Council Regulation (EC) No 320/2006 of 20 February 2006 establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the common agricultural policy (OJ 2006 L 58, p. 42).

In the second place, the Court examined whether, in view of the objective difficulties in interpreting the relevant legislation as regards the retention of silos in the case of full dismantling, the Commission should have reduced the amount of the financial correction or should not have made any financial correction at all, in accordance with the guidelines set out in Document VI/5330/97 [81] and, more specifically, in the second paragraph under the heading 'Borderline cases' in Annex 2 to that document ('the borderline case').

The Court took the view that the borderline case is a weighting factor which does not automatically give rise to an entitlement that it be applied. The application of the borderline case is subject to the condition, first, that the deficiency identified by the Commission during the procedure for the clearance of accounts must be the result of difficulties in interpreting EU legislation and, secondly, that the national authorities must have taken the necessary steps to remedy the deficiency as soon as it was brought to light by the Commission.

VIII. Health protection

In the judgment in ***GMPO* v *Commission*** (T-733/17, under appeal, [82] EU:T:2019:334), delivered on 16 May 2019, the Court dismissed in its entirety the action seeking the annulment in part of the Commission decision to withdraw a medicinal product based on the active substance trientine, the sponsor of which is the GMP-Orphan (GMPO), the applicant, from the European Union Register of Orphan Medicinal Products on the ground that it did not satisfy the criteria laid down in Regulation No 141/2000, [83] namely that it must provide a 'significant benefit' to patients with a rare disease by comparison with a similar medical product that is already authorised. The status of orphan medicinal product would have allowed the applicant to benefit from a period of commercial exclusivity of 10 years from the time when it obtained authorisation to place that product on the market.

The applicant's main argument was that its medicinal product, for which a marketing authorisation procedure by means of the centralised procedure established by Regulation No 726/2004 [84] was in progress, would have procured, through that authorisation and by mere operation of law, a 'significant benefit' for patients within the meaning of Regulation No 141/2000 by comparison with another similar medicinal product already authorised but only on the market of one Member State.

The Court stated that no provision in either Regulation No 141/2000 or Regulation No 847/2000 [85] provides that marketing authorisation at EU level for an orphan medicinal product is to constitute per se a significant benefit by comparison with an existing medicinal product, which is as effective and already authorised, albeit in only one Member State. Furthermore, according to the Court, the sponsor cannot rely for those purposes on presumptions or assertions of a general nature, such as a supposed insufficient availability of treatments

81| Commission Document VI/5330/97 of 23 December 1997, entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding the clearance of the accounts of the EAGGF Guarantee'.

82| Case C-575/19 P, ***GMPO* v *Commission***.

83| Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products (OJ 2000 L 18, p. 1).

84| Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency.

85| Commission Regulation (EC) No 847/2000 of 27 April 2000 laying down the provisions for implementation of the criteria for designation of a medicinal product as an orphan medicinal product and definitions of the concepts 'similar medicinal product' and 'clinical superiority' (OJ L 2000 L 103, p. 5).

already existing and authorised in the Member States. The sponsor must, conversely, demonstrate, on the basis of concrete and substantiated evidence and information, that the new medicinal product provides a benefit for patients and that it contributes to patient care. The Court made clear in that regard that the expected advantage of that new medicinal product by comparison with the existing medical product must exceed a certain quantitative or qualitative threshold in order that it may be considered to be 'significant' or 'major' within the meaning of the relevant legal framework.

In that instance, the Committee for Orphan Medicinal Products of the European Medicines Agency had concluded in its opinion, on the basis of which the Commission adopted the contested decision, that the applicant had not provided sufficient supporting information to establish that there was an availability problem with the medicinal product that already existed. In that regard, while noting that that committee's opinion does not entail complex technical or scientific assessments, but is essentially based on findings of fact regarding the availability within the European Union of the reference medical product, the Court carried out a full judicial review of that opinion. The Court observed that the inquiry conducted by the committee for the purposes of verifying the arguments put forward by the applicant before the committee is of high probative value and, moreover, that the evidence submitted by the applicant before that committee was properly evaluated. Thus, the Court concluded that the contested decision, which endorses the opinion of the Committee for Orphan Medicinal Products, is not vitiated by an error of assessment.

IX. Energy

In the judgment in ***Poland* v *Commission*** (T-883/16, under appeal, [86] EU:T:2019:567), delivered on 10 September 2019, the Court upheld the action for annulment brought by the Republic of Poland against the decision of the Commission approving the variation to the exemption regime for the operation of the OPAL gas pipeline proposed by the German regulatory authority. [87]

The OPAL gas pipeline is the terrestrial section of the North Stream 1 gas pipeline which transports gas from Russia into Europe, circumventing the 'traditional' transit countries such as Ukraine, Poland and Slovakia. In 2009, the Commission had approved, subject to conditions, the decision of the German regulatory authority to exempt the OPAL pipeline from the rules under Directive 2003/55 [88] (later replaced by Directive 2009/73 [89]) on third party access to the gas pipeline network and on tariff regulation. As Gazprom had never complied with one of the conditions imposed by the Commission, it has been able to operate the OPAL pipeline only up to 50% of its capacity since it was put into service in 2011.

In 2016, at Gazprom's request, the German regulatory authority notified the Commission of its intention to vary certain provisions of the exemption granted in 2009. In essence, the variation proposed was to enable the OPAL pipeline to be operated at its full capacity, on condition that at least 50% of that capacity would be sold by way of auction. The Commission approved that variation subject to certain conditions. Given that

86| Case C-848/19 P, ***Germany* v *Poland***.

87| Commission Decision C(2016) 6950 final of 28 October 2016 on review of the conditions for exemption of the OPAL pipeline from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC.

88| Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

89| Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

that decision enabled Gazprom to reduce the quantities of gas transiting through Ukraine and Slovakia and, ultimately, that transiting via Poland, the latter brought an action before the Court seeking the annulment of that decision by relying, inter alia, on a weakening of its energy security.

The Court, in the first place, rejected the plea for annulment alleging a breach of Article 36(1)(a) of Directive 2009/73. Under that provision, gas interconnectors are able, upon request, to benefit for a fixed period from an exemption from the provisions of that directive on third party access to the gas pipeline network, provided that certain conditions are satisfied. Improvement of the security of supply being amongst those conditions, Poland criticised the Commission for having breached that provision. In that regard, the Court observed however that it was the investment in major new gas infrastructures, namely, in that case, the construction of the OPAL pipeline, that was required to satisfy the criterion of improving the security of supply. Consequently, it was at the time of the original decision of 2009 that the Commission was required to satisfy itself that the investment proposed met that criterion. By contrast, the Commission was not required to examine that criterion when adopting the contested decision of 2016, which merely approved a variation to the conditions attached to the initial exemption. Indeed, since no new investment was being proposed at that stage, and the variation to the operating conditions proposed by the German authority did not alter the OPAL pipeline as an infrastructure, that question could not receive a different response in 2016 from that given in 2009.

In the second place, the Court examined, for the first time, the principle of energy solidarity laid down in Article 194(1) TFEU, the breach of which was alleged by Poland. First of all, it observed that, as a specific expression in the field of energy of the general principle of solidarity between the Member States, that principle entails rights and obligations both for the European Union and for the Member States. The Court furthermore stated that that principle was not limited to obligations of mutual assistance in exceptional situations of crisis in the supply or functioning of the internal gas market. On the contrary, the principle of solidarity also entails a general obligation on the part of the European Union and the Member States, in the exercise of their respective competences, to take into account the interests of the other stakeholders. In the context of the energy policy of the European Union, that policy requires the European Union and the Member States to endeavour, in the exercise of their powers in the field of energy policy, to avoid adopting measures liable to affect the interests of the European Union and the other Member States, as regards security of supply, its economic and political viability and the diversification of supply or of sources of supply. Therefore, the EU institutions and the Member States are obliged to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict.

Having regard to the scope of the principle of solidarity, in the context of the adoption of the contested decision in 2016 the Commission should have assessed whether the variation to the regime governing the operation of the OPAL pipeline, as proposed by the German regulatory authority, could affect the interests in the field of energy of other Member States and, if so, to balance those interests with the interest that that variation had for the Federal Republic of Germany and, if relevant, the European Union. As such an assessment was lacking in the contested decision, that decision was annulled by the Court.

X. Chemical products (REACH)

On 20 September 2019, in the judgment in ***BASF Grenzach* v *ECHA*** (T-125/17, EU:T:2019:638), delivered by a Chamber sitting in an extended composition, the Court ruled for the first time on the task and the powers of the Board of Appeal of the European Chemicals Agency (ECHA) and, more particularly, on the nature and

intensity of the review conducted by that board in the context of an action brought before it against an ECHA decision requesting further information on the evaluation of the substance Triclosan, in accordance with Regulation No 1907/2006. [90]

The applicant company, the manufacturer of Triclosan, is the sole registrant of that substance within the meaning of that regulation. Following the adoption by ECHA of a decision requesting further information from the applicant, the latter brought an appeal before that agency's Board of Appeal, which was dismissed in part. By its appeal before the Court, the applicant requested the annulment of the decision of the Board of Appeal of ECHA, on the basis of pleas alleging that the Board of Appeal had failed to understand its review task since it did not carry out a '*de novo*' examination of the scientific assessments on which the initial ECHA decision was based. The applicant's arguments were unsuccessful and the Court dismissed the appeal on the following grounds.

In the first place, as regards the scope of the review task of the Board of Appeal of ECHA, the Court noted at the outset that none of the provisions of Regulation No 1907/2006 or of Regulation No 771/2008 [91] expressly provides that, in the context of an action before it against a decision of the ECHA requesting further information in the evaluation of a substance, the Board of Appeal is to conduct a '*de novo*' evaluation as envisaged by the applicant, that is to say, an evaluation of the question whether, at the time when it rules on the action, in the light of all the relevant matters of law and fact, in particular scientific issues, a new decision with the same operative part as the decision before it may be lawfully adopted. By contrast, it follows from the provisions of those two regulations that, in the context of such an action, the Board of Appeal is to confine itself to examining whether the arguments put forward by the applicant are such as to demonstrate the existence of an error vitiating the contested decision. The Court ruled that, because of the adversarial nature of the procedure before the Board of Appeal of ECHA, as provided for by the general procedural rules of Regulation No 771/2008, the subject of that procedure is determined by the pleas put forward by the applicant in the context of the action before that board and that this type of action may therefore only aim to examine whether the evidence submitted by the applicant is capable of demonstrating that the decision contested before it is vitiated by error.

Moreover, the Court noted that it is clear from the scheme of Regulation No 1907/2006 that the rules of procedure which apply to ECHA where it adopts a decision at first instance are not intended to apply directly to the Board of Appeal. The Court therefore concluded that the Board of Appeal was not required to carry out a new evaluation comparable to that carried out by ECHA at first instance. In particular, the Court concluded that it is not for the Board of Appeal to repeat the scientific examination conducted in the initial ECHA decision, as, first, that examination, which is to be carried out in accordance with the precautionary principle, must be entrusted only to scientific experts and, secondly, there is no provision in Regulation No 1907/2006 or Regulation No 771/2008 providing for such a new scientific evaluation in the context of appeal proceedings before the Board of Appeal.

In the second place, as regards the intensity of the review by the Board of Appeal of ECHA, the Court ruled that, unlike review by the Courts of the European Union, the review carried out by the Board of Appeal of assessments of highly complex scientific facts in an ECHA decision is not limited to verifying the existence

90| 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).

91| Commission Regulation (EC) No 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ 2008 L 206, p. 5).

of manifest errors. Having regard to the respective legal and scientific qualifications of the members of the Board of Appeal of ECHA, the board has the necessary expertise to allow it to carry out this type of assessment itself. Therefore, it is in reliance on the legal and scientific competences of its members, that that board must examine whether the arguments put forward by the applicant are capable of demonstrating that the findings on which that decision is based are vitiated by error.

In the judgment of 20 September 2019, ***Germany*** **v** ***ECHA*** (T-755/17, EU:T:2019:647), the Court ruled on the task and powers of the Board of Appeal of the ECHA and, more particularly, on the nature and intensity of the review conducted by that board in the context of an action brought before it against an ECHA decision requesting further information on the evaluation of the substance benpat, in accordance with Regulation No 1907/2006.

Following the adoption by ECHA of a decision requesting further information from companies which had registered benpat with ECHA, those companies brought before the Board of Appeal of that agency an action as a result of which the contested decision was annulled in part. By its action before the Court, the Federal Republic of Germany sought to have the decision of the Board of Appeal of ECHA annulled, on the ground, in essence, that that board is not competent to rule on pleas seeking to demonstrate the existence of substantive errors vitiating an ECHA decision. Since the applicant Member State's arguments were unsuccessful, the Court dismissed in part the action and held that the Board of Appeal of ECHA is competent to examine such pleas.

In the first place, the Court noted, in the light, in particular, of the fact that the members of the Board of Appeal are appointed on the basis of their experience and scientific and legal expertise, that that board has the necessary expertise at its disposal to carry out assessments of scientific evidence itself and that that expertise is intended to ensure a balanced assessment of both legal and technical aspects. In the second place, the Court noted that neither Regulation No 1907/2006 nor Regulation No 771/2008 provides for special rules concerning actions against decisions on the evaluation of substances.

In the third place, the Court concluded that the objectives pursued by the possibility of bringing an action before the Board of Appeal against an ECHA decision plead in favour of that board's competence to examine pleas seeking to demonstrate the existence of substantive errors vitiating such a decision. The Court concluded that, since the intensity of the review conducted by the Board of Appeal of ECHA is greater than that of a review carried out by the EU Courts, the powers of that board are not limited to verifying the existence of manifest errors, but extend to verifying the technical aspects of a decision requesting further information. Moreover, limiting the powers of the Board of Appeal of ECHA would make it impossible for that board to perform its function, which is to limit litigation before the EU Courts, while still guaranteeing a right to an effective remedy, and would be contrary to the considerations forming the basis of the introduction of the rules concerning the admission of appeals in cases which have already been considered twice, that is to say, initially by that board and subsequently by the Court. [92]

92| Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2019 L 111, p. 1).

In the fourth and final place, the Court found that limiting the powers of the Board of Appeal of ECHA would prevent it from ensuring an effective remedy for the purposes of the first paragraph of Article 47 of the Charter. After noting that, in adversarial proceedings, the Board of Appeal merely examines whether the arguments put forward before it are capable of demonstrating the existence of an error vitiating the contested decision, the Court took the view that, if that board's powers were limited in that way, pleas alleging the existence of substantive errors vitiating an ECHA decision could not usefully be invoked in the context of an action for annulment against a decision of that board brought before the Court. Moreover, the approach of limiting the Board of Appeal's powers would result in unnecessary actions being brought before that board, inasmuch as an applicant wishing to have an ECHA decision annulled solely on the basis of pleas alleging substantive errors vitiating that decision would have to bring an action before the Board of Appeal, even though such an action would, in such a case, be bound to fail.

XI. Dumping

By its judgment in ***Foshan Lihua Ceramic* v *Commission*** (T-310/16, EU:T:2019:170), delivered on 20 March 2019, the Court dismissed the action brought by Foshan Lihua Ceramic, a Chinese exporting producer ('the applicant'), for annulment of the Commission's decision rejecting its request for new exporting producer treatment with regard to the definitive anti-dumping measures imposed on imports of ceramic tiles originating in the People's Republic of China by Implementing Regulation No 917/2011 [93] ('the definitive regulation'). The applicant, which did not participate in the administrative procedure which led to the adoption of that regulation, was charged anti-dumping duty at a rate that was calculated by reference to the highest of the dumping margins found for a representative product type from an exporting producer which participated in that procedure. The Commission rejected the request for new exporting producer treatment on the ground that the applicant had not established that it satisfied the conditions for granting such treatment.

The Court first of all observed that Article 11(5) of Regulation No 1225/2009 [94] ('the basic regulation'), which transposes only to the review procedures provided for in Article 11(2) to (4) of that regulation the relevant provisions of the basic regulation concerning the procedures and the conduct of investigations, including Article 5(10) and (11) of the basic regulation and Article 6(7) of that regulation, is not applicable in an investigation based on Article 3 of the definitive regulation.

As regards the alleged infringement of Article 9.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) ('the Anti-Dumping Agreement'), [95] the Court found that, although the wording of the first to third subparagraphs of Article 11(4) of the basic regulation is, with the exception of the third condition relating to the existence of exports post-dating the initial investigation period, similar to the wording of Article 9.5 of the Anti-Dumping Agreement, Article 11(4) of the basic regulation includes a fourth subparagraph, according to which that article is not to apply where the institutions have used sampling in the initial investigation. The purpose of that exception is to ensure that new exporting

93| Council Implementing Regulation (EU) No 917/2011 of 12 September 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tiles originating in the People's Republic of China (OJ 2011 L 238, p. 1).

94| 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), as last amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1).

95| Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103) set out in Annex 1 A to the Agreement establishing the World Trade Organization (WTO) (OJ 1994 L 336, p. 3).

producers are not placed in a more favourable procedural situation than those which cooperated in the initial investigation, but were not sampled. That consideration was not taken into account in the Anti-Dumping Agreement. Thus, the fourth subparagraph of Article 11(4) of the basic regulation is an expression of the EU legislature's intention to adopt, as regards the conditions for initiating a review in respect of new exporting producers, an approach specific to the EU legal order, so that that provision cannot be considered to be a measure intended to ensure the implementation in the EU legal order of a particular obligation assumed in the context of the World Trade Organization. It follows that Article 9.5 of the Anti-Dumping Agreement does not have direct effect in the EU legal order.

Next, the Court held that, since the objectives of the investigation conducted under Article 3 of the definitive regulation are more restrictive than those of the investigation conducted under Article 11(4) of the basic regulation, it is justified that fewer persons are informed of the initiation of an investigation under Article 3 of the definitive regulation. Whilst the investigation conducted under Article 11(4) of the basic regulation is intended to determine not only whether the operator in question is a new exporting producer, but also, if that first question is answered in the affirmative, its individual dumping margin, the sole purpose of the investigation conducted under Article 3 of the definitive regulation is to ascertain whether the operator in question is indeed a new exporting producer. During that investigation, the latter must demonstrate that it did not export the goods described in Article 1(1) of the definitive regulation, originating in China, during the initial investigation period, that it is not related to an exporter or producer subject to the measures imposed by this regulation and that it has either actually exported the goods concerned or has entered into an irrevocable contractual obligation to export a significant quantity of those goods to the European Union after the end of the initial investigation period. Since those conditions relate to the specific situation of the operator in question, that operator — to the exclusion of any third party — is clearly best placed to provide the necessary information.

Finally, as regards the burden and standard of proof, the Court explained that the burden of proof on an applicant for new exporting producer treatment, both under Article 3 of the definitive regulation and pursuant to Article 11(4) of the basic regulation, is in itself in no way impossible to satisfy. The provision of complete, consistent and verifiable evidence, in particular concerning all its sales and its group structure, enables the Commission to rule out, if that was not actually the case, that the product concerned was exported to the European Union during the initial investigation period, or to conclude that the applicant is not related to any exporting producer subject to the anti-dumping duties in question.

In that regard, it is not for the Commission either to prove the existence of exports of the product concerned by the applicant to the European Union or of any links with undertakings subject to the anti-dumping duties in question, or to provide any indications in support of this. In order to reject an application for the grant of that treatment, it is sufficient, on the substance, that the evidence adduced by the operator in question was insufficient to substantiate its claims. By contrast, it is for the Commission, in the context of its role in investigations on whether to grant new exporting producer treatment, to verify by all means available the accuracy of the claims and evidence put forward by such an operator.

By its judgment in ***Stemcor London and Samac Steel Supplies*** **v** ***Commission*** (T-749/16, EU:T:2019:310), of 8 May 2019, the Court dismissed the action for annulment of Commission Regulation 2016/1329 [96] ('the contested regulation') providing for the retroactive levying of the definitive anti-dumping duty on the imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation.

96| Commission Implementing Regulation (EU) 2016/1329 of 29 July 2016 levying the definitive anti-dumping duty on the registered imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation (OJ 2016 L 210, p. 27).

In that judgment, the Court ruled for the first time on the mechanism provided for by Article 10(4) of the basic regulation on anti-dumping [97] which enables the Commission to levy an anti-dumping duty retroactively on products which were entered for consumption no more than 90 days prior to the date of application of provisional measures (but not prior to the initiation of the investigation), provided that the imports at issue have been registered, that 'there is, for the product in question, a history of dumping over an extended period, or the importer was aware of, or should have been aware of, the dumping as regards the extent of the dumping and the injury alleged or found' (Article 10(4)(c)) and that 'in addition to the level of imports which caused injury during the investigation period, there is a further substantial rise in imports which, in the light of its timing and volume and other circumstances, is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied' (Article 10(4)(d)).

First, with regard to the applicants' claim that the Commission had made several errors in the interpretation and application of the conditions laid down in Article 10(4)(c) of the basic regulation, the Court rejected the suggested interpretation according to which, in order to fulfil the condition laid down in Article 10(4)(c) of the basic regulation, the importers' awareness must be established with regard to the 'actual' dumping and not only the 'alleged' dumping and held that the words 'alleged' or 'found' must be regarded as relating both to the extent of the dumping and to the extent of the injury in order to ensure the practical effect of that provision.

Next, the Court held that the evidence contained in the non-confidential version of the complaint and in the notice of initiation of investigation was sufficient in that case for the purposes of establishing that the importers, who are experienced professionals, were aware of the extent of the alleged dumping, within the meaning of Article 10(4) of the basic regulation, from the initiation of the investigation.

