COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
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I. VALUES OF THE UNION AND FUNDAMENTAL RIGHTS

Judgment of the Court (Grand Chamber) of 20 April 2021, Repubblika, C-896/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 2 TEU – Values of the European Union – Rule of law – Article 49 TEU – Accession to the European Union – No reduction in the level of protection of the values of the European Union – Effective judicial protection – Article 19 TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Scope – Independence of the members of the judiciary of a Member State – Appointments procedure – Power of the Prime Minister – Involvement of a judicial appointments committee

Repubblika is an association whose purpose is to promote the protection of justice and the rule of law in Malta. Following the appointment, in April 2019, of new members of the judiciary, that association brought an *actio popularis* before the Prim'Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta), with a view, in particular, to challenging the procedure for the appointment of members of the Maltese judiciary, as governed by the Constitution. [1] The constitutional provisions concerned, which had remained unchanged from the time of their adoption in 1964 until a reform in 2016, confer on Il-Prim Ministru (Prime Minister, Malta) the power to submit to the President of the Republic the appointment of a candidate to such office. In practice, the Prime Minister thus has a decisive power in the appointment of members of the Maltese judiciary, which, according to Repubblika, raises doubts as to the independence of those judges and magistrates. Nevertheless, the candidates must satisfy certain conditions, also laid down by the Constitution, and, since the 2016 reform, a Judicial Appointments Committee has been established, which is charged with assessing candidates and providing an opinion to the Prime Minister.

In that context, the referring court decided to refer questions to the Court of Justice on the conformity of the Maltese system for appointing members of the judiciary with EU law and, more specifically, with the second subparagraph of Article 19(1) TEU and with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The second subparagraph of Article 19(1) TEU, it should be noted, requires the Member States to provide sufficient remedies in order to ensure effective judicial protection in the fields covered by EU law, while Article 47 of the Charter sets out the right to an effective remedy for any litigant relying, in a given case, on a right that he or she derives from EU law.

The Court, sitting as the Grand Chamber, holds that EU law does not preclude national constitutional provisions such as the provisions of Maltese law relating to the appointment of members of the judiciary. It does not appear that those provisions might lead to those members of the judiciary not being seen to be independent or impartial, the consequence of which would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

Findings of the Court

First, the Court states that the second subparagraph of Article 19(1) TEU is intended to apply in the present case, since the action seeks to challenge the conformity with EU law of national-law provisions governing the procedure for the appointment of members of the judiciary called upon to rule on questions relating to the application or interpretation of EU law, and which it is alleged are liable to affect their independence. In so far as Article 47 of the Charter is concerned, the Court states

1 Articles 96, 96A and 100 of the Maltese Constitution.

that, although it is not applicable as such [2] inasmuch as Repubblika does not rely on a subjective right that it derives from EU law, it must nonetheless be taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU.

Second, the Court holds that the second subparagraph of Article 19(1) TEU does not preclude national provisions which confer on a Prime Minister a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body tasked, in particular, with assessing candidates for judicial office and providing an opinion to that Prime Minister.

In order to reach that conclusion, the Court first points out, generally, that, amongst the requirements of effective judicial protection which must be satisfied by national courts which are liable to rule on the application or interpretation of EU law, the independence of the judiciary is of fundamental importance, in particular for the EU legal order, in a number of respects. It is essential to the proper working of the preliminary-ruling procedure, laid down in Article 267 TFEU, which may be activated only by an independent court or tribunal. Furthermore, it forms part of the essence of the fundamental right to effective judicial protection and to a fair trial provided for in Article 47 of the Charter.

Next, the Court recalls its recent case-law, [3] in which it clarified the guarantees of judicial independence and impartiality, required under EU law. Those guarantees presuppose, inter alia, the existence of rules that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of members of the judiciary to external factors, in particular to direct or indirect influence from the legislature or the executive, and as to their neutrality with respect to the interests before them.

Lastly, the Court points out that, under Article 49 TEU, the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, such as the rule of law, which respect those values and undertake to promote them. A Member State cannot therefore amend its legislation, particularly in regard to the organisation of justice, in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. Against that backdrop, the Member States are required to refrain from adopting rules which would undermine the independence of the judiciary.

Having clarified those points, the Court holds, first, that the creation, in 2016, of the Judicial Appointments Committee serves, on the contrary, to reinforce the guarantee of judicial independence in Malta in comparison with the situation arising from the constitutional provisions which were in force when Malta acceded to the European Union. In that connection, the Court states that, in principle, the involvement of such a body may be such as to contribute to rendering more objective the process for appointing members of the judiciary, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard, provided that that body is sufficiently independent. In the present case, the Court finds that there is a series of rules which appear to be such as to guarantee that independence.

Second, the Court points out that, although the Prime Minister has a certain power in the appointment of members of the judiciary, the exercise of that power is circumscribed by the requirements of professional experience, laid down in the Constitution, which must be satisfied by candidates for judicial office. Moreover, although the Prime Minister may decide to submit to the President of the Republic the appointment of a candidate not put forward by the Judicial Appointments Committee, the Prime Minister is then required to communicate his or her reasons to,

2 In accordance with Article 51(1) of the Charter.

3 See judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18.

in particular, the legislature. According to the Court, provided that the Prime Minister exercises that power only in exceptional circumstances and adheres to strict and effective compliance with the obligation to state reasons, that power is not such as to give rise to legitimate doubts concerning the independence of the candidates selected.