As regards Article 10(4)(d) of the basic regulation, the Court held that the relevant period for assessing the 'further substantial rise in imports' must be capable of including the time that has elapsed since the publication of the notice of initiation of investigation, since it is from that moment that importers were aware of the possibility that duties might subsequently be applied retroactively on registered imports and that they might thus be tempted to import massive amounts of the products concerned in anticipation of the future imposition of those duties.

Next, the Court explained that the further substantial rise in imports must be assessed as a whole in order to determine whether the imports, taken as a whole, are likely seriously to undermine the remedial effect of the definitive duties and thus create additional injury for the Union industry, without considering the individual and subjective position of the importers in question.

The Court also held that the 'substantial' nature of the rise is to be determined on a case-by-case basis, not only by comparing monthly weighted averages of the imports that took place during the investigation period and those which occurred during the period between the notice of initiation of investigation and the imposition of provisional measures, but also by taking all other relevant considerations into account. Those are in particular: the development of the overall consumption of the products concerned in the Union, the evolution of stocks and the evolution of market shares.

97| Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

Accordingly, the Court ruled that the Commission was fully entitled to conclude that the further substantial rise in imports, in the light of its volume, timing and other circumstances, namely the substantial decrease in prices and increase in stocks, had a further negative bearing on the prices and Union market share of the Union industry and was therefore likely seriously to undermine the remedial effect of the definitive anti-dumping duty.

By its judgment of 3 December 2019, ***Yieh United Steel* v *Commission*** (T-607/15, EU:T:2019:831), the Court dismissed the action brought by Yieh United Steel Corp. seeking the annulment of Commission Implementing Regulation 2015/1429 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan. [98]

At the origin of the case is an anti-dumping proceeding conducted by the Commission in 2014 and 2015 which led, by means of the contested regulation, to the imposition of an anti-dumping duty of 6.8% on imports of stainless steel cold-rolled flat products. The applicant is a company established in Taiwan which manufactures and distributes the products subject to that anti-dumping duty.

The applicant brought an action before the Court seeking the annulment of Implementing Regulation 2015/1429 in so far as it relates to it, alleging, inter alia, infringement of Article 2 of the basic anti-dumping regulation. [99] Under Article 2(2) of that regulation, the 'normal value' of products subject to the anti-dumping duty is normally to be determined on the basis of sales of the like product intended for consumption on the domestic market of the exporting country. In accordance with Article 2(1) of the basic regulation, the normal value of the product subject to the anti-dumping duty is normally to be based on the prices paid or payable, in the ordinary course of trade, by independent customers.

In that regard, the applicant disputed, inter alia, the Commission's refusal to deduct the value of recycled scrap from the cost of production of the product subject to the anti-dumping duty for the purposes of determining the normal value. In addition, it claimed that the Commission wrongly refused to take into consideration certain of its sales to an independent customer in the exporting country, which is also a distributor of the product concerned, which the applicant claimed to have been domestic sales which it did not intend for export or the end destination of which it did not know. However, the Commission had refused to take those sales into consideration for the purposes of determining the normal value of the product concerned on the basis that, according to the investigation report, there was objective evidence that those sales were actually export sales and, moreover, that part of the sales in question was subject to an export rebate system.

The Court found, first, that the Commission had been entitled to reject the claim to deduct the value of recycled scrap from the cost of production of the product subject to the anti-dumping duty, having been unable accurately to verify whether the costs associated with the production and sale of the recyclable scrap were reasonably reflected in the applicant's accounting records.

As regards the request for account to be taken of the sales of stainless steel cold-rolled flat products to an independent customer in the exporting country, the Court observed first of all that, even where there is divergence between the various language versions of Article 2(2) of the basic regulation, a large proportion of the various language versions refer to the destination of the product concerned without making reference to the intention of the producer as to that destination at the time of the sale.

98| Commission Implementing Regulation (EU) 2015/1429 of 26 August 2015 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (OJ 2015 L 224, p. 10).

99| 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, corrigendum OJ 2010 L 7, p. 22).

Next, the Court pointed out, on the one hand, that Article 2.1 of the GATT anti-dumping agreement [100] uses, in its three official languages, 'destined for consumption' in English, 'destiné à la consommation' in French and 'destinado al consumo' in Spanish and noted, on the other hand, that the provisions of the basic anti-dumping regulation must, so far as is possible, be interpreted in the light of the corresponding provisions of that anti-dumping agreement.

The interpretation that it is not necessary to seek a 'specific intention' or 'knowledge' on the part of the vendor as to the final destination of the product concerned is, moreover, confirmed by the Court's analysis of the context of Article 2 of the basic anti-dumping regulation.

That interpretation is also in line with the purpose of the anti-dumping investigation, which consists in seeking objective evidence. In that context, making the exclusion of sales of products which have been exported from the determination of the normal value subject to proof of the intention of the vendor as to the final destination of the product concerned would, according to the Court, be tantamount to allowing the prices of exported products that are likely to distort or compromise the correct determination of the normal value to be taken into account for the purposes of determining the normal value.

Finally, the Court stated that this interpretation is also compatible with the principles of foreseeability and legal certainty, whereas the application of a criterion based on the specific intention or knowledge of the vendor would make taking into account the sale price of the exported products for the purposes of determining the normal value contingent on a subjective element, the existence of which runs the risk of being random or impossible to establish.

The Court thus held that the applicant had failed to demonstrate in that case that the Commission had made an error of law or a manifest error of assessment by refusing to take into account, for the purposes of determining the normal value of the product involved in the anti-dumping procedure, the applicant's sales to its independent customer.

XII. Access to documents of the institutions

In 2019, the Court had the opportunity to provide clarification of the concept of information relating to emissions into the environment, the exception relating to the protection of documents intended for internal use and the scope of the general presumption of confidentiality of documents relating to procedures for reviewing State aid.

1. Concept of information relating to emissions into the environment

In the judgment in ***Tweedale*** **v** ***EFSA*** (T-716/14, EU:T:2019:141), delivered on 7 March 2019, the Court upheld the action brought under Article 263 TFEU by Mr Tweedale for annulment in part of the decision of the European Food Safety Authority (EFSA), whereby EFSA denied him access to studies of the toxicity of glyphosate

100| Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103) set out in Annex 1 A of the Agreement establishing the World Trade Organization (WTO) (OJ 1994 L 336, p. 3).

on the basis of Article 4(2) of Regulation No 1049/2001. [101] EFSA contended that there was no overriding public interest in disclosure of the parts of the requested studies, since they did not constitute information which 'relates to emissions into the environment' for the purposes of Regulation No 1367/2006. [102] The applicant claimed, in particular, that there had been an infringement of Article 4(2) of Regulation No 1049/2001 and Article 6(1) of Regulation No 1367/2006 in that the requested studies might be categorised as information which 'relates to emissions into the environment' for the purposes of the latter provision.

First of all, the Court observed that an institution of the European Union dealing with a request for access to a document cannot justify its refusal to divulge it on the basis of the exception relating to the protection of the commercial interests of a particular natural or legal person, provided for in the first indent of Article 4(2) of Regulation No 1049/2001, where the information contained in that document constitutes information which 'relates to emissions into the environment' for the purposes of Article 6(1) of Regulation No 1367/2006. In that respect, the Court concluded that the question therefore arose whether the information contained in the requested studies constituted information which 'relates to emissions into the environment' for the purposes of that provision.

With regard to the concept of information which 'relates to emissions into the environment', the Court concluded that such information cannot be limited to information concerning emissions actually released into the environment when the plant protection product or active substance in question is used on plants or soil, but that that concept also covers information on foreseeable emissions into the environment from the plant protection product or active substance in question, under normal or realistic conditions of use of that product or substance, namely the conditions under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used.

In that regard the Court held that an active substance contained in plant protection products, such as glyphosate, in the course of normal use, is intended to be discharged into the environment by virtue of its function, and its foreseeable emissions cannot, therefore, be regarded as purely hypothetical, or even simply foreseeable. Given that glyphosate has been authorised in Member States since 2002 and has actually been used in plant protection products, its emissions into the environment are therefore a reality. The requested studies are therefore intended to establish the toxicity of an active substance which is actually present in the environment.

Next the Court stated that, according to the case-law of the Court of Justice, the concept of information which 'relates to emissions into the environment' is not limited to information which makes it possible to assess the emissions as such, but also covers information relating to the effects of those emissions. In that regard, the Court held that the requested studies are intended to determine the limits within which glyphosate, when present in food, does not present any risk in the medium to long term for human health and, thus, to set the various values relating to the consequences of glyphosate emissions on human health. The Court stated that, in order for the studies to be classified as information which 'relates to emissions into the environment', what matters is not so much the conditions in which those studies were carried out, in particular whether or not they were carried out in a laboratory, but their purpose.

101| 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).

102| Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

Finally, the Court took the view that the applicant's access to the requested studies would enable him to understand the manner in which human health could be affected by glyphosate being released into the environment and that, therefore, the requested studies must be regarded as constituting information which 'relates to emissions into the environment' for the purposes of Article 6(1) of Regulation No 1367/2006.

2. Exception relating to the protection of documents intended for internal use

In the case that gave rise to the judgment of 12 March 2019, ***De Masi and Varoufakis* v *ECB*** (T-798/17, under appeal, [103] EU:T:2019:154), the Court heard an action for annulment of the decision of the European Central Bank (ECB) refusing the applicants, Mr Fabio de Masi and Mr Yanis Varoufakis, access to the document entitled 'Responses to questions concerning the interpretation of Article 14.4 of the Protocol on the Statute of the European Central Banks System and of the European Central Bank'. That document included the response from an external adviser to a legal consultation requested by the ECB concerning the powers held by the Governing Council under Article 14.4. The document examined in particular the prohibitions, restrictions or conditions that the Council can place upon the performance of functions outside the European System of Central Banks (ESCB) by national central banks in so far as there is a risk that those functions may interfere with the objectives and tasks of the ESCB. The ECB refused to grant access to that document on the basis of, first, the exception provided for in the second indent of Article 4(2) of Decision 2004/258, [104] concerning the protection of legal advice and, secondly, the exception provided for in the first subparagraph of Article 4(3) of the same decision, concerning the protection of documents for internal use.

As regards the exception concerning the protection of documents for internal use, the Court noted the differences between the wording of the first subparagraph of Article 4(3) of Decision 2004/258 and that of Article 4(3) of Regulation No 1049/2001. In that respect, the Court found that the application of the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258 does not require it to be established that the decision-making process had been seriously undermined. In addition, the Court held that the public interest underlying that exception was to protect, first, a space for reflection within the ECB, in which the institution's decision-making bodies may have a confidential exchange of views as part of their deliberations and preliminary consultations and, secondly, a space for a confidential exchange of views between the ECB and the national authorities concerned. The Court then held that the ECB was entitled to conclude that the document at issue was a document for internal use within the meaning of the first subparagraph of Article 4(3) of Decision 2005/258, in so far as the ECB concluded that that document was intended to provide information and support to the deliberations of the Governing Council within the scope of the competences conferred on it by Article 14.4 of the Protocol on the Statute of the ESCB and of the ECB.

As regards the argument alleging that there is an overriding public interest in disclosure of the document at issue, the Court held that such an interest had not been established in that case. In any event, the Court noted that the interest in having access to the document, as a document which was supposedly preparatory to the agreement on emergency liquidity assistance, could not outweigh the public interest which underlies the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258. Consequently, the

103| Case C-342/19 P, ***De Masi and Varoufakis* v *ECB***.

104| Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ 2004 L 80, p. 42), as amended by Decision 2011/342/EU of the European Central Bank of 9 May 2011 (ECB/2011/6) (OJ 2011 L 158, p. 37) and Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 (ECB/2015/1) (OJ 2015 L 84, p. 64).

ECB was fully entitled to base its refusal to grant access to the document at issue on the exception to the right of access provided for in the first subparagraph of Article 4(3) of Decision 2004/258, concerning documents for internal use.

3. Scope of the general presumption of confidentiality of documents relating to procedures for reviewing State aid

In the case that gave rise to the judgment in ***Commune de Fessenheim and Others*** **v** ***Commission*** (T-751/17, EU:T:2019:330), delivered on 14 May 2019, the Court was required to rule on the application of the general presumption of confidentiality of documents relating to procedures for reviewing State aid to documents exchanged in the context of pre-notification.

In that case, the French Government sent to the Commission, in the context of a pre-notification procedure, the protocol for the compensation of the Électricité de France (EDF) Group in respect of the closure of the Fessenheim Nuclear Power Plant. At the end of that procedure, the Commission issued an assessment on the conformity of the protocol with EU law on State aid.

The Commune de Fessenheim and other local authorities concerned by the closure of the power plant requested, on the basis of Regulation No 1049/2001, that the Commission disclose to them the assessment closing the pre-notification procedure.

The Commission refused to grant access to that document on the basis of the exception relating to the protection of the purpose of investigations, provided for in the third indent of Article 4(2) of that regulation, relying on the general presumption of confidentiality of documents relating to procedures for reviewing State aid.

The Court dismissed the action brought against the Commission's decision and accepted the application of the general presumption of confidentiality to documents exchanged in the context of pre-notification for two reasons.

First, pre-notification exchanges may be followed by a preliminary investigation or even a formal investigation procedure pursuant to Regulation 2015/1589. [105] If documents exchanged during pre-notification could be disclosed to third parties, the presumption of confidentiality applicable to documents relating to the review procedure governed by that regulation would lose its effectiveness, since the documents to which it relates could have been disclosed beforehand.

Secondly, pre-notification exchanges between the Commission and the Member State concerned must take place in an atmosphere of trust. If the Commission were required to grant access to sensitive information provided by the Member States in the context of pre-notification exchanges, those States might be reluctant to share that information, even though that willingness to cooperate is crucial to the success of those exchanges, which, according to the Code of Best Practice, are intended to enhance the quality of the notification and thereby make it possible to develop, under the best possible conditions, ways of addressing situations that might be problematic in the light of EU law on State aid.

105| Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

XIII. Civil service

1. Termination of contract

In its judgment in ***RY* v *Commission*** (T-160/17, EU:T:2019:1), delivered on 10 January 2019, the Court annulled a Commission decision terminating — on the basis of a breach of the relationship of trust — the contract for an indefinite period of a member of the temporary staff, on the ground of a breach of that staff member's right to be heard, as enshrined in Article 41(2)(a) of the Charter.

The person concerned, who had been recruited as a member of the temporary staff under Article 2(c) of the Conditions of Employment of Other Servants of the European Union (CEOS), performed his duties in the Cabinet of a Member of the Commission. Following the Commission's decision to terminate his contract, the person concerned had submitted a complaint against that decision to the Commission's authority empowered to conclude contracts of employment (AECC), pursuant to Article 90(2) of the Staff Regulations of Officials of the European Union, on the ground, inter alia, that he had not been informed of the reasons that had led to his contract being terminated and that he had not been given an opportunity to state his views before the AECC. The AECC rejected that complaint, concluding that the obligation to hear the person concerned before dismissal did not apply in the case of a member of the temporary staff recruited on the basis of Article 2(c) of the CEOS, where the decision to terminate the contract was taken on the ground of a breakdown in the relationship of trust.

The Court held, first of all, that the specific nature of the duties carried out in the Cabinet of a Member of the Commission and the need to maintain relations of mutual confidence should not deprive the staff member concerned of the right to be heard before the adoption of a decision unilaterally terminating his contract on the ground of a breakdown in the relationship of trust. The Court noted that the right of the person concerned to be heard before the adoption of any individual decision adversely affecting him is expressly enshrined in Article 41(2)(a) of the Charter, which has the same legal value as the Treaties. It added that respect for the right to be heard is all the more necessary with regard to the termination of the contract for an indefinite period of a member of the temporary staff on the initiative of the administration, since such a measure, however justified it may be, constitutes an act with serious consequences for the person concerned. It stated that the Member of the Commission concerned might take the view, after that staff member has been given the opportunity to submit his observations, that the relationship of trust has ultimately not broken down. In addition, while it is not for the AECC to substitute its own assessment for that of the Member of the Commission concerned as regards the reality of the breakdown in the relationship of trust, the AECC must nevertheless, first, check whether the absence or loss of a relationship of trust has indeed been invoked, then ensure that the facts have been accurately stated and, finally, ensure that, in view of the ground stated, the request for termination is not vitiated by a breach of fundamental rights or by an abuse of powers. In that context, the AECC may, for example, take the view, in the light of the observations made by the person concerned, that special circumstances justify the consideration of measures other than dismissal.

Finally, the Court held that it is the AECC's responsibility, where a member of the temporary staff alleges that his right to be heard was not respected, to prove that the person concerned was given the opportunity to submit his observations on the Commission's intention to terminate his contract on the ground of a breakdown in the relationship of trust.

In the judgment in ***L* v *Parliament*** (T-59/17, EU:T:2019:140), delivered on 7 March 2019, the Court annulled a decision of the Parliament terminating a contract as an accredited parliamentary assistant (APA) by an MEP on the ground of breakdown in the relationship of trust on account of the former's exercise of an outside activity without lodging a prior request for authorisation. In that regard, the Court was required to adjudicate

on the extent to which the 'trust' referred to in Article 139(1)(d) of the CEOS, on which the working relationship between the parliamentary assistant and the MEP was based, could have been broken, within the meaning of that article, on account of the exercise of undeclared outside activities, where it is apparent from the documents on file that the MEP was at the origin of those activities.

The Court ruled that, first, while it is not incumbent on the Parliament's AECC to substitute its assessment for that of the parliamentarian concerned as to the reality of the breach of the relationship of trust, the AECC must nevertheless ensure that the reason given is based on facts that plausibly justify that assessment and, secondly, where an institution which decides to terminate the contract of an APA refers, in particular, to a loss of trust as the basis for the contract termination decision, the Court is required to check if that ground is plausible.

The Court held, in that case, that the MEP concerned could not have been unaware that the applicant practised a legal profession in parallel with his duties as an APA, since, as is apparent from the evidence on file, the exercise of such activities was in response to instructions from him and the MEP knew that such an activity had not been declared in accordance with Article 12b(1) of the Staff Regulations, in so far as that MEP had not been heard by the AECC regarding the outside activities in question, as provided for in Article 6(2) of the Implementing Measures for Title VII of the CEOS. The Court noted, moreover, that the MEP could not reasonably have expected that the outside activities in question, in view of their nature, would be the subject of a formal request for authorisation from the Parliament. These included, in particular, the lodging of asylum applications in Russia and Switzerland to enable the MEP to avoid a prison sentence, the representation in court of the MEP for the same purposes, and the establishment of ad hoc human rights disputes to promote the image of the MEP in order to make it more difficult for him to be imprisoned following criminal proceedings brought against him. The Court concluded that the reason given by the MEP to justify the termination decision, namely the loss of trust, did not appear plausible and that, therefore, in responding to the MEP's request for termination, the AECC had made a manifest error of assessment.

2. Automatic retirement

In the judgment in ***RV* v *Commission*** (T-167/17, EU:T:2019:404), delivered on 12 June 2019, the Court upheld an action brought by a former official seeking annulment of a decision of the Commission placing that official on leave in the interests of the service under Article 42c of the Staff Regulations of Officials of the European Union and, at the same time, automatically retiring that official pursuant to the fifth subparagraph of that provision.

First of all, the Court found it necessary to examine the issue relating to the definition of the scope of Article 42c of the Staff Regulations, notwithstanding the fact that the applicant had not raised a plea in respect of that issue. The Court decided to examine the issue on the basis of two alternative considerations.

First, and primarily, the Court stated that the definition of the scope of Article 42c of the Staff Regulations and its application in the case of an official who has already reached 'pensionable age' were preliminary issues that needed to be borne in mind in the context of the examination of the complaints put forward by the applicant and that it was under a legal obligation to examine that issue as otherwise it would, should the case arise, be compelled to base its decision on legally flawed considerations. Secondly, in the alternative, the Court noted that, in any event, the plea alleging breach of the scope of the law is a matter of public policy and that it is for the Court to examine that plea of its own motion. In that regard, the Court concluded that it would manifestly be neglecting its function as the arbiter of legality if it failed to make a finding of its own motion that the contested decision had been adopted on the basis of a rule, namely Article 42c of the Staff Regulations, that was not applicable to the case in point and if, as a consequence, it was led to adjudicate on the dispute before the Court by itself applying such a rule.

On the substance, the Court concluded, on the basis of a literal, contextual and teleological interpretation of Article 42c of the Staff Regulations, that that provision could not be applied to officials who, like the applicant, have reached 'pensionable age' within the meaning of that provision.

3. Social security

By its judgment in ***Wattiau* v *Parliament*** (T-737/17, EU:T:2019:273), delivered on 30 April 2019, the Court annulled the decision of the Luxembourg Settlements Office for the Joint Sickness Insurance Scheme of the European Union (JSIS) making the applicant, a former European official, now retired and a member of the JSIS, liable for 15% of a medical bill sent by a Luxembourg hospital centre on account of oxygen therapy sessions in a hyperbaric chamber which the applicant had attended. The applicant argued that the invoices had overcharged the amount for the services in question by comparison with the amount which would have been charged to a person covered by the national health system. In support of his claim for annulment, the applicant raised a plea of illegality directed against the agreement concluded in 1996 between, on the one hand, the European Communities and the European Investment Bank (EIB) and, on the other hand, the Entente des hôpitaux luxembourgeois (Luxembourg Hospitals Group) and the Grand Duchy of Luxembourg on the scales of fees for hospital care received by members of the JSIS and of the EIB's sickness insurance fund ('the 1996 Agreement').

At the outset, the Court ruled that the plea of illegality was admissible. It held, more specifically, that, on the one hand, the 1996 Agreement could not only be comparable to an act of an EU institution for the purposes of Article 277 TFEU, but that it was also an act of general application. On the other hand, the 1996 Agreement had a direct legal connection with the contested decision. One of the amounts included in the contested decision was set out in the scale of fees which had itself been established in accordance with the 1996 Agreement and was annexed to it.

As regards the merits of the plea of illegality, the Court found that the invoicing system in question constituted indirect discrimination on the ground of nationality. In this respect, the Court held, in the first place, that JSIS members were in a situation comparable to that of members of the Caisse nationale de santé luxembourgeoise (Luxembourg National Health Fund) when those two categories of members received the same medical care.

In the second place, the Court held that the fees applied to JSIS members, which were set out in the scale of fees adopted on the basis of the 1996 Agreement, were considerably higher than those applied to members of the Luxembourg National Health Fund. The 1996 Agreement put in place an invoicing system whereby JSIS members were charged for both the fixed costs and the variable costs associated with the hospital service in question, whereas members of the Luxembourg National Health Fund were not invoiced for any costs in association with the same treatment.

In the third and final place, the Court stated that, in that case, there was no legitimate aim that justified the difference in treatment, established by the scale of fees annexed to the 1996 Agreement, between the persons covered by the two schemes for the reimbursement of medical costs.

4. Whistle-blowers

In the judgment in ***Rodriguez Prieto* v *Commission*** (T-61/18, under appeal, [106] EU:T:2019:217), delivered on 4 April 2019, the Court annulled the decision of the European Commission rejecting a request for assistance based on Article 24 of the Staff Regulations of Officials of the European Union, finding that the applicant's right to the presumption of innocence had been breached.

Since 1996, Eurostat had disseminated statistics to the public through the Office for Official Publications of the European Communities and a network of sales outlets. In 1998, the applicant, a Head of Unit within Eurostat, requested that an internal audit be conducted. Following a finding of irregularities and investigations by the European Anti-Fraud Office (OLAF), in 2003, the Commission initiated criminal proceedings with the French authorities in which the applicant was called as a witness and then charged. The applicant made a first request for assistance under Article 24 of the Staff Regulations, stating that he had acted as a whistle-blower and that the Commission should bear the legal costs which he had incurred. That request was rejected.

After the French courts made an order of no need to adjudicate in respect of all the persons charged, including the applicant, the Commission lodged an appeal followed by an appeal on a point of law, both of which were dismissed. The applicant then made a second request for assistance asking the Commission to reimburse the legal costs which he had incurred before the French courts. In the alternative, he alleged that the Commission had disregarded his status as a whistle-blower and that it had refused to protect him in that regard, in breach of Article 22a of the Staff Regulations, and he sought damages. The Commission rejected those requests. The applicant challenged the rejection of his requests before the Court.

As regards, first of all, the applicability of Article 24 of the Staff Regulations in that case, the Court noted that that article is concerned with the protection of officials, by their institution, against the acts of third parties, not against acts of the institution itself. First, the acts by the French judicial authorities in that case were part of the normal conduct of the criminal proceedings and did not constitute prima facie unlawful acts which would warrant assistance. Secondly, Article 24 of the Staff Regulations did not apply in that case because, in reality, the applicant was seeking the Commission's assistance against that institution's own acts, by which it had initiated the criminal proceedings and the continuation of those proceedings.

As regards, next, the alleged disregard of the applicant's status as whistle-blower, the Court noted that Article 22a of the Staff Regulations, which entered into force on 1 May 2004, established an obligation for all officials to report facts which give rise to a presumption of illegal activity or a serious failure to comply with the obligations of EU officials. The Court stated that any official who, before that date, alerted his superiors to unlawful activity or breaches of obligations under the Staff Regulations of which he was aware and which could adversely affect the EU's financial interests had already been entitled to the protection of the institution against any retaliation resulting from such disclosure and against any prejudicial effects on the part of that institution provided that he acted in good faith. However, the Court held that that protection cannot have the aim of shielding the official against investigations regarding his possible involvement in the facts which he reported. At most, the fact that the official reported such irregularities may, if those investigations confirm that he was implicated, be an attenuating circumstance in disciplinary proceedings. Thus, the status of whistle-blower claimed by the applicant was not capable of shielding him against proceedings.

In that context, the question was whether the Commission had acted unlawfully in causing the criminal proceedings to continue following the order of no need to adjudicate. The Court, after recalling that the ability to assert one's rights through the courts and the judicial control which that entails constitutes the

106| Case C-457/19 P, ***Rodriguez Prieto* v *Commission***.

expression of a general principle of law and that it is only in wholly exceptional circumstances that the fact that legal proceedings are brought by an institution is capable of constituting a breach of administrative duty, found, in that case, that there was no such breach and therefore dismissed the claim for compensation for the damage allegedly caused to the applicant by the fact of having been exposed to criminal proceedings between 2003 and 2016.

Finally, the Court, after pointing out that the principle of the presumption of innocence applies, even in the absence of a criminal prosecution, to an official accused of a breach of obligations under the Staff Regulations which is sufficiently serious to warrant an investigation by OLAF, in the light of which the administration may adopt any measure it deems necessary, however severe, found that the Commission, in rejecting the applicant's request for the payment of the legal costs he incurred in the French criminal proceedings, for the reason, essentially, that its interests continued to oppose those of the applicant, even though the applicant had been acquitted in those criminal proceedings, breached the applicant's right to be presumed innocent.

5. Security of staff in the service of the European Union

In the judgment in ***Missir Mamachi di Lusignano and Others* v *Commission*** (T-502/16, EU:T:2019:795), delivered on 20 November 2019, the Court upheld the action for damages brought by the mother, brother and sister of Mr Alessandro Missir Mamachi di Lusignano ('the applicants'), an EU official murdered in Rabat (Morocco).

Mr Alessandro Missir Mamachi di Lusignano ('Mr Alessandro Missir' or 'the deceased official') was murdered on 18 September 2006 with his wife in Rabat (Morocco), where he was due to take up his post as a political and diplomatic advisor to the European Commission's delegation. The murder was committed in a furnished house rented by that delegation for Mr Alessandro Missir, his wife and their four children. The action brought by the applicants in this case follows the Court's judgment of 7 December 2017 in ***Missir Mamachi di Lusignano and Others* v *Commission*** (T-401/11 P-RENV-RX, EU:T:2017:874), in which the Court ruled on the application for compensation made by the father and children of the deceased official. In their observations, the applicants maintained that, although the decisions already delivered had resulted in compensation for certain damage, other damage still had to be assessed in the context of that action, that is to say, the non-material damage suffered by the mother, brother and sister of the deceased official. The Commission argued that, with regard to the non-material damage alleged by the mother of the deceased official, the claim for compensation was inadmissible on the ground that it was submitted out of time. As regards the non-material damage alleged by Mr Alessandro Missir's brother and sister, the Commission responded that, in addition to their application being out of time, the applicants could not be regarded as persons covered by the Staff Regulations.

In that respect, the Court ruled, in the first place, on the standing of the brothers and sisters of a deceased official to bring an action for damages under Article 270 TFEU. The Court observed that the criterion which determines whether such an action may be brought was that of being a person 'to whom [the] Staff Regulations apply' (Article 91(1) of the Staff Regulations). However, Article 73 of the Staff Regulations provides, in the event of the death of the insured official, for payment of guaranteed benefits to his or her spouse and children if he or she has any and, where there are no such persons, to other descendants of the official and, where there are no such persons, to relatives of the official in the ascending line and, where there are no such persons, to the institution. Since that article is silent on collateral relatives, the Commission maintained that they were not entitled to compensation for the damage suffered. It added that, although Articles 40, 42b and 55a of the Staff Regulations applied to collateral relatives, that was irrelevant in that case, since those articles are not applicable in the case of an official who died following failure of the institution to exercise its duty of protection. The Court noted that the criterion of being a person 'to whom [the] Staff Regulations apply' cannot be regarded as fulfilled on the sole ground that the applicant is referred to in any context by the Staff Regulations. It must be a context that reflects a relevant connection between such a person and the contested act, or that reflects such a connection between that person and the official, the harm to whose

interests allegedly causes damage to that person. The Court found that that was the case not only for the relatives in the ascending line, descendants and spouse of the official, but also for his or her siblings. The Staff Regulations apply to those persons, whether in Article 73 or in Articles 40, 42b and 55a, because the legislature had intended to take note, by means of specific provisions in those regulations, of their close relationship with an official. Accordingly, siblings must be regarded as persons 'to whom [the] Staff Regulations apply' for the purpose of determining the legal procedure to be followed when they sought compensation for the non-material damage suffered as a result of the death of their brother or sister who was an official, for which the institution is, in their view, responsible.

In the second place, the Court ruled on what the Commission alleged to have been the late submission of the claims for compensation, which had not been made within a reasonable time, and on the applicants' objection that the Commission's plea of inadmissibility was itself raised out of time. The General Court noted that the Court of Justice's case-law, under which compliance with the limitation period laid down in Article 46(1) of the Statute of the Court of Justice of the European Union was not examined of its own motion, also applied, *mutatis mutandis*, to the limitation arising on expiry of a reasonable period in which a claim for compensation based on the Staff Regulations had to be made. Consequently, the Commission's plea of inadmissibility was not an absolute bar to proceeding to be examined by the Court of its own motion. As a result, the Court examined the applicants' objection that the plea of inadmissibility was raised out of time, and rejected it as unfounded. The Court then considered the submission that the application itself was inadmissible because it was out of time, which it also rejected, stating that although the limitation period of five years laid down for actions in non-contractual liability by Article 46 of the Statute of the Court of Justice of the European Union did not apply in disputes between the European Union and its servants, it was however necessary, according to settled case-law, to take the point of reference provided by that period into account in order to assess whether a claim has been made within a reasonable period of time.

In the third place, regarding the merits of the case, in accordance with the principles applied in the judgment in ***Missir Mamachi di Lusignano and Others* v *Commission*** (T-401/11 P-RENV-RX), the Court granted the claim for compensation for non-material damage made by the deceased official's mother. As regards the compensation claim made by the deceased official's brother and sister and the conditions for awarding that compensation — namely the fault, causal link and non-material damage — the Court noted that the Commission's liability for Mr Alessandro Missir's murder, established in a judgment that has become final, and the principle that the Commission bore joint and several liability for the harm resulting from that murder were fully applicable to that case. As regards the non-material damage suffered by the deceased official's brother and sister, the Court noted that Article 73 of the Staff Regulations, as interpreted in case-law, did not preclude the brothers and sisters of an official who has died through the fault of the European Union from obtaining, as appropriate, compensation for the damage suffered by them as a result of that death. While that issue has not been addressed by EU law, the Court noted that a common general principle derives from the laws of the Member States under which, in circumstances similar to those of that case, national courts recognise a right for the siblings of a deceased worker to claim, as appropriate, compensation for non-material damage suffered by them as a result of the death.

XIV. Actions for damages

In the judgment in ***Printeos* v *Commission*** (T-201/17, under appeal, [107] EU:T:2019:81), delivered on 12 February 2019, the Court, in an action for non-contractual liability brought under Article 268 TFEU, upheld the applicant's claim, seeking, primarily, compensation for the damage sustained as a result of the European Commission's refusal, following the annulment of a decision ordering the applicant to pay a fine for infringement of Article 101 TFEU, to pay to the applicant default interest on the principal amount of the reimbursed fine.

By its Decision C(2014) 9295 final of 10 December 2014 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (AT.39780 — Envelopes) ('the decision of 10 December 2014'), the European Commission found that the applicant, Printeos, had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) by participating in an agreement concluded and implemented on the European stock/catalogue and special printed envelopes market. The Commission accordingly imposed on the applicant, jointly and severally with certain of its subsidiaries, a fine of EUR 4 729 000.

By application lodged at the Court Registry on 20 February 2015, the applicant brought an action under Article 263 TFEU seeking, as its main claim, annulment in part of the decision of 10 December 2014. On 9 March 2015, the applicant made a provisional payment in respect of the fine imposed on it. By judgment of 13 December 2016, ***Printeos and Others* v *Commission***, [108] the Court granted the application for annulment in part of the decision of 10 December 2014. The Commission accordingly repaid to the applicant the principal amount of the fine provisionally paid, but refused, however, pursuant to the second sentence of Article 90(4)(a) of Commission Delegated Regulation No 1268/2012 [109] ('the contested provision'), to grant the applicant's request for payment of interest on the amount of the fine provisionally paid, since the overall return on the Commission's investment in financial assets had been negative. The contested provision provides that, where a fine is cancelled or reduced, the amounts unduly collected must, after all legal remedies have been exhausted, be repaid to the third party concerned, together with the interest yielded, it being specified that, if the overall return on the amount of a fine provisionally paid, having been invested in financial assets, has been negative for the relevant period, only the nominal value of the amount unduly collected must be repaid.

After setting out the conditions under which the European Union incurs non-contractual liability, the Court observed that the applicant alleged, inter alia, infringement of Article 266 TFEU, and accordingly it sought to ascertain whether there had been a sufficiently serious breach of that provision. It concluded that, in that case, Article 266 TFEU constitutes a rule of law intended to confer rights on individuals, in so far as it establishes an absolute, unconditional obligation on the part of the institution whose act has been declared void to take, in the interests of the successful applicant, the measures necessary to ensure compliance with the annulling judgment, to which the applicant's right to full compliance with that obligation corresponds. In the event of the annulment of a decision imposing a fine, case-law has recognised the applicant's right to be restored to the situation which it was in prior to that decision, which involves, inter alia, reimbursement of the principal sum that was unduly paid because of the annulled decision and the payment of default interest. Unlike the payment of compensatory interest, the payment of default interest constitutes a measure giving effect to a judgment cancelling a fine, for the purpose of the first paragraph of Article 266 TFEU, in that it is designed

107| Case C-301/19 P, ***Commission* v *Printeos***.

108| Judgment of the Court of 13 December 2016, ***Printeos and Others* v *Commission*** (T-95/15, EU:T:2016:722).

109| Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1).

to provide compensation at a standard rate for the loss of use of monies owed and to encourage the debtor to comply with that judgment as soon as possible (judgment of 12 February 2015, ***Commission* v *IPK International***, C-336/13 P, EU:C:2015:83, paragraphs 29 and 30; order of 21 March 2006, ***Holcim (France)* v *Commission***, T-86/03, not published, EU:T:2006:90, paragraphs 30 and 31; judgment of 10 October 2001, ***Corus UK* v *Commission***, T-171/99, EU:T:2001:249, paragraphs 50, 52 and 53).

Pointing out, next, that the contested provision, given its regulatory context, its clear wording and its express reference to legal remedies and to the annulment of a decision imposing a fine, is intended to give effect to the requirements set out in the first paragraph of Article 266 TFEU, and that it must therefore be interpreted in the light of that provision, the Court observed, in particular, that Commission Delegated Regulation No 1268/2012 does not define the terms 'together with the interest yielded', or qualify that interest as 'default' or late-payment. Therefore, pointing out that the obligation which derives directly from the first paragraph of Article 266 TFEU is designed to provide compensation at a standard rate for the loss of use of monies owed in order to satisfy the principle *restitutio in integrum*, the Court stated that, because of the annulment of the decision of 10 December 2014 with retroactive effect, the Commission was necessarily late in reimbursing the principal amount of the fine since the time of provisional payment thereof.

The Court concluded that the Commission was required, pursuant to the first paragraph of Article 266 TFEU, by way of measures to comply with the judgment in Case T-95/15, not only to reimburse the principal amount of the fine but also to pay default interest in order to provide compensation at a standard rate for the loss of use of that amount during the reference period, and that the Commission enjoyed no discretion in that regard, the breach of that absolute and unconditional obligation being a sufficiently serious breach of that provision which is capable of rendering the European Union non-contractually liable.

The Court found, moreover, that the Commission's failure to meet its obligation to pay default interest under the first paragraph of Article 266 TFEU has a sufficiently direct causal link with the damage sustained by the applicant, such damage being equivalent to the loss of that default interest during the reference period, that interest representing compensation at a standard rate for loss of use of the principal amount of the fine during that same period and corresponding to the applicable European Central Bank (ECB) refinancing rate plus 2 percentage points, as claimed by the applicant.

The Court consequently ordered the European Union, represented by the Commission, to redress the damage sustained by the applicant by reason of the failure to pay the sum of EUR 184 592.95 which was due to the applicant as default interest for the period from 9 March 2015 to 1 February 2017, plus default interest, starting from the date of delivery of that judgment and continuing until full payment, at the rate fixed by the ECB for its main refinancing operations, plus 3.5 percentage points.

In the judgment in ***Steinhoff and Others* v *ECB*** (T-107/17, under appeal, [110] EU:T:2019:353), delivered on 23 May 2019, the Court dismissed an action for damages seeking restitution of the loss allegedly suffered by private creditors, following the adoption of the opinion of the European Central Bank (ECB) on the terms of securities issued or guaranteed by the Hellenic Republic. [111]

On 2 February 2012, the Hellenic Republic submitted to the ECB, pursuant to Article 127(4) TFEU, in conjunction with Article 282(5) TFEU, a request for an opinion on Draft Law No 4050/2012 introducing rules amending the terms applicable to marketable securities issued or guaranteed by the Greek State under agreements

110| Case C-571/19 P, ***EMB Consulting and Others* v *ECB***.

111| Opinion of the ECB of 17 February 2012 on the terms of securities issued or guaranteed by the Greek State (CON/2012/12).

with their holders for the purpose of restructuring the Greek public debt, based, in particular, on the application of collective action clauses (CACs). Since the ECB delivered a positive opinion on the draft law, it was adopted, on 23 February 2012, by the Greek Parliament.

Under the CAC mechanism, the proposed amendments to the bonds concerned would become legally binding on all holders of bonds governed by Greek law issued before 31 December 2011, as identified in the act of the Ministerial Council approving private sector involvement (PSI) invitations, if the amendments were approved by a quorum of bondholders representing at least two thirds of the face value of those bonds. Since the quorum and the majority required for the planned bond exchange to go ahead were reached, all holders of Greek bonds, including those who opposed the exchange, had their bonds exchanged pursuant to Law No 4050/2012, with the result that the value of those bonds fell. The applicants, as holders of Greek bonds, participated in the restructuring of the Greek public debt in accordance with the PSI and the CACs implemented pursuant to Law No 4050/2012, after having refused the offer to exchange their bonds.

By their action, the applicants allege that the ECB is liable for the loss they allegedly suffered due to the fact that the ECB failed, in its opinion, to draw the attention of the Hellenic Republic to the unlawful nature of the proposed restructuring of the Greek public debt by a mandatory exchange of bonds.

With regard to the non-contractual liability of the ECB, the Court noted, in the first place, that the ECB's opinions are not binding on national authorities. Indeed, according to recital 3 and Article 4 of Decision 98/415, [112] national authorities are required only to take those opinions into account and the opinions are without prejudice to the responsibility of those authorities for the matters which are the subject of the draft legislative provisions concerned. It follows that, although compliance with the obligation to consult the ECB requires that the ECB may make its views known effectively to the national authorities, it cannot compel them to abide by those views. In the second place, the Court stated that the ECB enjoys a broad discretion when adopting its opinions. The broad discretion enjoyed by the ECB means that its non-contractual liability may be incurred only if it manifestly and gravely disregards the limits on that discretion. Consequently, only a sufficiently serious breach of a rule of law which confers rights on individuals is capable of establishing the non-contractual liability of the ECB.

In that context, the Court held that the applicants were incorrect to claim that the ECB committed a wrongful act capable of triggering its non-contractual liability by failing to draw attention in the contested opinion to the breach of the principle *pacta sunt servanda* allegedly caused by the adoption of Law No 4050/2012 in respect of them. The applicants' subscription to the disputed bonds issued and guaranteed by the Hellenic Republic created a contractual relationship between them and the Hellenic Republic. That contractual relationship is not governed by the principle *pacta sunt servanda* in Article 26 of the Vienna Convention on the Law of Treaties. [113] Pursuant to Article 1 thereof, that Convention is to apply only to treaties between States. Consequently, Article 26 of the Vienna Convention on the Law of Treaties is not a rule of law conferring rights on the applicants.

In addition, the Court observed that the opinions of the ECB are not addressed to individuals, nor do they have as their main purpose contractual relations between an individual and a Member State following the issuance of bonds by that Member State. Under Article 2 of Decision 98/415, the addressees of the ECB's opinions are the authorities of the Member States which are required to consult the ECB, not individuals. Consequently, where, as in that case, the ECB is consulted by the Hellenic Republic regarding draft legislative

112| Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ 1998 L 189, p. 42).

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

provisions concerning national banks and the rules applicable to financial institutions in so far as they materially influence the stability of such institutions and the financial markets, it is not required to take a view on whether that Member State has complied with the general principle of contract law, *pacta sunt servanda*, vis-à-vis holders of State bonds. Thus, the ECB's power to issue opinions does not confer on the applicants a right to have the ECB draw attention to a breach of a contractual right they enjoy vis-à-vis the Hellenic Republic after they subscribed to Greek bonds issued and guaranteed by that Member State.

Subsequently, the Court concluded that limiting the value of the applicants' bonds was not a disproportionate measure in relation to the aim of protecting the Hellenic Republic's economy and the euro area against the risk of that Member State's insolvency and the collapse of the economy. The applicants were therefore wrong to claim that the measures at issue constituted a breach of the right to property enshrined in Article 17(1) of the Charter.

Next, the Court held that there was no infringement of the free movement of capital enshrined in Article 63(1) TFEU, by finding that, in that case, the measures implemented by Law No 4050/2012 were justified by overriding reasons in the public interest, in so far as the circumstances that led to that law were genuinely exceptional since, without restructuring, at least a selective default in the short term by the Hellenic Republic was a credible prospect. Likewise, the measures at issue were intended to ensure the stability of the banking system of the euro area as a whole. Furthermore, the applicants have not shown that those measures were disproportionate. They served to restore the stability of the banking system of the euro area as a whole and it has not been demonstrated that they went beyond what was necessary for that purpose. In particular, the involvement of private creditors in the exchange of Greek bonds on a voluntary basis only, as the applicants advocated, would not have ensured the success of that exchange. Without the assurance that private creditors would be treated equally, very few of those creditors would have accepted the exchange in view of the moral hazard it entailed, namely that they would bear the consequences of risks taken by creditors who were not participating in the exchange of Greek bonds.