II. EQUAL TREATMENT AND THE RIGHT TO EFFECTIVE JUDICIAL PROTECTION

Judgment of the Court (Grand Chamber) of 15 April 2021, Braathens Regional Aviation, C-30/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Equal treatment between persons irrespective of racial or ethnic origin – Directive 2000/43/EC – Article 7 – Protection of rights – Article 15 – Sanctions – Action for compensation based on an allegation of discrimination – Defendant acquiescing to a claim for compensation without recognition on its part of the discrimination alleged – Connection between the compensation paid and the discrimination alleged – Article 47 of the Charter of Fundamental Rights of the European Union – Right to effective judicial protection – National procedural rules preventing the court seised from ruling on whether there was discrimination as alleged, despite the express request of the claimant

In 2015, the captain on board an internal Swedish flight operated by the airline Braathens Regional Aviation AB ('Braathens') decided to subject a passenger of Chilean origin resident in Stockholm (Sweden) to an additional security check.

Acting on behalf of the passenger, who considered that he had been the subject of discrimination for reasons connected with his physical appearance and ethnicity, the Diskrimineringsombudsmannen (Equality Ombudsman) asked the Stockholms tingsrätt (District Court, Stockholm, Sweden) to order Braathens to pay that passenger compensation for discrimination.

Braathens agreed to pay the sum claimed without however recognising the existence of any discrimination. The first instance court therefore ordered the payment of that sum but declared inadmissible the Equality Ombudsman's claims seeking a declaratory judgment making a finding of the existence of discrimination. That court considered that, under Swedish procedural law, it was bound by Braathens' acquiescence and was thus required to dispose of the litigation without examining whether there had been any discrimination. After having unsuccessfully appealed against the judgment of the first instance court, the Equality Ombudsman brought an appeal before the referring court, the Högsta domstolen (Supreme Court, Sweden).

Having doubts as to whether the Swedish legislation complies with the requirements of Directive 2000/43 [4] implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), which guarantees every person the right to an effective judicial remedy, the Supreme Court decided to refer a question to the Court of Justice as to whether, where a defendant

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

acquiesces to a claimant's claim for compensation, the court seised must nevertheless be able to examine the question of the existence of discrimination upon the request of the party who considers that he or she was subject to it.

Findings of the Court

At the outset, the Court recalls that the purpose of Directive 2000/43 is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. Compliance with that principle requires the effective judicial protection of the right to equal treatment of persons who consider themselves victims of such discrimination, whether those persons act directly or through the intermediary of an association, organisation or other legal entity. In addition, the sanctions put in place in order to transpose that directive into the national legal order of a Member State must ensure real and effective judicial protection of the rights that are derived from it. The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while complying with the general principle of proportionality.

In that regard, the Court holds that Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter, precludes a national law which prevents a court that is seised of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination.

In the first place, it follows from Article 7 of Directive 2000/43 that any person who considers himself or herself to have been the victim of discrimination based on racial or ethnic origin must be able, in the context of proceedings to assert rights derived from the principle of equal treatment, to obtain a ruling from the court on the possible breach of those rights, if the defendant does not recognise the discrimination alleged. Therefore, the payment of the monetary amount alone is not capable of ensuring effective judicial protection for a person who seeks to obtain a ruling of the existence of such a breach.

In the second place, such a national law is contrary to both the compensatory function and the dissuasive function required of the sanctions laid down by the Member States in accordance with Article 15 of Directive 2000/43. The payment of a sum of money is insufficient to meet the claims of a person who seeks primarily to obtain recognition, by way of compensation for the non-material damage suffered, of the fact that he or she has been the victim of discrimination. Similarly, the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination where, as in the present case, the defendant contests the existence of any discrimination but considers it more advantageous, in terms of cost and reputation, to pay the compensation claimed by the claimant. The Court also states that the option of bringing criminal proceedings does not make it possible, due to the specific purposes that such proceedings pursue and the constraints inherent therein, to remedy the failure of civil law remedies to comply with the requirements of that directive.

In the third place, the Court emphasises that that interpretation is not called into question by procedural law principles or considerations, such as the principle that the subject matter of an action is defined by the parties, the principle of procedural economy, and the concern to promote the amicable settlement of disputes. First, a national law such as that at issue in the main proceedings has the effect of transferring the control of the dispute to the defendant, since the claimant may no longer, where the defendant acquiesces to pay the compensation claimed, obtain from the court hearing the case a ruling on the cause on which the claim is based, nor may the claimant prevent the termination of the case brought on his or her initiative. Second, a national court would not in any way infringe the principle that the subject matter of an action is defined by the parties if, despite the defendant's acquiescence to pay the compensation claimed by the claimant, it examined the existence or otherwise of the discrimination alleged by the latter, since that examination would consider the cause on which the claimant's claim for compensation is based, which is the subject matter of the dispute.