Finally, the Court concluded that the applicants were wrong to invoke the existence of unlawfulness rendering the ECB liable towards them owing to the ECB's failure to draw attention to an infringement of Article 124 TFEU. Article 124 TFEU prohibits any measure, not based on prudential considerations, granting Member States, among others, privileged access to financial institutions so as to encourage the former to follow a sound budgetary policy by not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits. The aim of Law No 4050/2012 was not to increase the level of debt of the Hellenic Republic, but rather to reduce it, owing to its excessively high nature, by devaluing the bonds held by the applicants. In addition, Draft Law No 4050/2012 contributed to preserving both Greek public finances and the stability of the financial system in the euro area. In any event, Article 124 TFEU is not designed to protect the applicants and does not confer rights on them.

XV. Applications for interim measures

In the order in ***Agrochem-Maks* v *Commission*** (T-574/18 R, EU:T:2019:25), made on 21 January 2019, the President of the Court dismissed the application for interim measures based on Articles 278 and 279 TFEU, brought by a company operating on the Croatian market for plant protection products, seeking suspension of the operation of Implementing Regulation 2018/1019. [114] The application for interim measures had been made in the context of an action for annulment of that implementing regulation. The company invoked, in essence, serious and irreparable damage owing to the risk of adverse effects on its turnover, loss of market share, and reduction of the total value of the undertaking.

In the first place, as regards the urgency and, more particularly, the seriousness of the alleged harm in that case, which is purely financial, the President of the Court noted that, on the one hand, with regard to a loss corresponding to less than 10% of turnover of undertakings active in highly regulated markets, the financial difficulties which those undertakings risk suffering do not appear to be such as to threaten their very existence and, on the other hand, regarding a loss representing almost two thirds of the turnover of those undertakings, while acknowledging that the financial difficulties they undergo may be such as to threaten their very existence, in a highly regulated sector, such as the plant protection sector, where major investment is often required and the competent authorities may be led to intervene when public health risks become apparent, for reasons which cannot always be foreseen by the undertakings concerned, it is for those undertakings, if they are not to bear themselves the loss resulting from such intervention, to protect themselves against its consequences by adopting an appropriate policy. It was stated that the judge hearing the application for interim relief, when evaluating the seriousness of the harm, cannot merely have recourse, in a mechanical and rigid manner, solely to the relevant turnover. He or she must also examine the circumstances particular to each case and relate them, when taking a decision, to the harm occasioned in terms of turnover. According to the President of the Court, that prohibition of a mechanical and rigid analysis, invoked principally in order to allow the judge to assess whether the seriousness of the alleged harm could be established despite the fact that the turnover did not exceed the indicative threshold of 10%, must also be understood as requiring the judge to confirm whether, given the specific circumstances of the case, the seriousness ought not to be established despite that threshold being exceeded.

In that regard, the President of the Court noted, first, that the fact of being a distributor of the substance concerned, on the one hand, involves not having to bear the same financial burdens as those incurred in the context of developing the activity of a manufacturer and, on the other hand, imposes an obligation to provide evidence that there are no viable alternative solutions.

The President of the Court then held that the fact that the applicant is operating in a highly regulated market means that the Court should take into account the applicant's business strategy. In the context of that assessment, without any further evidence relating to measures that the company may have taken to avoid a potentially risky situation in the light of the nature of the market in question, the fact that the indicative threshold of 10% is exceeded cannot, in itself, convince the judge hearing the application for interim measures of the seriousness of the alleged harm.

In that context, the President of the Court once again stressed, noting that the principle of the protection of legitimate expectations can be invoked only in relation to a situation that could give rise to a legitimate expectation that was caused by the institution empowered to take the final decision, that such a principle

114| Commission Implementing Regulation (EU) 2018/1019 of 18 July 2018 concerning the non-renewal of approval of the active substance oxasulfuron, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending Commission Implementing Regulation (EU) No 540/2011 (OJ 2018 L 183, p. 14).

of protection of legitimate expectations cannot arise, in the context of a procedure for the renewal of the approval of a plant protection substance, with regard to the results of the interim report submitted by the rapporteur Member State, since that report is only an intermediate stage of a well-known procedure and does not in any way predict the final outcome to be determined by the Commission.

In the second place, as regards the balancing of interests, and, more particularly, as regards the argument of the company in question to the effect that the active substance concerned does not present a known danger to public health, the President of the Court noted, inter alia, that the company in question can draw no convincing argument from the fact that the substance has been safely used in the European Union for a long time without any harmful effects on human health ever having been reported. In the plant protection sector, scientific developments are not uncommon and thus provide the opportunity to assess substances once again in the light of new knowledge and scientific discoveries. That is the basis of renewal procedures and the rationale for applying time limits to marketing authorisations. Consequently, the examination by the judge hearing the application for interim measures in the context of the balancing of interests must extend to the risks now identified, on the one hand, and which cannot be ruled out, on the other hand. Furthermore, it is not for that judge to conduct a technical assessment of scientific data that would exceed his or her powers. Consequently, the arguments stating that there is no public health risk, raised in the context of demonstrating the existence of a prima facie case, fall within the review of the legality of the procedure and, without other elements and with the exception of a possible acknowledgement of a manifest error of assessment, cannot lead the judge hearing the application for interim measures, in the context of the balancing of interests, to conclude that those arguments must prevail over the contested assessments which are in principle the result of a meticulous and exhaustive examination. This is especially true where the alleged harm does not result, with regard to public health, from scientific data collected, but specifically from the lack of such data. A lack of information does not make it possible to rule out risks to public health, which must therefore be taken into consideration in the light of the other interests at stake, bearing in mind, on the one hand, that in principle the requirements of the protection of public health must unquestionably be given precedence over economic considerations and, on the other hand, that the precedence of the imperative requirements of the protection of public health may justify restrictions which have adverse consequences, and even substantial adverse consequences, for certain operators.

In the order in ***Athanasiadou and Soulantikas* v *Commission*** (T-762/18 R, EU:T:2019:574), made on 10 September 2019, the President of the Court, hearing an application for interim measures, rejected the plea of inadmissibility of the application for interim measures based on the failure to bring a main action.

Ms Athanasiadou and Mr Soulantikas, residing in Greece, formed the partnership ECOSE. That partnership concluded a grant agreement with the Education, Audiovisual and Culture Executive Agency for the implementation of a project entitled 'Seniors in Action'. Following an audit report recommending the recovery of EUR 59 696.98, the Commission adopted a decision to recover that amount from ECOSE, together with interest due ('the contested decision'). In accordance with the provisions of the Greek Code of Civil Procedure, the Commission served the contested decision and the order for payment using the services of a bailiff. On 30 October 2018, the applicants filed an opposition before the Court of First Instance (single judge), Athens (Greece). On 31 December 2018, those applicants submitted an application to the Court, on the basis of

Article 299 TFEU, [115] for suspension of enforcement of the decision. In its observations, the Commission claimed that the application for interim measures was inadmissible on the ground that no main action for annulment of the contested decision had been brought, in breach of Articles 161 and 156 [116] of the Rules of Procedure of the General Court.

First, the President of the Court recalled his exclusive jurisdiction to order the suspension of the forced execution of the contested decision and noted that the national courts concerned have jurisdiction only over complaints that enforcement is being carried out in an irregular manner. [117]

Secondly, he noted that Article 156 of the Rules of Procedure lays down procedural rules which differ according to the legal basis of the application for interim measures. Thus, the requirement laid down in Article 156(1) of those rules, in accordance with which an application to suspend the operation of a measure adopted by an institution is to be admissible only where the applicant has challenged that measure in a main action brought prior to or concurrently with that application, is expressly limited to applications made pursuant to Article 278 TFEU and Article 157 TEAEC. Consequently, that requirement does not necessarily apply in this case.

Thirdly, the President of the Court found that the requirement to satisfy such an obligation would deprive the applicants of the right to an effective remedy. [118] In the circumstances of that case, in order to allow the national courts the time necessary to exercise their jurisdiction over complaints that enforcement is being carried out in an irregular manner, under Article 299(4) TFEU, it must be possible to request the Courts of the European Union, which alone have the jurisdiction to do so, to order the suspension of enforcement, where appropriate.

In that situation, the President of the Court pointed out that, consequently, the pleas in law raised in the context of proving the existence of a prima facie case must fall within the jurisdiction of the national courts and appear to be well founded. Pleas concerning the legality of the decision would be ineffective unless they were raised in the context of an application under Article 278 TFEU alongside a main action brought under Article 263 TFEU, in so far as the merits of an enforceable decision can be disputed only before the court hearing the application for annulment, on the basis of Article 263 TFEU.

In that regard, without there being any need at this stage to rule on whether the pleas appear to be well founded, the President of the Court noted that, in that case, some of the grounds put forward by the applicants to support the claim that the condition relating to the existence of a prima facie case has been satisfied

115| Under Article 299 TFEU, acts of the Commission which impose a pecuniary obligation on persons other than States, are to be enforceable. Enforcement is to be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement is to be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State is to designate for this purpose and is to make known to the Commission and to the Court of Justice of the European Union. When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority. Enforcement may be suspended only by a decision of the Court of Justice of the European Union. However, the courts of the country concerned are to have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

116| Article 156(1) of the Rules of Procedure of the General Court provides that an application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU or Article 157 TEAEC, is to be admissible only if the applicant has challenged that measure in an action before the General Court.

117| In accordance with Article 299 TFEU, in conjunction with Article 256(1) TFEU and Articles 39(1) and 53(1) of the Statute of the Court of Justice of the European Union.

118| The right to an effective remedy is enshrined in the second paragraph of Article 47 of the Charter and guaranteed in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

concern, specifically, the enforcement procedure in Greece and the regularity of the enforcement measures, and therefore do fall within the jurisdiction of the national court. Thus, the application for interim measures is indeed intended to enable the national court to exercise its powers under Article 299 TFEU.

Consequently, the President of the Court concluded that the plea of inadmissibility relating to the absence of a main action must be dismissed. Ultimately, the application for interim measures was dismissed as lacking urgency.

C| Activity of the Registry of the General Court in 2019

by **Emmanuel Coulon**, Registrar of the General Court

2019 was a pivotal year that marked the dawn of a new era for the General Court and its Registry.

This year will remain anchored in the history of the General Court as the year of the 30th anniversary of the date on which its first members took up their posts [1] and the year in which the reform of the judicial architecture of the European Union initiated by means of a regulation on 16 December 2015 [2] was completed. Thirty years after the first 12 judges and the Registrar took office, the General Court — by law composed of two judges per Member State since September 2019 — assisted by a Registrar, has become the international court with the largest number of judges in the world.

This change in scale, the implementing measures designed to give practical effect to the decisions adopted by the Court and the assistance provided to the Presidency of the General Court in preparing for the arrival of the new judges and carrying out, since the end of September 2019, the projects identified as priorities by President van der Woude, have certainly had an impact on the organisation and the *modus operandi* of the Registry.

Nonetheless, adapting itself continuously to the new context and incorporating movement as a parameter of its functioning, the Registry has performed its tasks of providing judicial and administrative assistance consistently, methodically and with commitment. Its staff, very much aware of the profound meaning of those transformations, has contributed to that collective success. The Registry has been a pole of stability on which the Court has been able to rely.

In spite of a continuous and rapid succession of changes, the Registry has demonstrated a capacity to work with the judges, the staff of the cabinets and the common services of the institution to create mutually beneficial value. Embodying a genuine culture of service, the Registry has been the multilingual point of contact for the lawyers and agents who represent the parties' interests in the proceedings brought before the General Court.

The Registry, which had 72 budgetary posts (55 assistants and 17 administrators), saw its workforce reduced to 69 posts in September in the context of a redeployment operation designed to enable the cabinets of the additional judges to be formed. The entry into office of the Deputy Registrar in May allowed a reorganisation of the service which had become as urgent as it was necessary. This latter development must be welcomed.

The Registry's contribution to the judicial activity and the administration of the General Court has been provided in different forms.

1| The documents from the Symposium held on 25 September 2019 on 'The General Court in the Digital Age' and the film paying tribute to the founding members and all those who have enabled that court to function since its creation are available on the website of the Court of Justice of the European Union.

2| Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14), 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. Contribution to the judicial activity

In accordance with the task of providing judicial assistance entrusted to it by the Rules of Procedure of the General Court, the Registry has:

- ensured the smooth conduct of the proceedings and the proper management of the files;
- ensured communications between the parties' representatives and the judges;
- actively assisted the judges and their staff.

Following a relative fall in the number of cases lodged observed in 2018, the number of new cases has again increased, with 939 actions lodged, but without hitting what is still the historic ceiling reached in 2016.

The number of cases closed remained high, albeit lower than the number closed in 2018. A total of 874 cases were determined in 2019, against 1 009 in the preceding year. The departure of a significant number of judges, the uncertainties linked with the renewal of the mandates of several judges, the entry into office of 14 judges, the complete restructuring of the Chambers, the assignation of judges to the Chambers and the re-assignation of all pending cases (apart from those at the deliberation stage, or those in which a decision was taken to rule without an oral part of the procedure before 26 September 2019) are factors that largely explain that slight statistical downturn.

As at 31 December 2019, the number of pending cases was 1 398.

The average length of proceedings was under 17 months for cases determined by judgment or by order and under 20 months for the category of cases determined by judgment.

a. Management of procedural files

The activity of the Registry of the General Court connected with the management of the procedural files has, from a quantitative aspect, been maintained at the same level as in 2018.

The Registry entered 54 723 procedural documents on the register, in 21 languages of cases (out of the 24 languages of cases provided for in the Rules of Procedure), dealt with 939 applications initiating proceedings and 4 446 other pleadings produced by the parties in pending cases, implemented decisions taken by the formations of the Court, in the form of measures of organisation of procedure or measures of investigation, and placed 1 699 notices in the *Official Journal of the European Union*.

While it is clearly not possible to mention all the data that would enable all the work of the Registry to be measured, it is nonetheless sufficient to identify some of them, in particular statistics, in order to highlight the volume of its activity:

- the 9 734 procedural documents lodged included 288 applications to intervene and 251 applications for confidential treatment vis-à-vis the parties or vis-à-vis the public;
- 11 024 routing slips prepared by the Registry (or more than 918 slips each month) were communicated (in digital form) to the judges' cabinets for the purposes of the investigation of the cases;

- hundreds of measures of organisation of procedure and tens of measures of inquiry were carried out, concerning in particular the production of documents which the parties had claimed to be confidential.

The fact that several groups or series of cases were brought during the year in the fields of competition law applicable to States (State aid) and institutional law required coordinated management both within the Registry and with the formations hearing the cases, in order to deal with requests for further time, joinder, intervention and also for decisions on the second exchange of pleadings and, where appropriate, on confidential treatment of the material in the file in each of those cases. That coordination requires a certain organisational flexibility on the part of the Registry's teams, which is sometimes difficult to reconcile with the necessary command of the languages in which the cases in those groups or series are lodged.

In addition, the treatment of some very sensitive cases in the field of competition law applicable to undertakings required the introduction of mechanisms designed to maintain the greatest confidentiality of the data to which they pertain and to ensure secure communication within the Court itself. These internal procedures are additional to the procedure designed to ensure the security of information or material produced in accordance with Article 105(1) or (2) of the Rules of Procedure, that is to say, pertaining to the security of the Union or to that of one or more of its Member States or to the conduct of their international relations. [3]

The service of the Registry was also provided by 11 administrators responsible for the management of procedural files [4] in 334 Chamber conferences and in hearings that took place in the context of 315 cases, involving, at the close of each Chamber conference and each hearing, in addition to the preparation of the files, the drafting of minutes submitted for approval by the judges.

Two figures illustrate the average volume of files held by the Registry. The procedural documents lodged at the Registry by means of the e-Curia application came to 749 895 pages, and the volume of files held by the Registry in the 1 398 cases pending at the end of 2019 represented 636 linear metres.

When carrying out its tasks, the Registry continued to derive the maximum benefit from the Rules of Procedure that entered into force on 1 July 2015, in particular in the field of intellectual property (the change of the language regime and the abolition of the second exchange of pleadings are measures which have significantly contributed to reducing the average length of the proceedings in that field). In addition, the possibility of determining cases by judgment without a hearing, in particular because the parties do not request a hearing, has been effectively used by the Court (up to 39% in all cases taken together and 52% in the field of intellectual property). Apart from the fact that that absence of a hearing has dispensed with the need to produce a summary Report for the Hearing in the language of the case, it has, in particular, enabled the cases to be determined more rapidly (15.1 months on average without a hearing as against 22.7 months on average with a hearing).

Furthermore, the percentage of the total number of direct actions that have resulted in cases determined by judgment without a second exchange of pleadings has risen (22% as against 13% in 2018). [5]

3| No document was lodged in 2019 on the basis of those rules governed by Decision (EU) 2016/2387 of the General Court of 14 September 2016 concerning the security rules applicable to information or material produced in accordance with Article 105(1) or (2) of the Rules of Procedure (OJ 2016 L 355, p. 18).

4| Taking account of the movements of staff in Function Group AD.

5| Litigation relating to intellectual property rights is omitted from this calculation, since the Rules of Procedure do not provide for a second exchange of pleadings in that category of cases.

In the field of the civil service, it was decided not to have a second exchange in 22% of cases (against 38% in 2018). It should be noted that in civil service matters the attempts to reach an amicable settlement of the proceedings made during the year were successful on two occasions.

Last, while it is a matter for concern that three out of every five applications had to be put in order by means of regularisation for failure to comply with the formal requirements in the field of intellectual property, the continuing fall in the rate of applications requiring regularisation in direct actions other than those brought in intellectual property matters (24%) is to be welcomed.

Most opportunely, the Registry has also taken advantage of the rationalisation of the processing of documents [6] made possible by the reform mandating the IT application e-Curia as the exclusive mode of exchange of judicial documents between the parties' representatives and the Court since 1 December 2018. [7] The gains derived from that rationalisation proved very valuable in 2019, [8] since they made it possible to alleviate the effects of the increase in the number requests made of the Registry, notably in the context of the increase in the number of cabinets in the Court.

The Registry has the task of processing all the procedural acts lodged and the decisions taken by the judges as quickly as possible.

For objective reasons, the processing of certain acts must, however, take priority over others, for example where documents are lodged shortly before the hearing or where a case is withdrawn even though it is already in deliberation. In urgent proceedings the procedural acts must be processed immediately. That is the case, in particular, of applications for urgent measures together with an application for interim measures (that is to say, even before the other party has been able to submit their observations), when the President must adopt a position within hours of the submission of such an application. On several occasions in 2019, the Registry processed the application for interim measures within a very short time and, sometimes at a very late hour, served the order of the President made in response to that application.

b. Support for consistency

The Registry's support for the judicial activity of the Court also aims, in accordance with the guidelines adopted by the Court, to promote consistency in decision-making practices and interpretation of rules in the field of procedure. The Registry has therefore devoted its resources to achieving that objective.

In the first place, the Registry lends its support to the handling of cases by the cabinets up to the time when deliberations commence, in the form of *ex ante* contributions. The objective pursued is primarily to enable

6| The mandatory nature of e-Curia has made it possible to put an end to the management of mixed formats (hard copy and digital), to the scanning of documents filed in hard copy and, where filing in hard copy is preceded by filing by fax, to the need to enter data twice in the procedural database held by the Registry and also to the need to verify the consistency of the document filed in hard copy. The recurring difficulties encountered when receiving or serving documents by fax, especially in the case of voluminous documents, are also a thing of the past.

7| All the parties (applicants, defendants and interveners) and all types of proceedings are affected. Certain exceptions are provided for, however, in accordance with the principle of access to the Court (in particular where the use of e-Curia proves to be technically impossible or where legal aid is sought by an unrepresented applicant).

8| Although the rate of the lodging of procedural acts by e-Curia is not 100%, but 93%, because methods other than e-Curia are used in order to lodge applications for legal aid, documents produced at the hearings, annexes in the form of USB keys or on DVD with content that cannot be transmitted by e-Curia and letters from the Court of Justice informing of the lodging of an appeal or transmitting the decision determining the appeal.

the President, the Presidents of Chambers and the formations to have at their disposal the material that will enable them to adjudicate rapidly by ensuring that they have the information necessary for that purpose.

Thus, during the first analysis of actions brought before the Court, the Registry identifies the subject matter, the matter concerned and any connections with other cases, irrespective of the language of the case in which the action was brought. That exercise, which the Registry has set itself the target of completing within 10 working days from the date on which the application is lodged, is designed in particular to enable the President of the Court to allocate the cases in an informed manner. It is also in that context that the Registry indicates requests for an expedited procedure and requests for priority treatment and also requests for anonymity. In addition, the Registry indicates cases which do not fall within the Court's jurisdiction or which appear to be manifestly inadmissible.

When dealing with the pleadings lodged in connection with pending cases, the Registry communicates them to the judges' chambers together with a routing slip identifying the procedural issues that arise and containing what are sometimes detailed proposals as to the action to be taken.

More generally, the collaboration between the representatives of the Registry and the staff of the judges' cabinets takes place on a daily basis and is sustained. The participation of the Registry in the administrative meetings of the chambers (Chamber conferences) facilitates the circulation of information and makes it possible to ensure, with the necessary knowledge of the contextual material, that procedural decisions taken by the formations are implemented without delay.