Finally, in the fourth place, the Court recalls that EU law does not as a general rule require Member States to create before their national courts remedies to ensure the protection of rights that parties derive from EU law other than those established by national law. However, it observes that, in the

present case, compliance with EU law does not require the creation of a new right of action, but merely that the referring court refuse to apply a procedural rule which prevents it from ruling on the existence of the discrimination alleged; and that this is so owing to the incompatibility of that rule not only with Articles 7 and 15 of Directive 2000/43 but also with Article 47 of the Charter. Those articles of the directive merely give specific expression to the right to effective judicial protection, as guaranteed by Article 47 of the Charter, which is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute between private persons.

III. LITIGATION OF THE UNION

1. APPLICATION FOR REVISION

Order of the General Court (Second Chamber) of 10 July 2020, Katjes Fassin v EUIPO - Haribo The Netherlands & Belgium (WONDERLAND), T-616/19 REV

Procedure – Application for revision – EU trade mark – Opposition proceedings – Action against a decision of EUIPO partially refusing to register a mark – Withdrawal of the opposition before service of the order dismissing the action – Fact unknown to the applicant and to the General Court – Time limit for the application – Interest in initiating the revision procedure – Admissibility

On 18 January 2017, the applicant for revision, Katjes Fassin GmbH & Co. KG, sought to register the word mark WONDERLAND with the European Union Intellectual Property Office (EUIPO). Haribo The Netherlands & Belgium BV filed a notice of opposition on the basis of its earlier Benelux word mark WONDERMIX. By decision of 8 July 2019, the Fourth Board of Appeal of EUIPO partially annulled the decision of the Opposition Division upholding the opposition in its entirety and concluded that there was a likelihood of confusion in respect of part of the goods covered by the application for registration.

The action brought by Katjes Fassin against that decision was dismissed by the Court by order of 10 July 2020. [5] After having become aware that the opponent had withdrawn its opposition to the registration of the mark WONDERLAND before the Court had made its order, Katjes Fassin made an application for revision by which it requested that the Court resume the proceedings in the case at hand and amend its order.

The Court declares the application for revision admissible and decides to continue the proceedings in relation to the substance.

Findings of the Court

As a preliminary point, the Court notes that an application for revision of its decision may be made only on discovery of a fact which is of such a nature as to be a decisive factor and which, when the judgment was delivered or the order served, was unknown to the General Court and to the party claiming revision. [6] Furthermore, it states that revision is an exceptional review procedure that allows

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5 Order of 10 July 2020, *Katjes Fassin* v *EUIPO – Haribo The Netherlands & Belgium (WONDERLAND)* (T-616/19, not published, EU:T:2020:334).

6 Article 169(1) of the Rules of Procedure of the General Court.

the force of *res judicata* attaching to a final judicial decision to be called into question on the basis of the findings of fact relied upon by the court.

Having made those observations, the Court examines, in the first place, whether the application for revision satisfies the conditions governing admissibility. In that regard, it observes that, although the opponent informed EUIPO of the withdrawal of the opposition, EUIPO did not make that information available to the applicant for revision. Consequently, as it had not been informed of the actual withdrawal of the opposition before service of the order of 10 July 2020, the applicant for revision was not in a position to know that fact on the date of service of that order. The Court adds that, when it made that order, it did not have any information on the withdrawal of the opposition, either, as no such information had been communicated to it either by EUIPO or by the opponent.

Furthermore, the Court notes that the withdrawal of the opposition is a fact which is of such a nature as to be of decisive influence. Where the opposition is withdrawn in the course of proceedings before the EU judicature for a ruling on an appeal to EUIPO against the decision on opposition, there is no longer any basis for the proceedings and they become devoid of purpose. It states that, had the withdrawal of the opposition been known to it before the order of 10 July 2020 was made, it cannot be excluded that it would have been led not to adopt that order.

In the second place, the Court rules on the applicant for revision's interest in initiating the revision procedure. It notes that, in the case at hand, the existence of that interest cannot be ruled out despite the fact that the action for annulment became devoid of purpose following the withdrawal of the opposition. After having noted the specific purpose of revision, namely to call into question the force of *res judicata* of a judicial decision, the Court finds that calling into question the force of *res judicata* of the order of 10 July 2020, which contains factual and legal considerations unfavourable to the applicant for revision, procures for the latter an advantage justifying its interest in initiating the revision procedure. In addition, it observes that the revision of that order could also procure for the applicant for revision an advantage as regards the allocation of the costs that it had been ordered to pay.

Consequently, the Court concludes that the admissibility criteria for the application for revision are fulfilled and that Katjes Fassin has an interest in seeking revision of the order of 10 July 2020.

IV. FREEDOM OF MOVEMENT – FREEDOM OF ESTABLISHMENT

Judgment of the Court (Third Chamber) of 29 April 2021, Banco de Portugal and Others, C-504/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Banking supervision – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Reorganisation measure adopted by an administrative authority in the home Member State of a credit institution – Transfer of rights, assets or liabilities to a 'bridge institution' – Transfer back to the credit institution subject to the reorganisation measure – Article 3(2) – *Lex concursus* – Effect of a reorganisation measure in other Member States – Mutual recognition – Article 32 – Effects of a reorganisation measure on a pending lawsuit – Exception to the application of the *lex concursus* – Article 47, first paragraph of the Charter of Fundamental Rights of the European Union – Effective judicial protection – Principle of legal certainty

In 2008, VR, a natural person, concluded a contract with Banco Espírito Santo, Sucursal en España ('BES Spain'), the Spanish branch of the Portuguese bank Banco Espírito Santo ('BES'), by which she purchased preferential shares in an Icelandic credit institution. In view of the serious financial

difficulties faced by BES, by a decision adopted in August 2014, Banco de Portugal decided to create a 'bridge bank', called Novo Banco SA, to which the assets, liabilities and other off-balance sheet items of BES were transferred. However, certain liabilities were excluded from the transfer to Novo Banco. Following that transfer, Novo Banco SA, Sucursal en España ('Novo Banco Spain') maintained the commercial relationship which VR had established with BES Spain.

On 4 February 2015, VR brought an action before the Juzgado de Primera Instancia de Vitoria (Court of First Instance, Vitoria, Spain) against Novo Banco Spain seeking, primarily, a declaration that the contract was null and void or, in the alternative, its termination. Novo Banco Spain claimed that it could not be sued because, pursuant to the decision of August 2014, the alleged liability was a liability that had not been transferred to it.

As the Court of First Instance Vitoria upheld VR's application, Novo Banco Spain brought an appeal before the Audiencia Provincial de Álava (Provincial Court, Álava, Spain). In the course of the proceedings, it lodged two decisions adopted by Banco de Portugal on 29 December 2015. Those decisions modified the August 2014 decision, stating inter alia that 'as of today, the following liabilities of BES have not been transferred to Novo Banco: … any liability subject to one of the procedures described in Annex I', which included the action brought by VR. In addition, they provided that, to the extent that assets, liabilities or off-balance sheet items should have remained part of BES' assets and liabilities but had, in fact, been transferred to Novo Banco, they were transferred back from Novo Banco to BES, with effect from 3 August 2014.

As the Provincial Court of Álava dismissed Novo Banco Spain's appeal, Novo Banco Spain brought an action before the referring court, the Tribunal Supremo (Supreme Court, Spain). Novo Banco Spain takes the view that, under Directive 2001/24 on the reorganisation and winding up of credit institutions,[7] the decisions of 29 December 2015 are effective in all Member States without any further formalities. The Supreme Court, taking the view that those decisions modified the decision of August 2014 with retroactive effect, referred the matter to the Court of Justice in order to ascertain whether such substantive changes should be recognised in the ongoing judicial proceedings.

Findings of the Court

The Court observes that, under Article 3(2) of Directive 2001/24, reorganisation measures are, in principle, applied in accordance with the law of the home Member State and are to take effect in accordance with the legislation of that State throughout the European Union without further formalities. However, as an exception to that principle, Article 32 of Directive 2001/24 provides that effects of reorganisation measures on a pending lawsuit concerning an asset or a right of which the credit institution has been divested are governed solely by the law of the Member State in which the lawsuit is pending.

In the first place, the Court points out that the application of Article 32 requires three cumulative conditions to be fulfilled, all of which are satisfied in the dispute in the main proceedings. First, there must be reorganisation measures within the meaning of Article 2 of Directive 2001/24, which is applicable in the present case, since the decisions of 29 December 2015 are intended to preserve or restore the financial situation of a credit institution.

Secondly, there must be a pending lawsuit, a concept which covers only proceedings on the substance of the case. In the present case, first, the main proceedings must be regarded as substantive proceedings and, second, the decisions of 29 December 2015 were adopted at a time when the proceedings initiated by VR on 4 February 2015 were already pending.

Thirdly, the pending lawsuit must concern 'an asset or a right of which the credit institution has been divested'. In view of the disparities between the language versions of Article 32 of Directive 2001/24,

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7 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ 2001 L 125, p. 15).

the Court examines the purpose of that provision and holds that it is intended to make the effects of reorganisation measures or winding-up proceedings on pending proceedings subject to the law of the Member State in which those proceedings are pending. In the light of such a purpose, it would not be logical to exclude the effects produced by reorganisation measures on a pending lawsuit from the application of that law, where that action concerns potential liabilities, which, by means of such reorganisation measures have been transferred to another entity. Thus, Article 32 must apply to one or more of the credit institution's assets and liabilities which are subject to reorganisation measures, as is the case with the potential liability at issue in the main proceedings.

In the second place, as regards the extent of the effects of the reorganisation measures governed by the law of the Member State in which the lawsuit is pending, the Court observes that the law of that Member State governs all the effects which such measures may have on such proceedings, whether procedural or on the merits.

Therefore, it follows from Article 3(2) and Article 32 of Directive 2001/24 that the effects, both procedural and substantive, of a reorganisation measure on a pending lawsuit on the merits are limited to those determined by the law of the Member State in which that lawsuit is pending.

Furthermore, the Court points out, first, that the recognition, in the main proceedings, of the effects of the decisions of 29 December 2015, in so far as it is capable of calling into question the judicial decisions already taken in favour of VR, would be incompatible with the general principle of legal certainty. Secondly, to recognise reorganisation measures taken by the competent authority of the home Member State after an action has been brought in another Member State which have the effect of modifying the relevant legal framework for the resolution of the dispute which gave rise to that action with retroactive effect, and which could lead the court before which the action has been brought to dismiss it, would constitute a limitation on the right to an effective remedy, within the meaning of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

The Court concludes that Article 3(2) and Article 32 of Directive 2001/24, read in the light of the principle of legal certainty and the first paragraph of Article 47 of the Charter of Fundamental Rights, preclude recognition, without any further conditions, in ongoing legal proceedings on the merits of the effects of a reorganisation measure, such as the decisions of 29 December 2015, where such recognition has the result that the credit institution to which the liabilities had been transferred by the first reorganisation measure can no longer be sued for the purposes of those proceedings, thereby calling in to question the judgments already delivered in favour of the applicant who is the subject of those proceedings.