In the second place, the Registry organises knowledge-sharing by making targeted documentation available to the Court. Information on procedural topics is regularly updated and procedural orders are made available according to a scheme of classification, while the procedural case-law of the General Court, the Court of Justice and the European Court of Human rights is flagged up every month. These analytical, monitoring and information tools and the thematic products of the Registry are established in order to meet the expectations of a court which has made consistency one of its priorities. They form part of the mechanisms for preventing and detecting discrepancies in the decision-making practices and in the case-law and thus supplement, within a defined area, the central mission entrusted to the Vice-President of the Court, namely that of developing a focal point of legal cross-analysis intended to enhance the consistency and quality of the case-law.

c. Preventive action connected with the risk of a no-agreement Brexit

In the interest of assisting the lawyers acting in proceedings before the Court and with a view to ensuring that the conditions that allow effective judicial protection are met in all circumstances, the Registry took preventive action connected with the risk that the United Kingdom of Great Britain and Northern Ireland would leave the Union without signing the withdrawal agreement.

Bearing in mind the risk that Barristers, Solicitors and Advocates of the United Kingdom ('United Kingdom lawyers') might no longer satisfy the conditions laid down by Article 19 of the Protocol on the Statute of the Court of Justice of the European Union [9] to properly represent a party before the Court in the event of a Brexit without a withdrawal agreement, an information campaign was conducted on two occasions, aimed

9| The fourth paragraph of Article 19 of the Protocol on the Statute of the Court of Justice of the European Union provides that 'only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court'.

at representatives of parties in the cases pending before the Court. By sending individual letters, the Registrar drew their attention to the procedural impact of the United Kingdom's leaving the Union without signing a withdrawal agreement and invited them to take appropriate steps in the interest of their clients' defence.

The first operation was carried out in sufficient time before 12 April 2019, shortly after the House of Commons of the United Kingdom Parliament had decided on 29 March 2019 to reject the draft withdrawal agreement.

The second operation was carried out a few days before the deadline of 31 October 2019.

The successive postponements of the deadline laid down in Article 50(3) TEU decided on by the European Council a few hours before the prescribed deadlines eventually allowed the exit of the United Kingdom without an agreement to be avoided in 2019.

II. Actions carried out in connection with the third stage of the reform

a. Actions connected with the departure and taking up of office of an unprecedented number of judges

In March 2019, the Court welcomed the Maltese judge appointed as successor to the judge appointed to the Court of Justice in October 2018.

In September 2019, in the context of the partial renewal of the General Court provided for in the second paragraph of Article 254 TFEU, [10] eight judges left their post and seven judges took the oath before the Court of Justice. On the same day, seven judges appointed as additional judges in the context of the third and final stage of the reform also took the oath before the Court of Justice.

The General Court therefore welcomed 15 new judges in 2019, including 14 on 26 September 2019. The number of judges making up the court was increased from 46 to 52 with effect from that date. [11]

Numerous measures were taken in connection with those changes in the composition of the Court. The actions coordinated by the cabinet of the President and the Registrar (and a part of his teams) were carried out by the common services of the institution, in particular by the Directorate of Buildings and Security, the Directorate of Human Resources and Staff Administration and the Directorate of Information Technology. They consisted in:

- releasing in good time the space necessary for the arrangement of premises for the installation of the new judges of the Court and the persons making up their cabinets and for the arrangement of a room allowing all the Members (judges and Registrar) to meet for the work-related needs of the Plenum, in accordance with the needs identified by the Court;

10| On 31 August 2019, the terms of office of 23 judges expired. It should be noted that, for the period between 1 and 26 September 2019, the General Court adopted a decision on the conduct of judicial activity (OJ 2019 C 238, p. 2).

11| On 31 December 2019, a number of Member States had yet to propose candidates for the posts of judges.

- managing the recruitment, the posting and the end of contract of the staff of the cabinets (legal secretaries and assistants) subject to approval by the competent authorities, in the form of files setting out proposals;

- providing the new cabinets with computer and telephone equipment and adapting the IT applications to take account of the change in the number of chambers and their mode of composition (the transition to 60 formations sitting with three judges and 10 formations sitting with five judges);

- welcoming the new judges: in order to enable them to have an overall view of the functioning of the Court, its procedures, its IT applications (relating to the processing of cases, document research and the Members' activities) and its multimedia equipment, the rules to be observed (in particular the rule governing personal data protection) and the parameters to be observed (in particular in the field of IT security), highly targeted sessions organised by the Presidency of the Court were conducted by legal secretaries and also by officials and other servants of the Registry and of the common services of the institution, followed by a welcome programme organised by the Registrar during which representatives of the senior management of the institution were able to present the activities and the priorities of their services.

Furthermore, as the third stage of the reform was achieved without new budgetary posts being created for the judges' cabinets, considerable thought was given throughout the year to deciding on the way in which the cabinets of judges who had succeeded a departing judge and those of the additional judges should be composed. The solution adopted by the Court will make it possible, by a sequential approach, to reinstate by 1 January 2020 functional equality between the cabinets of all the judges of the Court.

b. Measures of organisation of the Court

In the first place, the organisation of the Court was rethought in the light of the increased number of judges. The number of chambers of the General Court was increased from 9 to 10. Each chamber is now composed of five judges, without prejudice to the possibility of forming chambers composed of six judges when all the judges have been appointed.

In the second place, in order to permit a more diversified composition of the formations, their mode of composition has been revised. Until 26 September 2019, a chamber of five judges was divided into two permanent formations presided over by the same President of Chamber. Since 30 September 2019, the number of formations has been increased by a system providing for the rotation of judges. A chamber of five judges thus allows six formations to be composed.

In the third place, the mode of composition of the Grand Chamber, composed of 15 judges, has been altered, in order to allow judges who are not Presidents of Chambers to sit in the Grand Chamber in the successive cases referred to it. Unlike the mode of composition which provided for the participation of the President, the Vice-President, all the Presidents of Chambers and the judges of the chamber before which a case was initially brought, the mode of composition in force since 26 September 2019 has provided for the participation of the President, the Vice-President, a limited number of Presidents of Chambers, the judges of the chamber to which the case was initially assigned and other judges chosen alternately according to seniority and reverse seniority.

In the fourth place, the Court decided to introduce a degree of specialisation to the chambers. Thus, since 30 September 2019 four chambers have dealt with civil service cases [12] and six chambers have dealt with intellectual property cases. [13] All other cases are allocated among all the chambers.

In that context, and while having adapted it to take account of the relative specialisation of the chambers, the Court has retained the system of allocation of cases provided for in its Rules of Procedure, based on the 'rota' rule, without prejudice to derogations based on the identification of connections between certain cases (where cases have the same subject matter or form part of the same series of cases, or where they have legal similarities) and the even spread of the workload.

In the fifth place, the Court decided to increase participation by the President and the Vice-President in judicial activity. For reasons connected with the extent of their responsibilities, it was confirmed that the President and the Vice-President would not be full-time judges in the formations. On the other hand, since 27 September 2019 the President is to replace a judge who is prevented from acting (previously such a judge was replaced by the Vice-President). In addition, the Vice-President, whose primary responsibility continues to be that of helping to maintain consistency in the case-law, is required to sit in the formations of extended composition of five judges, at the rate of one case per chamber per year.

All of these decisions taken in the context of the increase in the number of judges of the General Court were preceded by reflection and proposals in which the Registrar and part of his service took part. They were all published in the *Official Journal of the European Union* and are available on the Curia website. [14]

III. Other forms of assistance to the Court

The Registry, through the Registrar and its representatives, has provided assistance to the various organs of the court (in particular the Plenum, the Conference of Presidents of Chambers and the Rules of Procedure Committee), and also to other committees and working groups, as required or appropriate to the nature to the topics considered (ethical matters, institutional issues or IT matters).

In addition, steps were taken in order to publish or disseminate documents concerning the General Court. In the first place, the Registrar assumed responsibility for the publication of the Reports of Cases, the publication in the *Official Journal of the European Union* of the decisions taken by the court in accordance with the Rules of Procedure and the dissemination on the internet of documents relating to the Court. The 'Procedure' page of the General Court on the Curia website has been kept fully up to date. In the second place, provisions have been adopted in accordance with the third subparagraph of Article 8(3) of the Code of Conduct for Members and former Members of the Court of Justice of the European Union to publish on the institution's website the external activities of Members that were authorised by the Court in 2018.

12| Actions brought under Article 270 TFEU and, where appropriate, Article 50a of the Protocol on the Statute of the Court of Justice of the European Union.

13| Actions brought against the decisions of the Boards of Appeal of the European Intellectual Property Office (EUIPO) and of the Community Plant Variety Office (CPVO).

14| Composition of the Grand Chamber (OJ 2019 C 172, p. 2); Criteria for the assignment of cases to Chambers (OJ 2019 C 372, p. 2); and Designation of a Judge to replace a Judge who is prevented from acting (OJ 2019 C 263, p. 2).

It is in the context of access to judicial decisions via the internet, moreover, that the Registrar, as the person responsible for the Court's publications, has received a number of requests for anonymity *ex post* by natural persons who, having been parties before the Court, have expressed the wish that their identity be removed from the decision of the Court or that of the European Union Civil Service Tribunal made available to the public via the internet. The Registrar, who is identified as the person responsible for the processing of the personal data contained in decisions following the closure of the cases, has determined each of the requests he has received.

Without prejudice to any action challenging the legality of the decision taken in that connection by the Registrar, the General Court, in keeping with the approach taken by the Court of Justice, [15] has adopted a decision establishing the period within which the Registrar must adopt a position and making provision for an independent review of his decisions by a committee composed of three judges. [16] The Court has thus complied with the terms of Article 8(3) of the Charter, which states that 'compliance with [the] rules [on the protection of personal data] shall be subject to control by an independent authority' and has taken account of the fact that the supervisory tasks of the European Data Protection Supervisor do not extend to the processing of personal data by the Court acting in its judicial capacity. [17]

IV. Administrative work

The workload related to the administration of the Court has increased considerably. Preparations for meetings of the committees and working groups (agenda, examination of files, drafting of minutes or records) which take place frequently and the multiplication of administrative topics to be dealt with in a court composed of more than 300 persons as at 31 December 2019 provide a logical explanation for this.

Furthermore, the workload associated with the administration of the service, the management of its officials and other servants (recruitment procedures, periodic assessments, exercise of the rights defined in the Staff Regulations), with the monitoring of developments of IT applications, with the coordination, documentation, information and communication (including the complete redesign of the website of the Registry of the General Court), has continued to be significant.

In its capacity as administrative service, the Registry has responded to various other requests made of it. In order to comply with the regulatory requirements, measures were adopted in order to:

- preserve the environment by continuing measures to heighten awareness, in conjunction with various other administrative players in the institution and the judges' cabinets, in the context of 'EMAS' — the Eco-Management and Audit Scheme;

15| Decision of the Court of Justice of 1 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the Court of Justice when acting in its judicial capacity (OJ 2019 C 383, p. 2).

16| Decision of the General Court of 16 October 2019 establishing an internal supervision mechanism regarding the processing of personal data by the General Court when acting in its judicial capacity (OJ 2019 C 383, p. 4).

17| See Article 57(1)(a) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

- implement the rules imposed by the financial regulations; [18]
- ensure compliance with the regulation on the processing of personal data by the institutions, organs and bodies of the Union; [19]
- give full effect to the mechanism for the protection of highly sensitive information in cases identified by the President of the Court.

Last, the Registry has mobilised resources to assist the Directorate of Information Technologies when drawing up the specifications of an institutional IT project (a project designed to put in place an integrated case-management system).

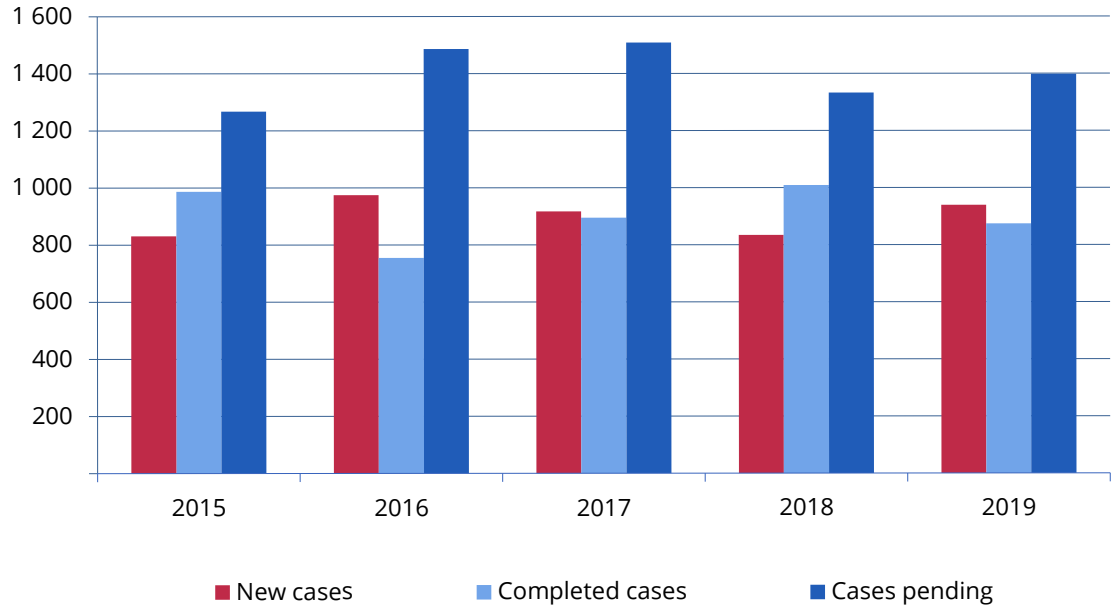
The task of ensuring the documents and procedures within the Registry are compliant, and the tasks involving the participation of officials and other servants in the fields of the environment, personal data protection and IT are among the tasks that have had to be reconciled with the Registry's contribution to judicial activity. Subject to an increasingly demanding requirement for rationalisation, while adaptability and flexibility are necessary, the Registry has therefore allocated its resources according to the reality of the needs and priorities of the Court and the regulatory obligations with which it must comply as an administrative service.

18| Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EC, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

19| Regulation 2018/1725, cited above.

D Statistics concerning the judicial activity of the General Court

I. General activity of the General Court — New cases, completed cases, cases pending (2015-2019) [1] [2]



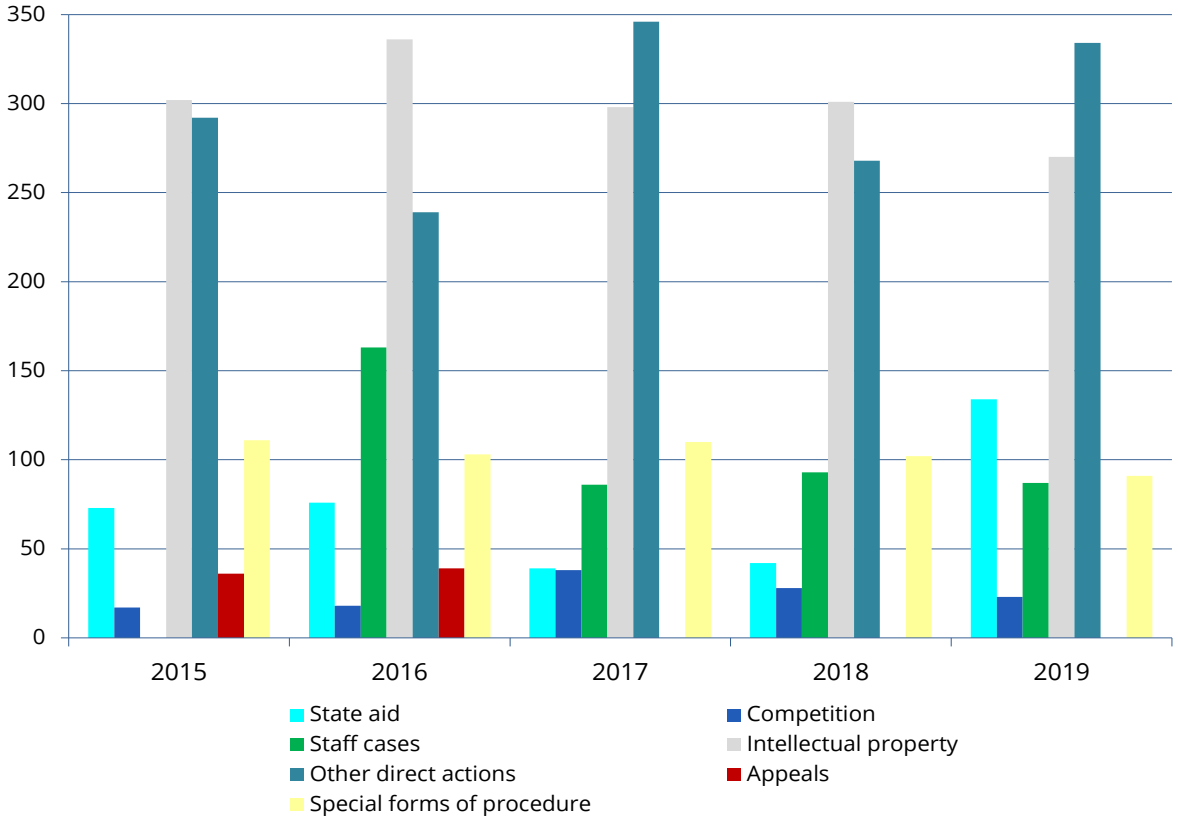
	2015	2016	2017	2018	2019
New cases	831	974	917	834	939
Completed cases	987	755	895	1 009	874
Cases pending	1 267	1 486	1 508	1 333	1 398

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.

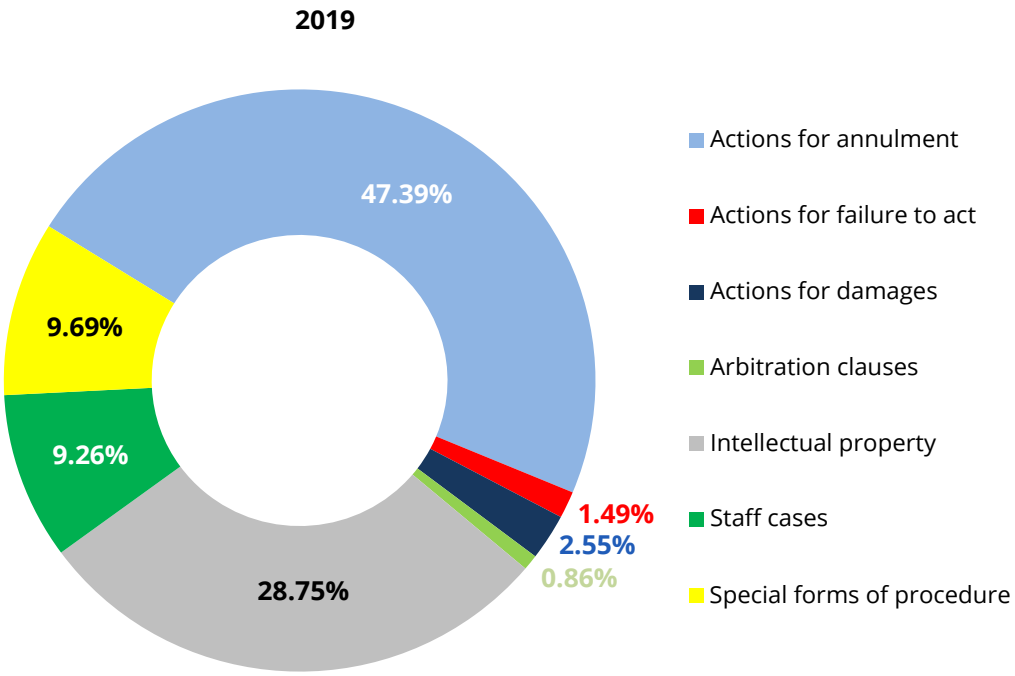
II. New cases — Nature of proceedings (2015-2019)



	2015	2016 [1]	2017	2018	2019
State aid	73	76	39	42	134
Competition	17	18	38	28	23
Staff cases		163	86	93	87
Intellectual property	302	336	298	301	270
Other direct actions	292	239	346	268	334
Appeals	36	39			
Special forms of procedure	111	103	110	102	91
Total	**831**	**974**	**917**	**834**	**939**

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 — Type of action (2015-2019)