V. JUDICIAL COOPERATION IN CRIMINAL MATTERS

Judgment of the Court (Fourth Chamber) of 15 April 2021, AV (Jugement global), C-221/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2008/909/JHA – Article 8(2) to (4) – Article 17(1) and (2) – Article 19 – Taking into account, for the purposes of an aggregate sentence, of a conviction delivered in another Member State, which must be enforced in the Member State in which that judgment is delivered – Conditions – Framework Decision 2008/675/JHA – Article 3(3) – Concept of 'interference with a sentence or its execution' which must be taken into account in the course of new criminal proceedings initiated in a Member State other than that in which the ruling was delivered

In 2010 and 2017, the Polish national AV received prison sentences, delivered by the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk, Poland), the referring court and a German court, respectively. The German judgment was recognised for the purpose of its enforcement in Poland by the referring court: under Framework Decision 2008/909, [8] which enables a Member State to recognise judgment delivered in another Member State and to enforce the sentence. While the sentence imposed by the German court is to be served in Poland from 1 September 2016 to 29 November 2021, the sentence imposed by the referring court must be served from 29 November 2021 to 30 March 2030.

In 2018, AV made an application to the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk) seeking an aggregate sentence covering those two sentences. Under the Polish Criminal Code, such an aggregate sentence makes it possible to change the duration of several sentences imposed on one person and to commute them into a new single sentence. When the conditions for issuing a cumulative sentence are met, an aggregate sentence may be delivered.

However, the referring court considers that the Polish Criminal Code does not allow an aggregate sentence to cover convictions handed down in Poland and convictions handed down in another Member State and recognised for the purpose of their enforcement in Poland, which is to the detriment of a person convicted several times in different Member States as compared with a person convicted several times in a single Member State. It is in that context that that court decided to refer questions to the Court of Justice for a preliminary ruling concerning the interpretation both of Framework Decision 2008/909 and Framework Decision 2008/675, [9] relating to the taking in account, in the course of new criminal proceedings, of previous convictions handed down in other Member States against the same person. The Court is asked whether and in what circumstances an aggregate sentence may be delivered where it covers not only convictions delivered previously against the person concerned in the Member State where the aggregate sentence is delivered, but also convictions delivered against that person in another Member State and which are enforced in the first Member State.

Findings of the Court

In the first place, the Court examines whether Framework Decision 2008/909 allows the delivery of an aggregate sentence such as that at issue in the main proceedings.

In that regard, it notes first that that framework decision lays down strict conditions for the adaptation, by the competent authority of the executing State, of the sentence handed down in the issuing State. The Court holds that that framework decision permits the delivery of an aggregate sentence, such as that at issue in the main proceedings, provided that it does not result in an adaptation of the duration or nature of the conviction, delivered in another Member State and enforced in the Member State in which that aggregate sentence is delivered, which exceeds the strict limits laid down for that adaptation. The opposite solution would not only entail an unjustified difference in treatment between persons subject to a number of sentences in a single Member State and those sentenced in several Member States where, in both cases, the sentences are enforced in the same Member State, but also involve an application of Framework Decision 2008/909 which does not comply with the right of citizens of the European Union to move and reside freely within the territory of the Member States conferred on them by Article 21 TFEU.

The Court then highlights that the Member State in which the aggregate sentence is delivered must deduct in full the period of deprivation of liberty already served by the sentenced person in the issuing State from the total duration of the deprivation of liberty to be enforced. Finally, it notes that,

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8 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), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.(OJ 2009 L 81, p. 24).

9 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32).

since only the issuing State may decide on applications for review of the judgment imposing the sentences to be enforced, in another Member State, Framework Decision 2008/909 only permits the delivery of an aggregate sentence, such as that at issue in the main proceedings, where it does not result in review of those sentences.

In the second place, the Court examines whether the delivery of an aggregate sentence, such as that at issue in the main proceedings, is permitted in the light of Framework Decision 2008/675, which requires the taking into account, in the course of new criminal proceedings brought against a person, of previous convictions handed down in another Member State against the same person for different facts. That may not have the effect either of interfering with previous convictions or their enforcement in the Member State in which the new criminal proceedings take place, or of revoking or reviewing them.

In that regard, the Court finds that a cumulative sentence may interfere with a previous conviction or its enforcement where that initial conviction has not yet been enforced or has not been forwarded to the second Member State for the purpose of its enforcement. However, in the case in the main proceedings, the conviction handed down by the German court was forwarded and recognised, in accordance with Framework Decision 2008/909, for the purpose of its enforcement in Poland. Therefore, the Court considers that the taking into account of that conviction with a view to the delivery of the aggregate sentence does not have the effect of interfering with that conviction or its enforcement, or of revoking or reviewing it, within the meaning of Framework Decision 2008/675, provided that the aggregate sentence observes the conditions and limits laid down in Framework Decision 2008/909. Subject to compliance with those conditions and limits, the court before which new criminal proceedings, such as the aggregate sentencing proceedings at issue in the main proceedings, are brought must take into account the previous conviction handed down in another Member State in the same way as it would take into consideration a previous national conviction.

Judgment of the Court (Fifth Chamber) of 29 April 2021, X (Mandat d'arrêt européen - Ne bis in idem), C-665/20 PPU

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant – Grounds for optional non-execution – Article 4(5) – Requested person has been finally judged in a third State in respect of the same acts – Sentence has been served or may no longer be executed under the law of the sentencing country – Implementation – Margin of discretion of the executing judicial authority – Concept of 'same acts' – Remittance of sentence granted by a non-judicial authority as part of a general leniency measure

In September 2019, a European arrest warrant ('EAW') was issued by the German judicial authorities against X, in order to conduct criminal proceedings for acts committed in 2012 against his partner and her daughter. In March 2020, X was arrested in the Netherlands. He objected to his surrender to those authorities, asserting that he had previously been prosecuted and finally judged in respect of the same acts in Iran. More specifically, he had been acquitted in respect of some of those acts and sentenced in respect of the other acts to a term of imprisonment which he had served almost in full before the sentence was remitted. That remittance was the result of a general leniency measure granted by a non-judicial authority, the Supreme Leader of Iran, to mark the 40th anniversary of the Islamic Revolution. Thus, according to X, due to his prior conviction in Iran, the principle *ne bis in idem,* as set out in Article 4(5) of the Framework Decision on the EAW, [10] transposed into Dutch law, precludes the execution of the EAW concerning him.

10 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

In accordance with that article, the executing judicial authority may refuse to execute an EAW if the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country. That ground 'for optional non-execution' is similar to the one 'for mandatory non-execution' provided for in Article 3(2) of the Framework Decision, with the exception that the latter refers to a judgment given not 'by a third State' but 'by a Member State'.

In that context, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) decided to seek the guidance of the Court of Justice on the interpretation of Article 4(5) of that framework decision. That district court, called upon to rule on the surrender of X, is uncertain as regards the margin of discretion it enjoys in such a case, the concept of 'same acts' referred to in that article, in so far as the Iranian courts have not explicitly ruled on certain acts which X is alleged to have committed in Germany, and the scope of the condition that, where there has been a sentence, that sentence 'has been served … or may no longer be executed under the law of the sentencing country'.

By its judgment, delivered in the context of the urgent preliminary ruling procedure, the Court of Justice rules, first of all, that the executing judicial authority must have a margin of discretion in order to determine whether it is appropriate to refuse to execute an EAW on the ground concerned. Next, the concept of 'same acts'[11] must be interpreted uniformly. Lastly, the condition relating to the execution of the sentence is met in a situation such as that at issue in the case in the main proceedings.

Assessment of the Court of Justice

In the first place, the Court recalls that the framework decision sets out, first, the grounds for mandatory non-execution of an EAW, [12] and second, the grounds for optional non-execution [13] which the Member States are free to transpose or not into their domestic law. Nevertheless, where the latter are transposed, the Member States may not provide that the judicial authorities are required to automatically refuse to execute any EAW concerned. Those authorities must have a margin of discretion, allowing them to carry out an examination on a case-by-case basis, taking into consideration all of the relevant circumstances. Depriving them of that possibility would have the effect of substituting a mere option to refuse to execute an EAW with a genuine obligation, although such a refusal constitutes the exception, the execution of the EAW being the general rule.

Furthermore, the Court emphasises the difference with the ground for mandatory non-execution provided for in Article 3(2) of the framework decision, the application of which, by contrast, does not leave any discretion to the executing judicial authority. The principles of mutual trust and of mutual recognition, which prevail between the Member States and require them to consider that each of them complies with EU law, and, more specifically, fundamental rights, are not automatically transferrable to judgments given by the courts of third States. Thus, a high level of trust in the criminal justice system, as it exists between the Member States, cannot be presumed as regards third States. For that reason, the executing judicial authority must be allowed a margin of discretion.

In the second place, the Court finds that the concept of 'same acts', referred to in Article 3(2) and Article 4(5) of the framework decision, must be interpreted uniformly. For reasons of consistency and legal certainty, those two concepts, worded in identical terms, must be given the same scope. The Court adds that the fact that Article 3(2) concerns judgments given in the European Union, whereas Article 4(5) refers to those given in a third State, cannot, as such, justify that concept being conferred a different scope.

11 That concept is referred to in Article 3(2) and Article 4(5) of the framework decision.

12 They are provided in Article 3 of the framework decision.

13 They are provided in Articles 4 and 4a of the framework decision.

In the third place, the Court rules that the condition relating to the execution of the sentence, provided for in Article 4(5) of the framework decision, is met in a situation such as that at issue in the main proceedings. In that regard, the Court emphasises that that article refers, in a general manner, to the 'law of the sentencing country', without providing further details as regards the reason for the impossibility of the execution of the sentence. It is therefore necessary, in general, to recognise all leniency measures provided for by the law of the sentencing country which have the effect that the imposed sanction may no longer be executed. In that regard, the seriousness of the acts, the nature of the authority which granted the measure, or the considerations in which that measure is rooted, where, for instance, it is not based on objective criminal policy considerations, have no impact.