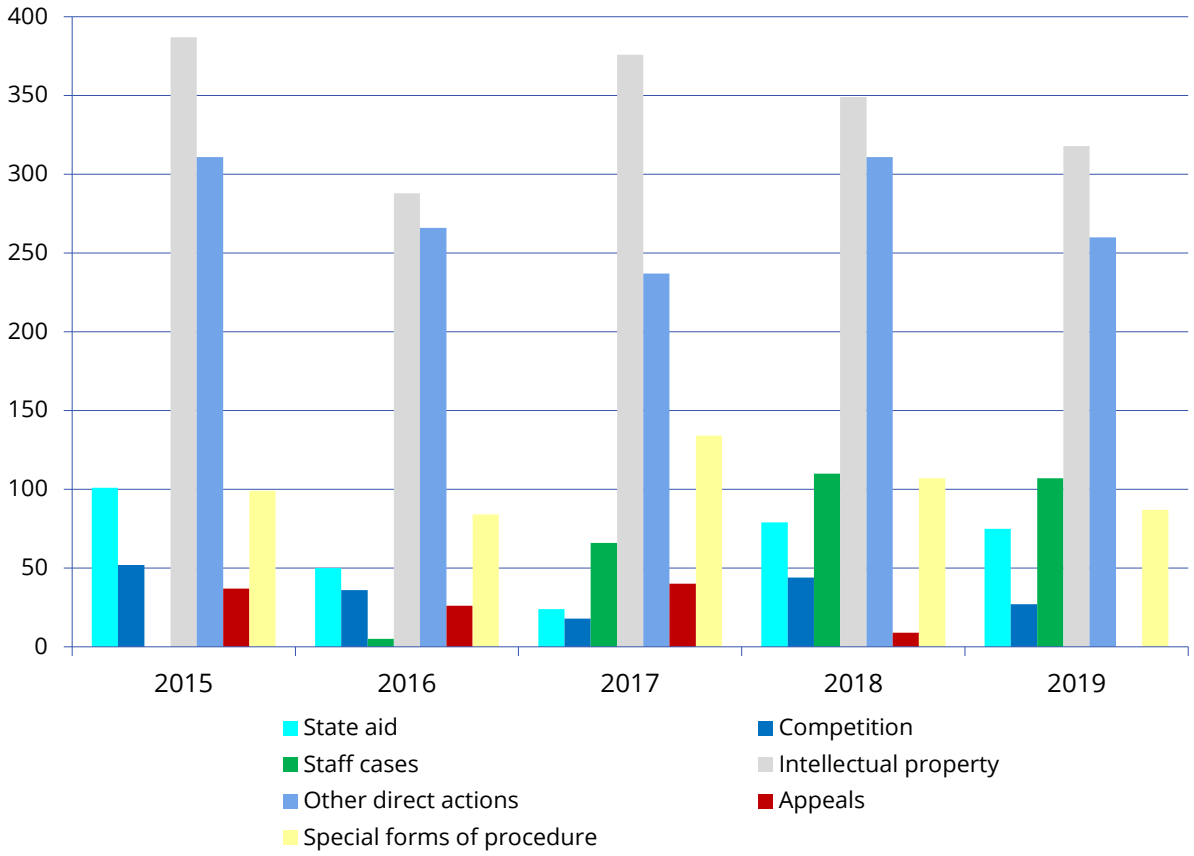


	2015	2016	2017	2018	2019
Actions for annulment	332	297	371	288	445
Actions for failure to act	5	7	8	14	14
Actions for damages	30	19	23	29	24
Arbitration clauses	15	10	21	7	8
Intellectual property	302	336	298	301	270
Staff cases		163	86	93	87
Appeals	36	39			
Special forms of procedure	111	103	110	102	91
Total	**831**	**974**	**917**	**834**	**939**

IV. New cases — Subject matter of the action (2015-2019)

	2015	2016	2017	2018	2019
Access to documents	48	19	25	21	17
Agriculture	37	20	22	25	12
Approximation of laws	1	1	5	3	2
Arbitration clause	15	10	21	7	8
Area of freedom, security and justice		7		2	1
Citizenship of the Union					1
Commercial policy	6	17	14	15	13
Common fisheries policy		1	2	3	
Common foreign and security policy		1			1
Company law	1				
Competition	17	18	38	28	23
Consumer protection	2	1		1	1
Culture		1			
Customs union and Common Customs Tariff		3	1		2
Economic and monetary policy	3	23	98	27	24
Economic, social and territorial cohesion	5	2	3		3
Education, vocational training, youth and sport	3	1		1	1
Energy	3	4	8	1	8
Environment	5	6	8	7	10
External action by the European Union	1	2	2	2	6
Financial provisions (budget, financial framework, own resources, combating fraud)	7	4	5	4	5
Free movement of capital	2	1		1	
Free movement of goods	2	1			
Freedom of establishment				1	
Freedom of movement for persons	1	1	1	1	2
Freedom to provide services		1			
Intellectual and industrial property	303	336	298	301	270
Law governing the institutions	53	52	65	71	148
Public health	2	6	5	9	5
Public procurement	23	9	19	15	10
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	5	6	10	4	6
Research and technological development and space	10	8	2	1	3
Restrictive measures (external action)	55	28	27	40	42
Social policy		1		1	1
State aid	73	76	39	42	134
Taxation	1	2	1	2	
Trans-European networks			2	1	1
Transport				1	1
Total EC Treaty/TFEU	**684**	**669**	**721**	**638**	**761**
Staff Regulations	36	202	86	94	87
Special forms of procedure	111	103	110	102	91
OVERALL TOTAL	**831**	**974**	**917**	**834**	**939**

V. Completed cases — Nature of proceedings (2015-2019)



	2015	2016	2017	2018	2019
State aid	101	50	24	79	75
Competition	52	36	18	44	27
Staff cases		5	66	110	107
Intellectual property	387	288	376	349	318
Other direct actions	311	266	237	311	260
Appeals	37	26	40	9	
Special forms of procedure	99	84	134	107	87
Total	**987**	**755**	**895**	**1 009**	**874**

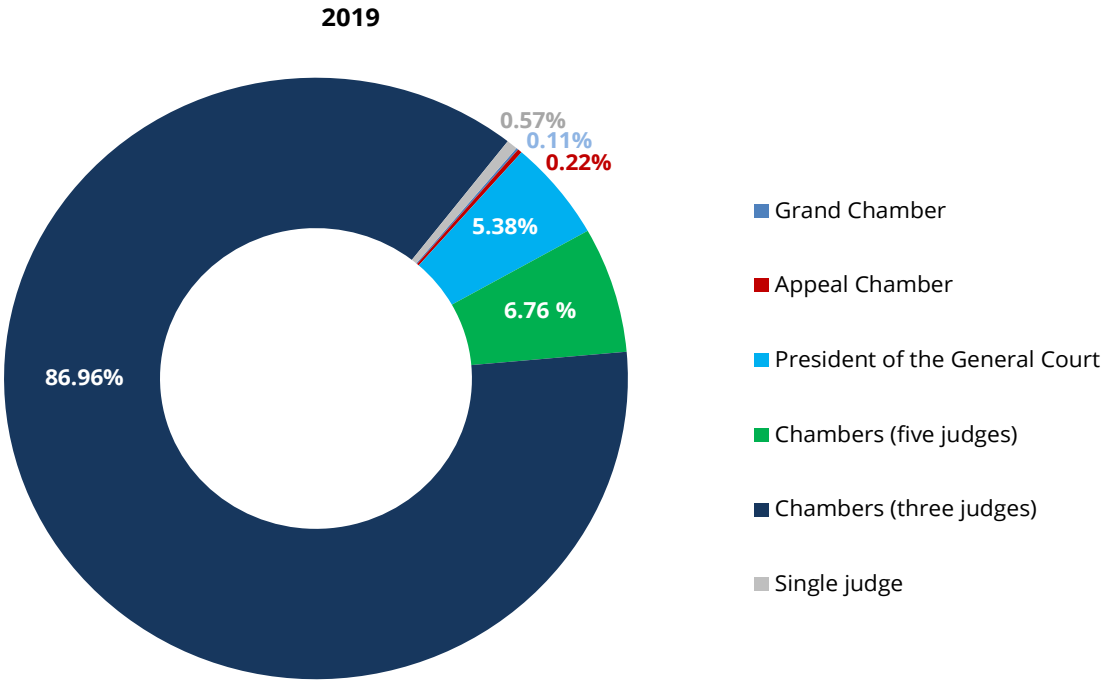
VI. Completed cases — Subject matter of the action (2019)

	Judgments	Orders	Total
Access to documents	10	7	17
Agriculture	23	10	33
Approximation of laws	2	2	4
Arbitration clause	13		13
Citizenship of the Union		1	1
Commercial policy	10	2	12
Company law	1		1
Competition	18	9	27
Consumer protection		1	1
Economic and monetary policy	7	6	13
Economic, social and territorial cohesion	2		2
Energy	3		3
Environment		6	6
External action by the European Union	1	2	3
Financial provisions (budget, financial framework, own resources, combating fraud)	1	3	4
Free movement of capital		1	1
Freedom of establishment		1	1
Freedom of movement for persons		1	1
Intellectual and industrial property	260	58	318
Law governing the institutions	23	48	71
Public health	3	4	7
Public procurement	13	4	17
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	9	1	10
Research and technological development and space	2	1	3
Restrictive measures (external action)	29	1	30
Social policy	1		1
State aid	50	25	75
Taxation		2	2
Trans-European networks	1	1	2
Total EC Treaty/TFEU	**482**	**197**	**679**
Staff Regulations	71	37	108
Special forms of procedure	1	86	87
OVERALL TOTAL	**554**	**320**	**874**

VII. Completed cases — Subject matter of the action (2015-2019) (Judgments and Orders)

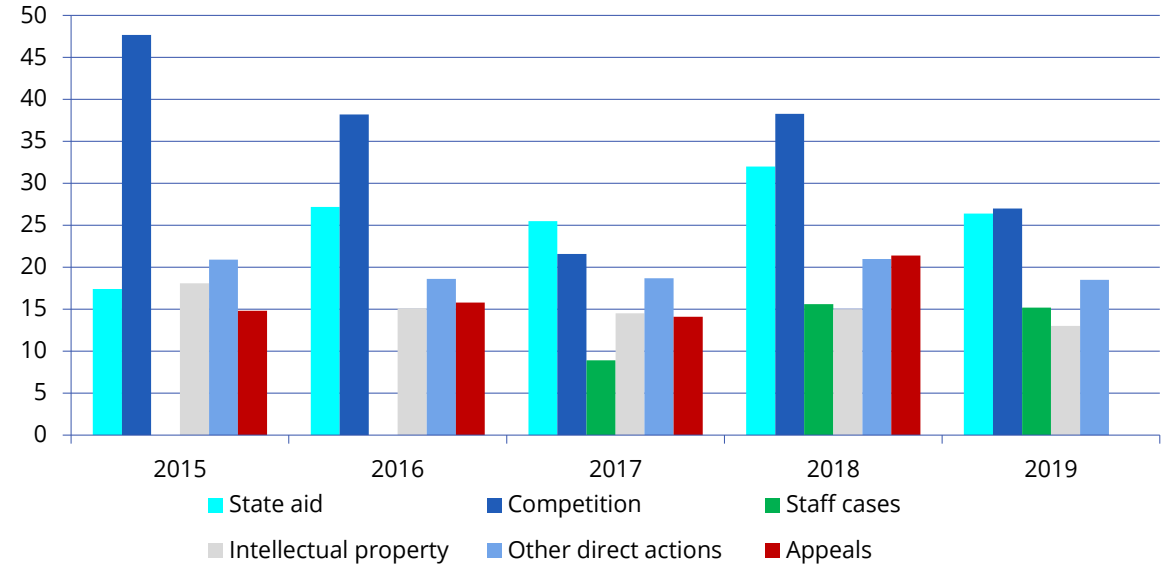
	2015	2016	2017	2018	2019
Access to documents	21	13	14	67	17
Accession of new States	1				
Agriculture	32	34	21	25	33
Approximation of laws		1	2	1	4
Arbitration clause	2	17	17	7	13
Area of freedom, security and justice			5	3	
Citizenship of the Union					1
Commercial policy	24	21	15	10	12
Common fisheries policy	3	2	2	2	
Common foreign and security policy	1			1	
Company law	1				1
Competition	52	36	18	44	27
Consumer protection	2	1	1	1	1
Culture		1	1		
Customs union and Common Customs Tariff	4	3	5	1	
Economic and monetary policy	9	2	6	16	13
Economic, social and territorial cohesion	6	1	12	4	2
Education, vocational training, youth and sport		1		3	
Energy	1	3	3	6	3
Environment	18	4	3	11	6
External action by the European Union	2		4	2	3
Financial provisions (budget, financial framework, own resources, combating fraud)	5	1	5	5	4
Free movement of capital	2	1			1
Free movement of goods	2	1			
Freedom of establishment	1				1
Freedom of movement for persons	1		2	1	1
Freedom to provide services		1			
Industrial policy	2				
Intellectual and industrial property	388	288	376	349	318
Law governing the institutions	58	46	54	64	71
Public health	15	3	3	5	7
Public procurement	22	20	16	20	17
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	9	8	4	4	10
Research and technological development and space	2	6	12	7	3
Restrictive measures (external action)	60	70	26	42	30
Social policy		1		1	1
State aid	101	50	24	79	75
Taxation	1		3		2
Trans-European networks		2		1	2
Transport	3			1	
Total EC Treaty/TFEU	**851**	**638**	**654**	**783**	**679**
Staff Regulations	37	33	107	119	108
Special forms of procedure	99	84	134	107	87
OVERALL TOTAL	**987**	**755**	**895**	**1 009**	**874**

VIII. Completed cases — Bench hearing action (2015-2019)



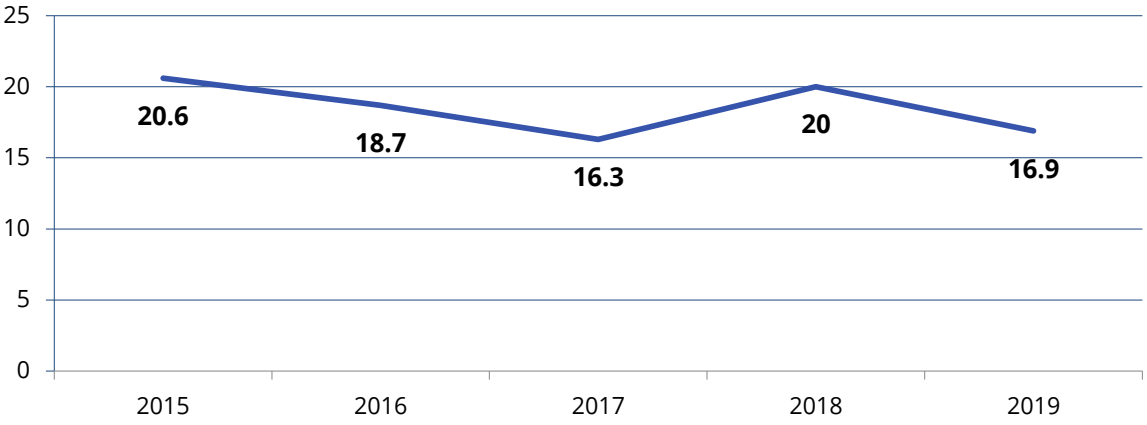
	2015			2016			2017			2018			2019		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Grand Chamber														1	1
Appeal Chamber	23	14	37	25	13	38	29	17	46	9	2	11		2	2
President of the General Court		44	44		46	46		80	80		43	43		47	47
Chambers (five judges)	8	3	11	10	2	12	13	5	18	84	3	87	50	9	59
Chambers (three judges)	538	348	886	408	246	654	450	301	751	546	317	863	499	261	760
Single judge	1	8	9	5		5				5		5	5		5
Total	**570**	**417**	**987**	**448**	**307**	**755**	**492**	**403**	**895**	**644**	**365**	**1 009**	**554**	**320**	**874**

IX. Completed cases — Duration of proceedings in months (2015-2019) [1] (Judgments and Orders)



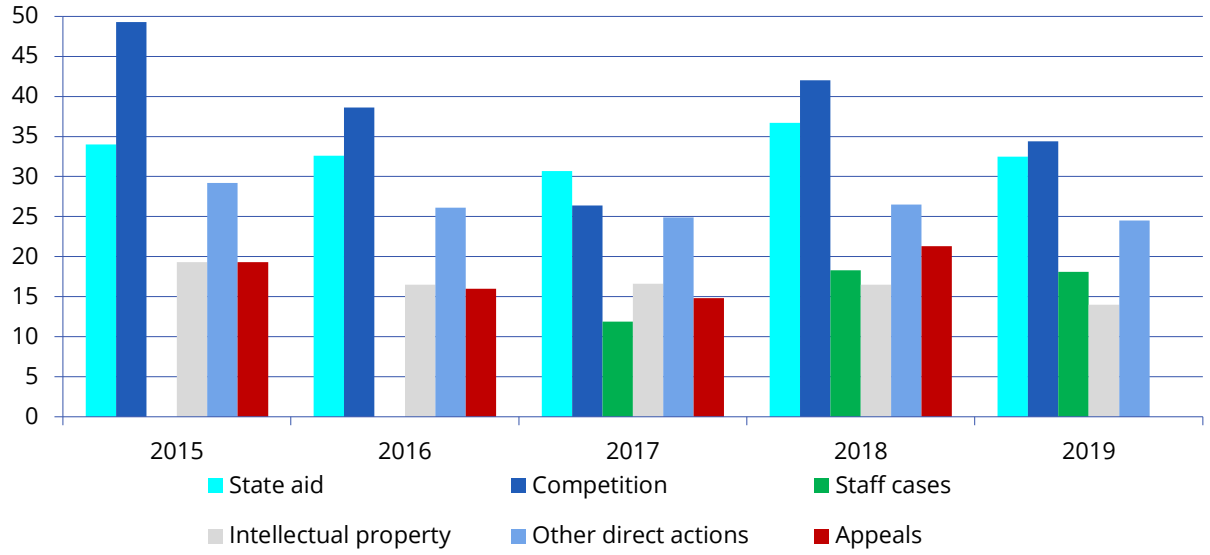
	2015	2016	2017	2018	2019
State aid	17.4	27.2	25.5	32	26.4
Competition	47.7	38.2	21.6	38.3	27
Staff cases			8.9	15,6	15.2
Intellectual property	18.1	15.1	14.5	15	13
Other direct actions	20.9	18.6	18.7	21	18.5
Appeals	14.8	15.8	14.1	21.4	
All cases	**20.6**	**18.7**	**16.3**	**20**	**16.9**

Duration of proceedings (in months)
All cases disposed of by way of judgment or order



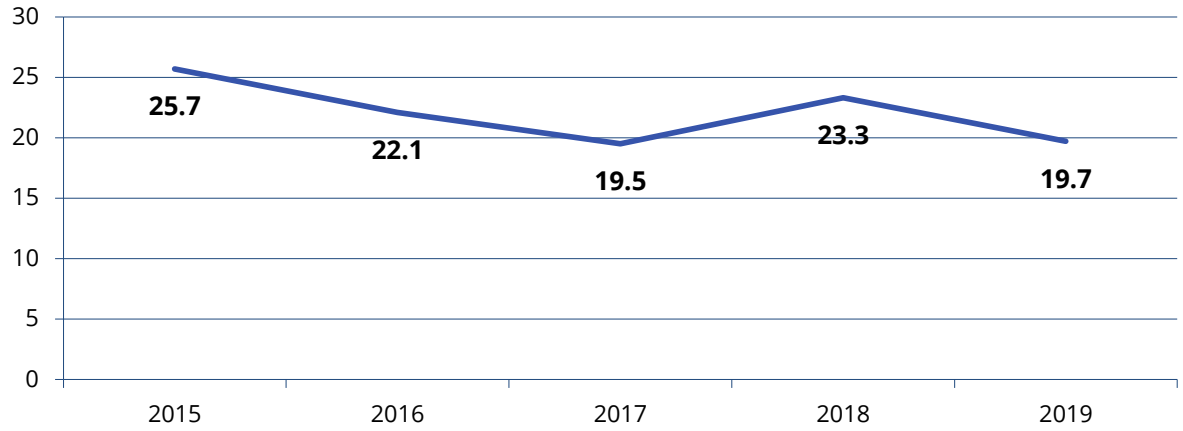
1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred 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 20.7 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

X. Duration of proceedings in months (2015-2019) [1] (Judgments)



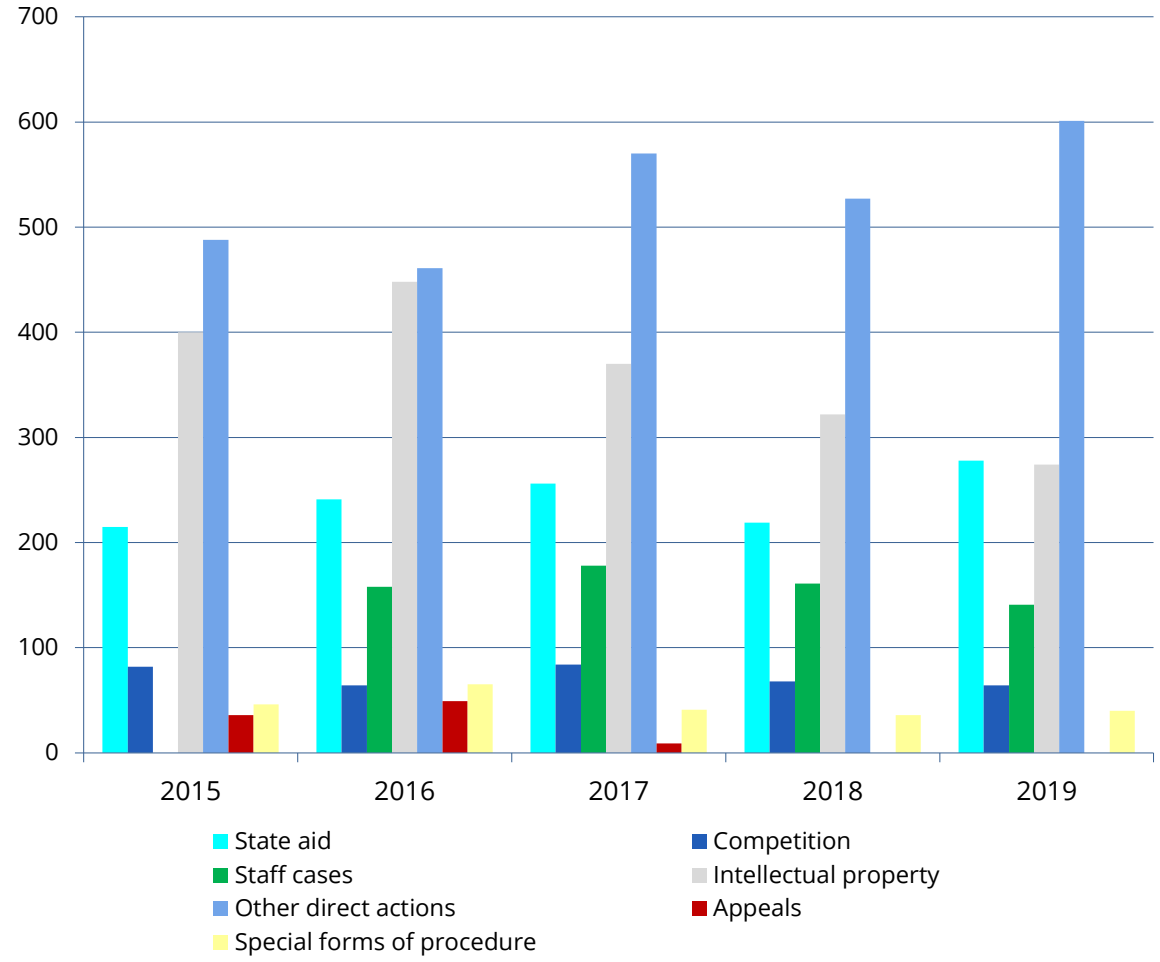
	2015	2016	2017	2018	2019
State aid	34	32.6	30.7	36.7	32.5
Competition	49.3	38.6	26.4	42	34.4
Staff cases			11.9	18.3	18.1
Intellectual property	19.3	16.5	16.6	16.5	14
Other direct actions	29.2	26.1	24.9	26.5	24.5
Appeals	19.3	16	14.8	21.3	
All cases	**25.7**	**22.1**	**19.5**	**23.3**	**19.7**