Nevertheless, the Court adds that the executing judicial authority must strike a balance when exercising the discretion it enjoys for the purpose of applying the ground for optional non-execution provided for in Article 4(5) of the framework decision. It must reconcile preventing the impunity of convicted and sentenced persons and combating crime with ensuring legal certainty as regards those persons through respect for decisions of public bodies which have become final. The principle *ne bis in idem,* set out in the framework decision in both Article 3(2) and Article 4(5), encompasses those two aspects.

VI. ASYLUM POLICY

Judgment of the Court (Grand Chamber) of 15 April 2021, Belgian State (Éléments postérieurs à la décision de transfert), C-194/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Article 27 – Remedy – Whether account should be taken of circumstances subsequent to the transfer decision – Effective judicial protection

H. A., a third-country national, made an application for asylum in Belgium. However, the Spanish authorities having agreed to take charge of him, his application was rejected and a decision to transfer him to Spain was adopted. Shortly afterwards, H. A.'s brother also arrived in Belgium, where he lodged an application for asylum. H. A. then brought an action against the transfer decision made in his case, claiming, in particular, that their respective asylum applications should be examined together.

That action was dismissed on the ground that H. A.'s brother arrived in Belgium after the adoption of the disputed decision and that that circumstance could not therefore be taken into consideration in the assessment of the lawfulness of that decision. H. A. lodged an appeal on a point of law before the Conseil d'État (Council of State, Belgium), alleging infringement of his right to an effective remedy, as follows from the Dublin III Regulation [14] and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Irrespective of the question whether the arrival of his brother was in

[14] Article 27 of 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; 'the Dublin III Regulation').

fact capable of having any bearing on the identity of the Member State responsible for examining H. A.'s asylum application, [15] the Conseil d'État (Council of State) must determine whether an applicant for asylum must be able to rely on circumstances subsequent to the adoption of a transfer decision relating to him or her. It decided to put that question to the Court of Justice.

In a Grand Chamber judgment, the Court rules that EU law [16] precludes national legislation which provides that the court or tribunal seised of an action for annulment of a transfer decision may not, in the context of the examination of that action, take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of the Dublin III Regulation. The position is otherwise if that legislation provides for a specific remedy that may be exercised after such circumstances have arisen, provided that that remedy allows for an *ex nunc* examination of the situation of the person concerned, the results of which are binding on the competent authorities.

Findings of the Court

In reaching that conclusion, the Court recalls that the Dublin III Regulation [17] provides that a person who is the subject of a transfer decision is to have the right to an effective remedy against that decision and that that remedy must cover, inter alia, the examination of the application of that regulation. It also recalls that it has previously held that an applicant for international protection must have an effective and rapid remedy available to him or her which enables that applicant to rely on circumstances subsequent to the adoption of a transfer decision, where the taking into account of those circumstances is decisive for the correct application of the Dublin III Regulation. [18]

However, the Court emphasises that the Member States are not required to organise their systems of legal remedies in such a way that compliance with the requirement to take such circumstances into account takes place within the framework of the examination of the action brought to call into question the lawfulness of the transfer decision. The EU legislature has harmonised only some of the procedural rules governing the right to a remedy against the transfer decision and the Dublin III Regulation does not specify whether it necessarily means that the court or tribunal seised may carry out an *ex nunc* examination of the lawfulness of the transfer decision. Therefore, in accordance with the principle of procedural autonomy, it is for each Member State to establish those rules, on condition that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).

In the present case, as regards more specifically the principle of effectiveness, the Court states that an action for annulment brought against a transfer decision, in the context of which the court or tribunal seised cannot take account of circumstances subsequent to the adoption of that decision which are decisive for the correct application of the Dublin III Regulation, does not ensure sufficient judicial protection in that it does not enable the person concerned to exercise his or her rights under that regulation and Article 47 of the Charter. However, the Court adds that such protection may be afforded, in the context of the national judicial system viewed as a whole, by a specific remedy, distinct from an action seeking to have the lawfulness of a transfer decision reviewed, that enables such circumstances to be taken into account. That specific remedy must, however, ensure that the person concerned has the opportunity to prevent the competent authorities of the requesting Member State from being able to carry out the transfer of that person, where a circumstance arising after the transfer decision precludes its implementation. That remedy must also ensure, when a subsequent circumstance means that the requesting Member State is responsible for examining the

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15 See the definition of 'family members' in Article 2(g) of the Dublin III Regulation, and Article 10 of that regulation.

16 Article 27(1) of the Dublin III Regulation, read in the light of recital 19 of the regulation and Article 47 of the Charter.

17 Article 27(1) and recital 19 of the Dublin III Regulation.

18 See judgment of 25 October 2017, *Shiri* (C-201/16, EU:C:2017:805), and judgment of 25 January 2018, *Hasan* (C-360/16, EU:C:2018:35).

application for international protection, that the competent authorities of that Member State are obliged to take the measures necessary to acknowledge that responsibility and to initiate that examination without delay. Furthermore, the exercise of that specific remedy must not be made conditional on the person concerned having been deprived of his or her liberty or on the fact that implementation of the transfer decision is imminent.