Duration of proceedings (in months)
All cases disposed of by way of judgment



1| The duration of proceedings is expressed in months and 10ths 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 23.7 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 (2015-2019)

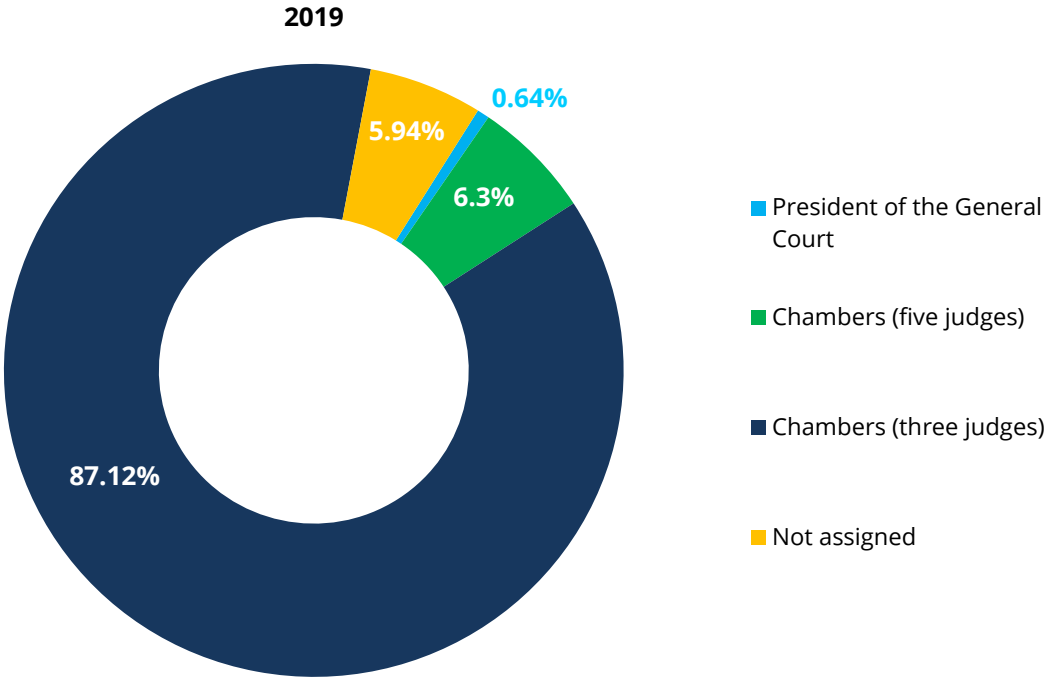


	2015	2016	2017	2018	2019
State aid	215	241	256	219	278
Competition	82	64	84	68	64
Staff cases		158	178	161	141
Intellectual property	400	448	370	322	274
Other direct actions	488	461	570	527	601
Appeals	36	49	9		
Special forms of procedure	46	65	41	36	40
Total	**1 267**	**1 486**	**1 508**	**1 333**	**1 398**

XII. Cases pending as at 31 December — Subject matter of the action (2015-2019)

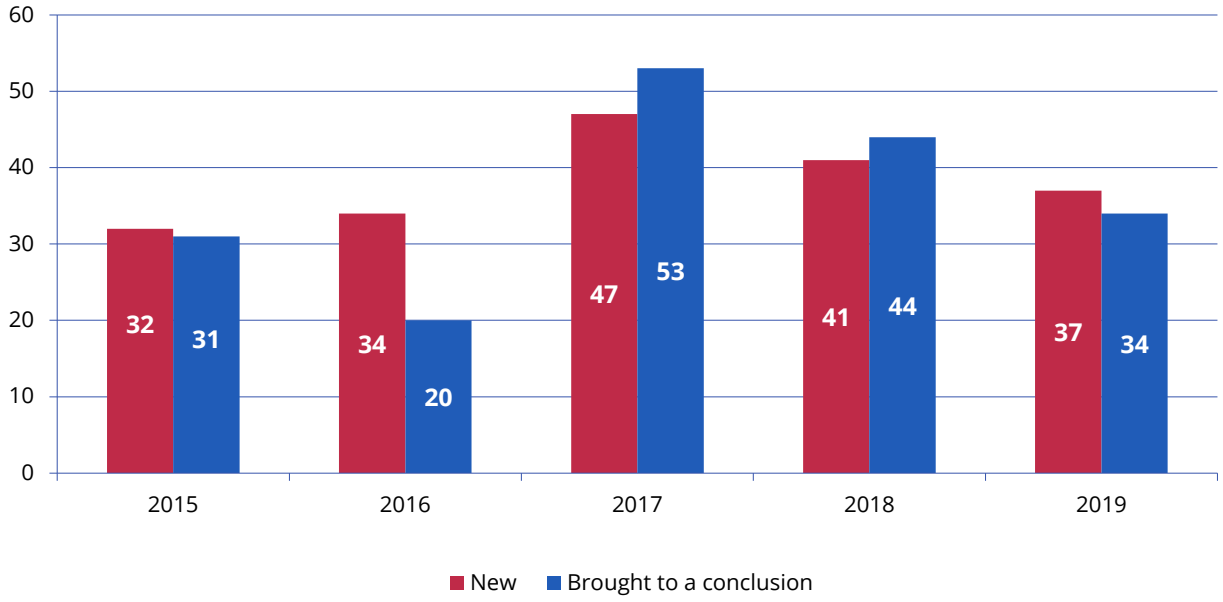
	2015	2016	2017	2018	2019
Access to documents	59	65	76	30	30
Agriculture	56	42	43	43	22
Approximation of laws	1	1	4	6	4
Arbitration clause	30	23	27	27	22
Area of freedom, security and justice		7	2	1	2
Commercial policy	40	36	35	40	41
Common fisheries policy	2	1	1	2	2
Common foreign and security policy		1	1		1
Company law	1	1	1	1	
Competition	82	64	84	68	64
Consumer protection	2	2	1	1	1
Culture	1	1			
Customs union and Common Customs Tariff	5	5	1		2
Economic and monetary policy	3	24	116	127	138
Economic, social and territorial cohesion	14	15	6	2	3
Education, vocational training, youth and sport	3	3	3	1	2
Energy	3	4	9	4	9
Environment	5	7	12	8	12
External action by the European Union	2	4	2	2	5
Financial provisions (budget, financial framework, own resources, combating fraud)	7	10	10	9	10
Free movement of capital				1	
Freedom of establishment				1	
Freedom of movement for persons		1			1
Intellectual and industrial property	400	448	370	322	274
Law governing the institutions	79	85	96	103	180
Public health	4	7	9	13	11
Public procurement	35	24	27	22	15
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	10	8	14	14	10
Research and technological development and space	17	19	9	3	3
Restrictive measures (external action)	103	61	62	60	72
Social policy	1	1	1	1	1
State aid	215	241	256	219	278
Taxation		2		2	
Trans-European networks	2		2	2	1
Transport					1
Total EC Treaty/TFEU	**1 182**	**1 213**	**1 280**	**1 135**	**1 217**
Staff Regulations	39	208	187	162	141
Special forms of procedure	46	65	41	36	40
OVERALL TOTAL	**1 267**	**1 486**	**1 508**	**1 333**	**1 398**

XIII. Cases pending as at 31 December — Bench hearing action (2015-2019)



	2015	2016	2017	2018	2019
Grand Chamber				1	
Appeal Chamber	48	51	11	1	
President of the General Court	12	12	1	1	9
Chambers (five judges)	6	23	100	77	88
Chambers (three judges)	1 099	1 253	1 323	1 187	1 218
Single judge	1			2	
Not assigned	101	147	73	64	83
Total	**1 267**	**1 486**	**1 508**	**1 333**	**1 398**

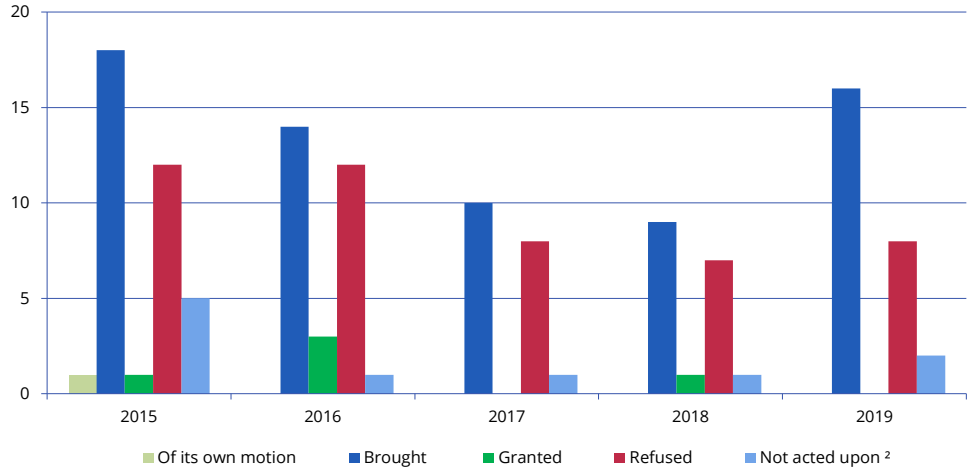
XIV. Miscellaneous — Proceedings for interim measures (2015-2019)



2019

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Granted	Removal from the register/no need to adjudicate	Dismissed
Agriculture	4	8		1	7
Area of freedom, security and justice	1	1			1
Competition	2	1			1
Customs union and Common Customs Tariff	1				
Economic and monetary policy	1	1			1
Environment	1	1			1
Financial provisions (budget, financial framework, own resources, combating fraud)		1			1
Freedom of movement for persons	1				
Law governing the institutions	6	4		1	3
Public health	3	4			4
Public procurement	6	3			3
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	1			1
Staff Regulations	5	6			6
State aid	4	3		1	2
Total	**37**	**34**		**3**	**31**

XV. Miscellaneous — Expedited procedures (2015-2019) [1]

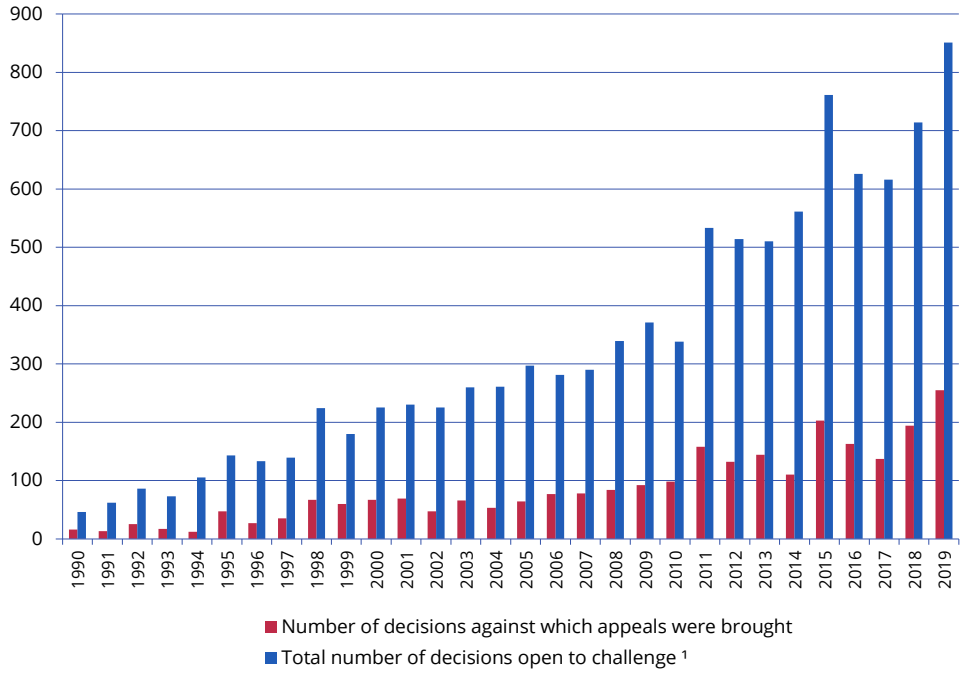


	2015					2016					2017					2018					2019				
			Outcome					Outcome					Outcome					Outcome					Outcome		
	Of its own motion	**Brought**	Granted	Refused	Not acted upon [2]	**Of its own motion**	**Brought**	Granted	Refused	Not acted upon [2]	**Of its own motion**	**Brought**	Granted	Refused	Not acted upon [2]	**Of its own motion**	**Brought**	Granted	Refused	Not acted upon [2]	**Of its own motion**	**Brought**	Granted	Refused	Not acted upon [2]
Access to documents		2		2			2		2			2		1					1			2		2	
Agriculture		1		1													1		1						
Area of freedom, security and justice							3	3									1			1					
Commercial policy							1		1													1		1	
Competition							1		1			1		1			3	1	2			2		1	
Consumer protection																	1								1
Economic and monetary policy		1		1													1		1						
Environment			1																						
External action by the European Union		1		1																					
Financial provisions (budget, financial framework, own resources, combating fraud)																						1			
Free movement of capital		2			2																				
Free movement of goods							1			1															
Intellectual and industrial property																						5			
Law governing the institutions		2			2		2		2			5		4	1							2		1	1
Public health							1		1																
Public procurement	1	1			1		1		1			1		1											
Restrictive measures (external action)		4		4			1		1													1		1	
Staff Regulations		1		1			1		1			1		1			2		2						
State aid		3		2					2													2		2	
Total	**1**	**18**	**1**	**12**	**5**		**14**	**3**	**12**	**1**		**10**		**8**	**1**		**9**	**1**	**7**	**1**		**16**		**8**	**2**

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 (1990-2019)



	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%
2018	194	714	27%
2019	255	851	30%

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.

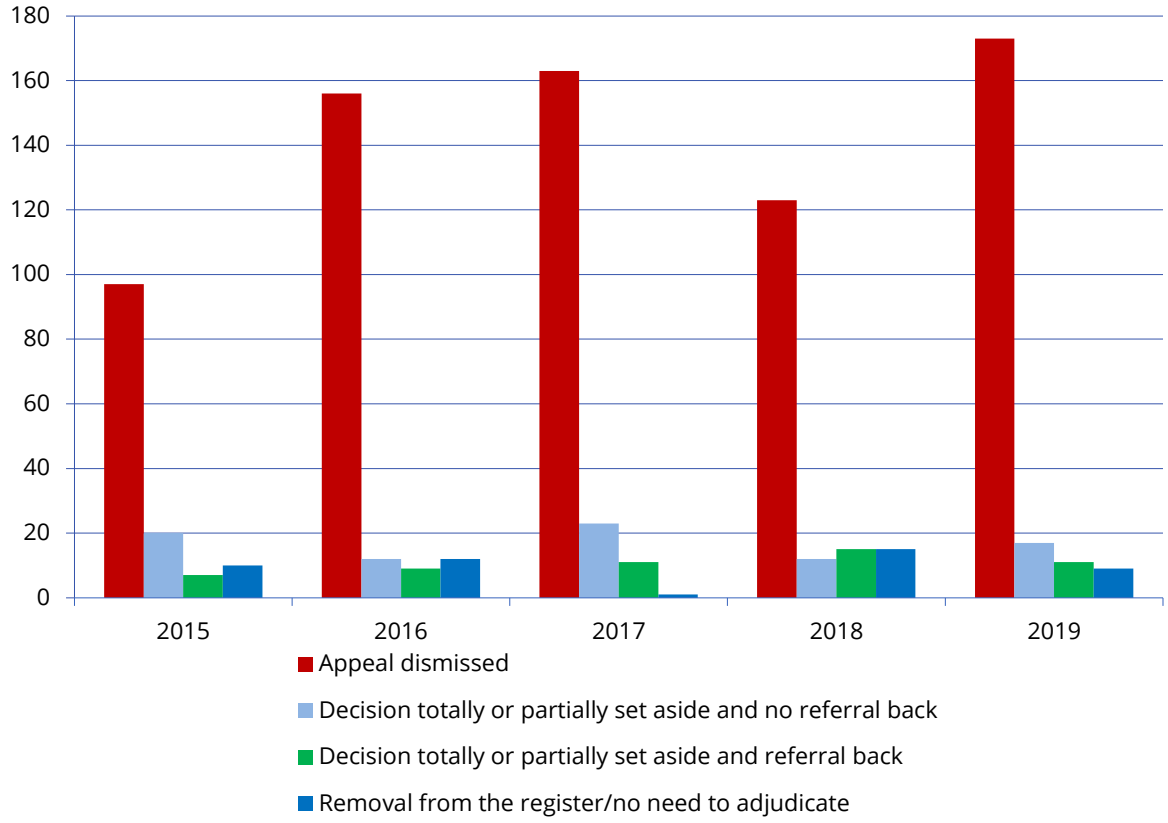
XVII. Miscellaneous — Distribution of appeals before the Court of Justice according to the nature of the proceedings (2015-2019)

	2015			2016			2017			2018			2019		
	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**
State aid	22	75	**29%**	23	56	**41%**	8	25	**32%**	20	55	**36%**	38	86	**44%**
Competition	32	61	**52%**	17	41	**41%**	5	17	**29%**	21	35	**60%**	28	40	**70%**
Staff cases							8	37	**22%**	15	79	**19%**	32	110	**29%**
Intellectual property	64	333	**19%**	48	276	**17%**	52	298	**17%**	68	295	**23%**	57	315	**18%**
Other direct actions	85	290	**29%**	75	253	**30%**	61	236	**26%**	69	249	**28%**	97	297	**33%**
Appeals		2													
Special forms of procedure							3	3	**100%**	1	1	**100%**	3	3	**100%**
Total	203	761	**27%**	163	626	**26%**	137	616	**22%**	194	714	**27%**	255	851	**30%**

XVIII. Miscellaneous — Results of appeals before the Court of Justice (2019) (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	4	1		1	**6**
Agriculture	6	2	1		**9**
Approximation of laws	1				**1**
Arbitration clause	2				**2**
Commercial policy	5	2	1		**8**
Common foreign and security policy	3	2	2		**7**
Competition	14	1			**15**
Consumer protection	1				**1**
Economic and monetary policy	3		3		**6**
Energy	3				**3**
Environment	3				**3**
External action by the European Union		1			**1**
Financial provisions (budget, financial framework, own resources, combating fraud)			1		**1**
Freedom of movement for persons	1				**1**
Intellectual and industrial property	75	2		4	**81**
Law governing the institutions	24	1	2		**27**
Procedure	1				**1**
Public health	1	1			**2**
Public procurement	1				**1**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	1				**1**
Research and technological development and space		1			**1**
Social policy	1				**1**
Staff Regulations	15	2		2	**19**
State aid	8	1	1	2	**12**
Total	**173**	**17**	**11**	**9**	**210**

XIX. Miscellaneous — Results of appeals before the Court of Justice (2015-2019) (Judgments and Orders)



	2015	2016	2017	2018	2019
Appeal dismissed	97	156	163	123	173
Decision totally or partially set aside and no referral back	20	12	23	12	17
Decision totally or partially set aside and referral back	7	9	11	15	11
Removal from the register/no need to adjudicate	10	12	1	15	9
Total	**134**	**189**	**198**	**165**	**210**

XX. Miscellaneous — General trend (1989-2019)

	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
2018	834	1 009	1 333
2019	939	874	1 398
Total	**16 147**	**14 749**	

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 (2015-2019)

Type of act	2015	2016	2017	2018	2019
Procedural documents entered in the register of the Registry [1]	46 432	49 772	55 069	55 389	54 723
Applications initiating proceedings [2]	831	835	917	834	939
Staff cases transferred to the General Court [3]	–	139	–	–	–
Rate of regularisation of the applications initiating proceedings [4]	42.5%	38.2%	41.2%	35.85%	35.04%
Written pleadings (other than applications)	4 484	3 879	4 449	4 562	4 446
Applications to intervene	194	160	565	318	288
Requests for confidential treatment (of data contained in procedural documents) [5]	144	163	212	197	251
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	285	299
Chamber conferences (with services of the Registry)	303	321	405	381	334
Minutes of hearings and records of delivery of judgment	873	637	812	924	787

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.

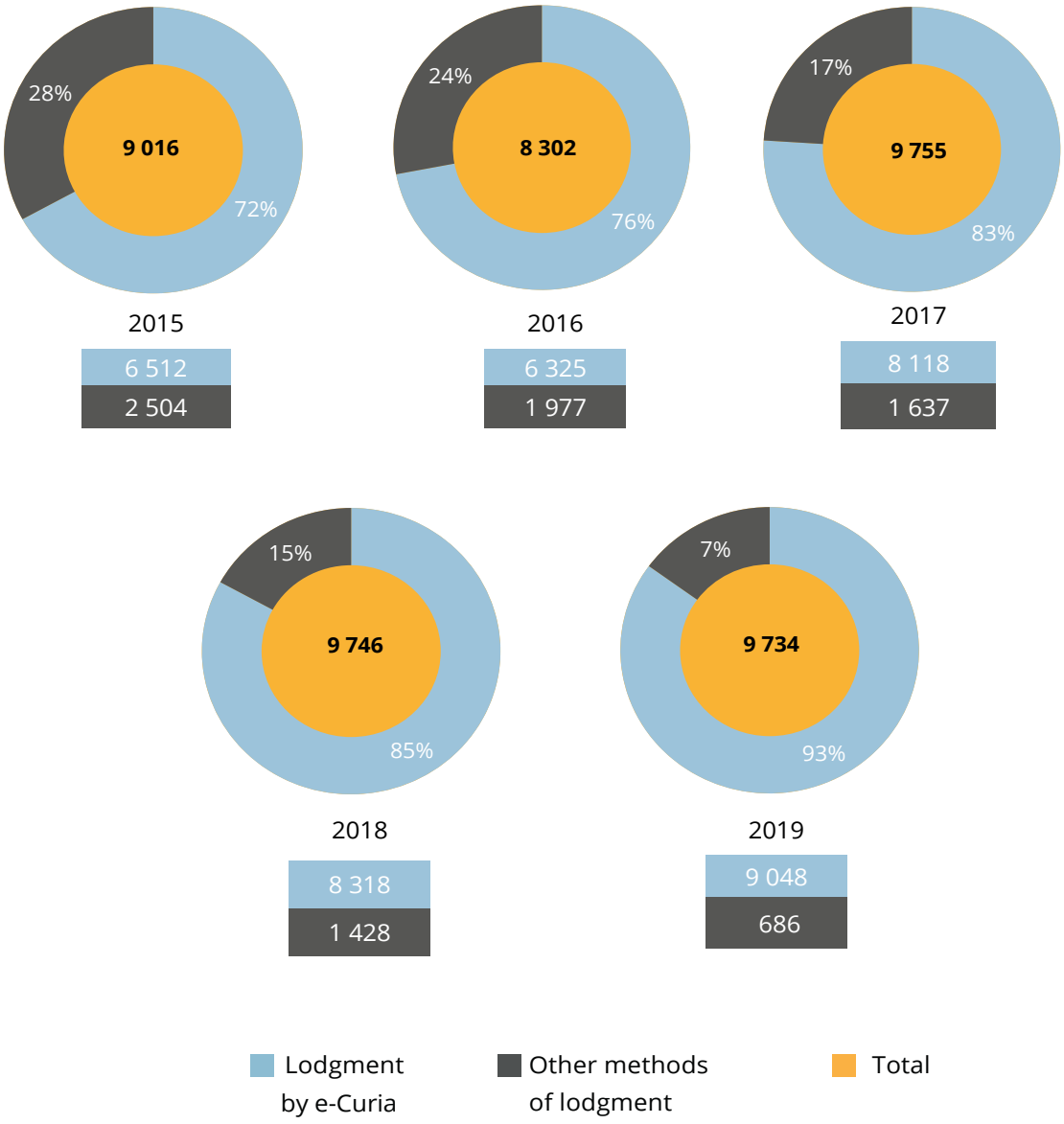
3| On 1 September 2016.

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.

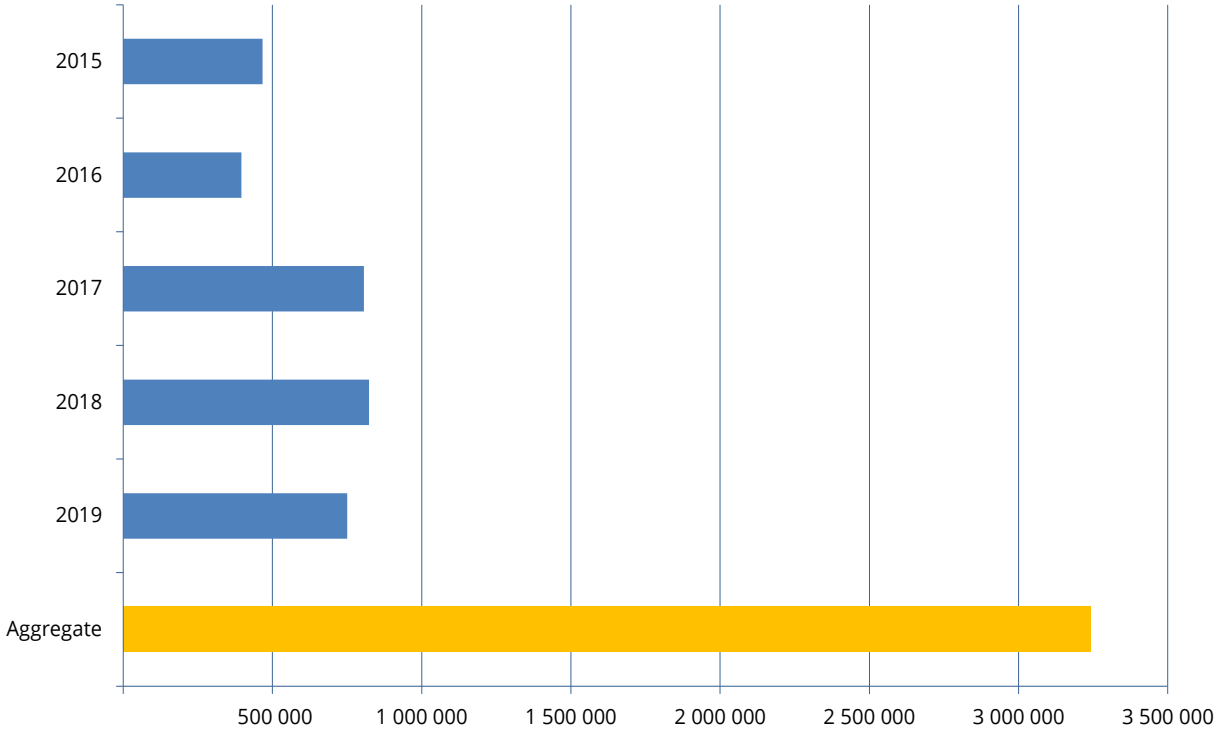
6| Since the entry into force, on 1 July 2015, of the new Rules of Procedure of the General Court, certain decisions that were previously taken in the form of orders (stay/resumption, joinder of cases, intervention by a Member State or an institution where confidentiality is not raised) have been taken in the form of a simple decision added to the case file.

XXII. Methods of lodging procedural documents before the General Court [1]



1| Since 1 December 2018, e-Curia has become the mandatory means of exchanging documents with the representatives of the parties in all proceedings before the General Court (without prejudice to the exceptions under the rules).

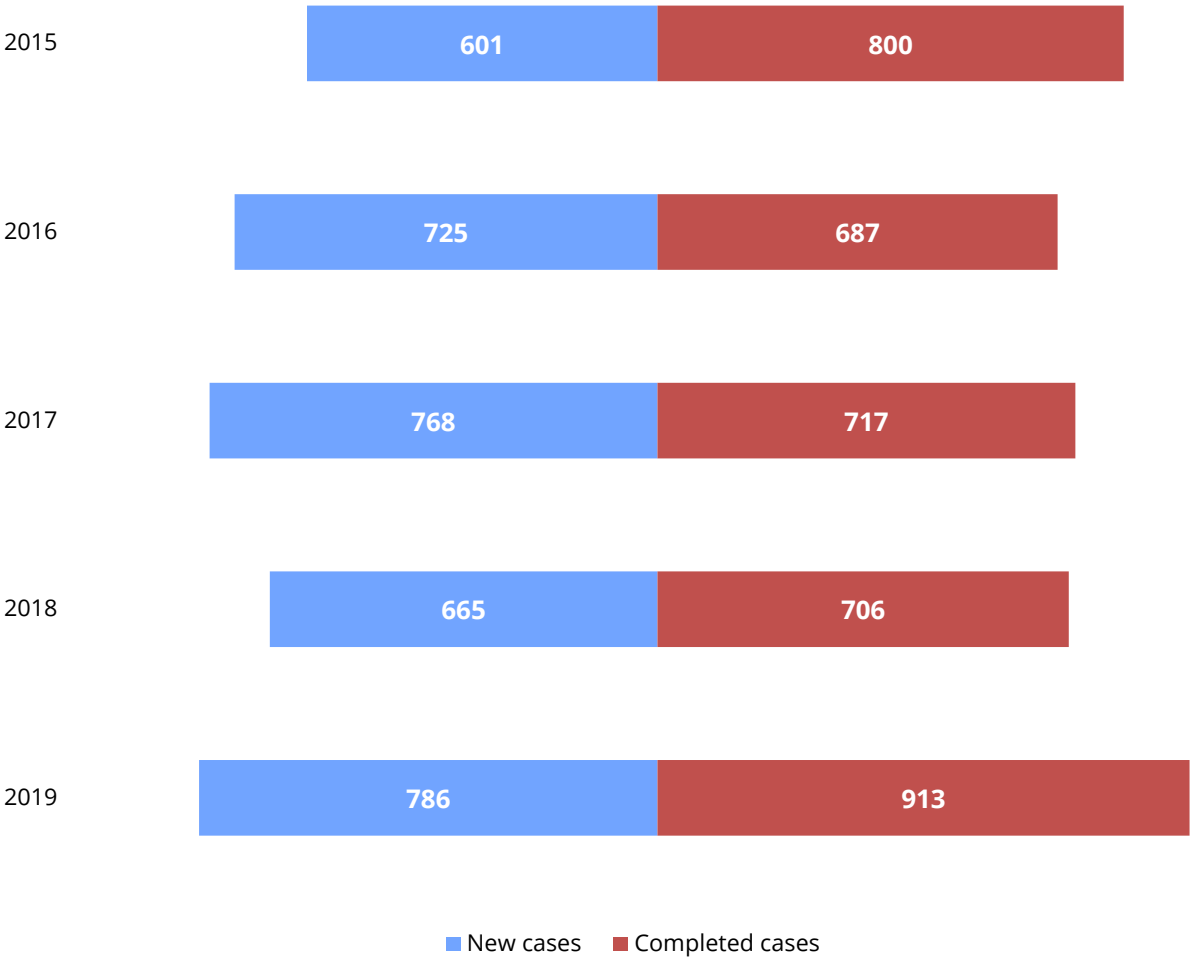
XXIII. Pages lodged by e-Curia (2015-2019) [1]



	2015	2016	2017	2018	2019	Aggregate
Pages lodged by e-Curia	466 875	396 072	805 768	823 076	749 895	**3 241 686**

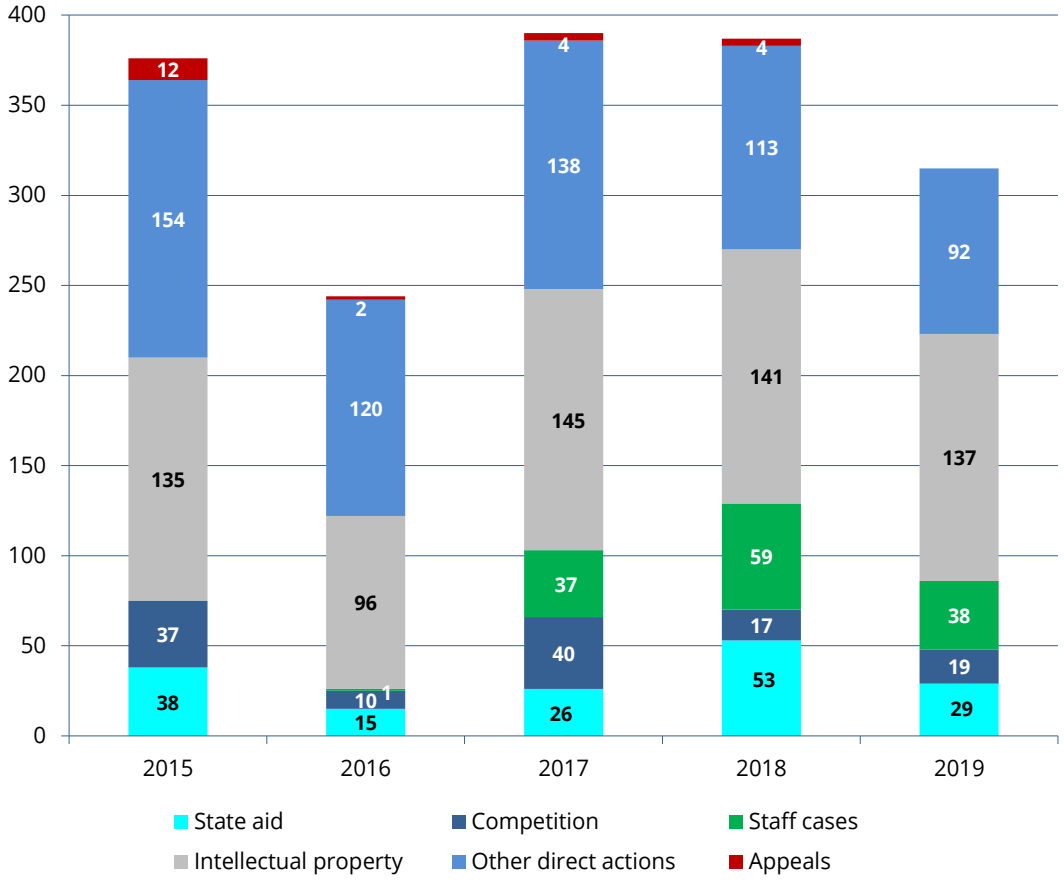
1| For the years 2015 to 2016, the data do not include the number of pages of the applications initiating proceedings.

XXIV. Notices in the *Official Journal of the European Union* (2015-2019) [1]



1| In accordance with the Rules of Procedure (Articles 79 and 122), notices concerning new applications and decisions which close the proceedings must be published in the *Official Journal of the European Union*.

XXV. Cases pleaded (2015-2019)



	2015	2016	2017	2018	2019
Total	376	244	390	387	315

E Composition of the General Court

(Order of precedence as at 31 December 2019)

First row, from left to right:

A. Kornezov, President of Chamber; J. Svenningsen, President of Chamber; A. Marcoulli, President of Chamber; S. Gervasoni, President of Chamber; V. Tomljenović, President of Chamber; S. Papasavvas, Vice-President of the Court; M. van der Woude, President of the Court; H. Kanninen, President of Chamber; A.M. Collins, President of Chamber; D. Spielmann, President of Chamber; R. da Silva Passos, President of Chamber; M.J. Costeira, President of Chamber; M. Jaeger, Judge

Second row, from left to right:

C. Iliopoulos, Judge; L. Madise, Judge; E. Buttigieg, Judge; D. Gratsias, Judge; S. Frimodt Nielsen, Judge; I. Labucka, Judge; J. Schwarcz, Judge; M. Kancheva, Judge; V. Kreuschitz, Judge; I.S. Forrester, Judge

Third row, from left to right:

O. Spineanu-Matei, Judge; B. Berke, Judge; R. Barents, Judge; F. Schalin, Judge; Z. Csehi, Judge; V. Valančius, Judge; N. Półtorak, Judge; I. Reine, Judge; P. Nihoul, Judge; U. Öberg, Judge

Fourth row, from left to right:

J. Martín y Pérez de Nanclares, Judge; J. Laitenberger, Judge; T. Pynnä, Judge; G. De Baere, Judge; K. Kowalik-Bańczyk, Judge; J. Passer, Judge; C. Mac Eochaidh, Judge; R. Frend, Judge; L. Truchot, Judge; R. Mastroianni, Judge

Fifth row, from left to right:

E. Coulon, Registrar; R. Norkus, Judge; I. Nõmm, Judge; M. Stancu, Judge; G. Hesse, Judge; O. Porchia, Judge; M. Sampol Pucurull, Judge; P. Škvařilová-Pelzl, Judge; G. Steinfatt, Judge; T. Perišin, Judge

1. Changes in the Composition of the General Court in 2019

Formal sitting on 20 March 2019

By decision of 6 March 2019, and following the appointment of Peter George Xuereb as Judge at the Court of Justice, the representatives of the governments of the Member States of the European Union appointed Ramona Frendo as Judge at the General Court for the remainder of Peter George Xuereb's term of office, that is to say, from 12 March 2019 to 31 August 2019.

A formal sitting took place at the Court of Justice on 20 March 2019 on the occasion of the taking of the oath and entry into office of the new judge of the General Court.

Formal sitting on 26 September 2019

In the context of the partial renewal of the membership of the General Court, by decision of 1 February 2019 the representatives of the governments of the Member States of the European Union appointed Stéphane Gervasoni, Mariyana Kancheva, Alexander Kornezov, Ulf Öberg, Inga Reine and Fredrik Schalin as Judges at the General Court for the period from 1 September 2019 to 31 August 2025.

In the context of the partial renewal of the membership of the General Court, by decision of 29 May 2019 the representatives of the governments of the Member States of the European Union appointed Eugène Buttigieg, Anthony Collins, Ramona Frendo, Colm Mac Eochaidh, Jan Passer and Vesna Tomljenović as Judges at the General Court for the period from 1 September 2019 to 31 August 2025.

- In the context of implementing the third stage of the reform of the judicial structure of the institution, which provides, inter alia, for an increase in the number of judges of the General Court, [1] the representatives of the governments of the Member States of the European Union appointed 14 new judges at the General Court.
- By decision of 1 February 2019, Laurent Truchot was appointed as Judge at the General Court for the period from 1 September 2019 to 31 August 2025 and Mirela Stancu was appointed as Judge at the General Court for the period from 1 September 2019 to 31 August 2022.
- By decision of 6 March 2019, Tuula Pynnä was appointed as Judge at the General Court for the period from 1 September 2019 to 31 August 2022.
- By decision of 29 May 2019, Johannes Laitenberger, José Martín y Pérez de Nanclares, Rimvydas Norkus, Tamara Perišin, Miguel Sampol Pucurull, Petra Škvařilová-Pelzl and Gabriele Steinfatt were appointed as Judges at the General Court for the period from 1 September 2019 to 31 August 2025 and Iko Nõmm was appointed as Judge at the General Court for the period from 1 September 2019 to 31 August 2022.
- By decision of 10 July 2019, Roberto Mastroianni and Ornella Porchia were appointed as Judges at the General Court for the period from 1 September 2019 to 31 August 2025.

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).

- By decision of 4 September 2019, Gerhard Hesse was appointed as Judge at the General Court for the period from 6 September 2019 to 31 August 2022.

A formal sitting took place at the Court of Justice on 26 September 2019 on the occasion of the partial renewal of the membership of the General Court and of the taking of the oath and entry into office of the 14 new judges of the General Court.

By decision of 27 September 2019, the General Court elected Marc van der Woude as President of the General Court for the period from 27 September 2019 to 31 August 2022 and Savvas Papasavvas as Vice-President of the General Court for the period from 27 September 2019 to 31 August 2022.

2. Order of Precedence

As at 31 December 2019

M. van der WOUDE, President of the General Court
S. PAPASAVVAS, Vice-President of the General Court
H. KANNINEN, President of Chamber
V. TOMLJENOVIĆ, President of Chamber
A.M. COLLINS, President of Chamber
S. GERVASONI, President of Chamber
D. SPIELMANN, President of Chamber
A. MARCOULLI, President of Chamber
R. da SILVA PASSOS, President of Chamber
J. SVENNINGSEN, President of Chamber
M.J. COSTEIRA, President of Chamber
A. KORNEZOV, President of Chamber
M. JAEGER, Judge
I. LABUCKA, Judge
S. FRIMODT NIELSEN, Judge
J. SCHWARCZ, Judge
D. GRATSIAS, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
V. KREUSCHITZ, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge
C. ILIOPOULOS, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
F. SCHALIN, Judge
I. REINE, Judge
R. BARENTS, Judge
P. NIHOUL, Judge
B. BERKE, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
J. PASSER, Judge
K. KOWALIK-BAŃCZYK, Judge
C. MAC EOCHAIDH, Judge
G. DE BAERE, Judge
R. FRENDO, Judge
T. PYNNÄ, Judge
L. TRUCHOT, Judge
J. LAITENBERGER, Judge
R. MASTROIANNI, Judge
J. MARTÍN Y PÉREZ DE NANCLARES, Judge
O. PORCHIA, Judge

G. HESSE, Judge
M. SAMPOL PUCURULL, Judge
M. STANCU, Judge
P. ŠKVAŘILOVÁ-PELZL, Judge
I. NÕMM, Judge
G. STEINFATT, Judge
R. NORKUS, Judge
T. PERIŠIN, 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)
Michail 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) (†)
Irena PELIKÁNOVÁ (2004-2019)
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)
Miro PREK (2006-2019)
Teodor TCHIPEV (2007-2010)
Valeriu M. CIUCĂ (2007-2010)
Santiago SOLDEVILA FRAGOSO (2007-2013)

Laurent TRUCHOT (2007-2013)
Alfred DITTRICH (2007-2019)
Kevin O'HIGGINS (2008-2013)
Andrei POPESCU (2010-2016)
Guido BERARDIS (2012-2019)
Carl WETTER (2013-2016)
Egidijus BIELŪNAS (2013-2019)
Ignacio ULLOA RUBIO (2013-2019)
Ezio PERILLO (2016-2019)
Peter George XUEREB (2016-2018)
Leopoldo CALVO-SOTELO IBÁÑEZ-MARTÍN (2016-2019)

Presidents

José Luis da CRUZ VILAÇA (1989-1995)
Antonio SAGGIO (1995-1998) (†)
Bo VESTERDORF (1998-2007
Marc JAEGER (2007-2019)

Registrar

Hans JUNG (1989-2005) (†)

COURT OF JUSTICE
OF THE EUROPEAN UNION

Directorate for Communication
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