VII. COMPETITION – STATE AID

Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021, Ryanair v Commission (Finnair I; Covid-19), T-388/20

Link to the complete text of the judgment

State aid – Finnish air-transport market – Aid granted by Finland to Finnair amid the Covid-19 pandemic – State guarantee on a loan – Decision not to raise any objections – Temporary Framework for State aid measures – Measure intended to remedy a serious disturbance in the economy of a Member State – Failure to weigh up the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition – Equal treatment – Freedom of establishment – Freedom to provide services – Obligation to state reasons

On 13 May 2020, the Republic of Finland notified the Commission of an aid measure in the form of a State guarantee in favour of the Finnish airline, Finnair Plc ('Finnair'), aimed at helping the latter obtain a loan of EUR 600 million from a pension fund to cover its working capital needs. The guarantee, which was supposed to cover 90% of that loan, was limited to a maximum duration of three years and could be relied upon in the event of Finnair's default with regard to the pension fund.

Referring to its communication on the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak, [19] the Commission classified the guarantee granted to Finnair as State aid which is compatible with the internal market in accordance with Article 107(3)(b) TFEU. [20] Under that provision, aid intended to remedy a serious disturbance in the economy of a Member State may, under certain circumstances, be considered to be compatible with the internal market.

The airline Ryanair brought an action for annulment of the Commission's decision, which was nevertheless rejected by the Tenth Chamber (Extended Composition) of the General Court. In that context, that Chamber examines for the first time, the legality of individual State aid adopted to address the consequences of the Covid-19 pandemic in the light of Article 107(3)(b) TFEU. [21]

Findings of the Court

In the first place, the Court analyses the legality of the contested decision in the light of Article 107(3)(b) TFEU.

With regard, first, to the complaints that aid benefiting a single individual undertaking could not remedy a serious disturbance in the economy of a Member State within the meaning of Article 107(3)(b) TFEU, the Court points out, first of all, that that provision applies both to aid schemes and to individual aid. Thus, individual aid may be declared to be compatible with the internal market if it is a necessary, appropriate and proportionate measure for remedying a serious disturbance in the economy of the Member State concerned.

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19 Communication from the Commission on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1), amended on 3 April 2020 (OJ 2020 C 112 I, p. 1) ('the Communication on the Temporary Framework').

20 Commission Decision C(2020) 3387 final of 18 May 2020 on State Aid SA.56809 (2020/N) – Finland – COVID-19: State loan guarantee for Finnair ('the contested decision').

21 In its judgment of 17 February 2021, *Ryanair* v *Commission* (T-238/20, EU:T:2021:91), the Court carried out a similar examination of the legality of a State aid scheme adopted by the Kingdom of Sweden in order to respond to the consequences of the Covid-19 pandemic on the Swedish air-transport market. In its judgments of 14 April 2021, *Ryanair* v *Commission* (T-378/20), and *Ryanair* v *Commission* (T-379/20), the Court also carried out an examination of two separate individual aid measures on the basis of Article 107(2)(b) TFEU.

Next, the Court states that Finnair's possible failure would have had serious consequences for the Finnish economy, so that the State guarantee, in so far as it is intended to maintain Finnair's activities and prevent its possible failure from further disrupting the Finnish economy, is appropriate to contribute to remedying the serious disruption to the Finnish economy caused by the Covid-19 pandemic.

The Court's conclusion is based on the fact that Finnair:

(i) is the main air carrier in Finland, with almost 15 million passengers carried in 2019, or 67% of all passengers carried to, from and within Finland;

(ii) is the main air cargo operator in Finland, serves the needs of a number of companies located in Finland, both for the export and import of goods, and has an extensive Asian network;

(iii) has 6 800 employees, with purchases from suppliers, who are mostly Finnish, coming to EUR 1.9 thousand million in 2019;

(iv) makes significant efforts in respect of research in Finland and is the 16th largest company in Finland in terms of its contribution to that country's GDP.

Secondly, with regard to the complaints that the Commission failed to balance the beneficial effects of the aid against its adverse effects, the Court holds that Article 107(3)(b) TFEU does not require such an analysis, contrary to what is prescribed by Article 107(3)(c) TFEU. Nor is such a balancing act required on the basis of the Communication on the Temporary Framework.

In the second place, the Court examines the alleged infringement of the principle of non-discrimination. In that regard, the Court observes, first of all, that, by its nature, individual aid introduces a difference in treatment, or even discrimination, which is inherent in the individual character of the measure. Arguing that such aid is contrary to the principle of non-discrimination would, in essence, amount to calling into question systematically the compatibility with the internal market of any individual aid, when EU law allows Member States to grant such aid in accordance with the conditions laid down in Article 107 TFEU.

Furthermore, even if the difference in treatment brought about by the guarantee granted to Finnair could be regarded as discrimination, it must be ascertained whether it is justified by a legitimate objective and whether it is necessary, appropriate and proportionate to achieve that objective.

According to the Court, the arrangements for providing Finnair with the guarantee are capable of attaining the objective envisaged, since the existence of a serious disturbance in the Finnish economy as a result of the Covid-19 pandemic and the significant adverse effects of that pandemic on the Finnish air-transport market have been established to the requisite legal standard. Moreover, the aid measure is necessary because Finnair was at risk of going into liquidation due to the sudden erosion of its business and the fact that it could not cover its liquidity needs through the credit markets. Finally, in view of Finnair's importance for the Finnish economy, the grant of the State guarantee only to Finnair does not go beyond the limits of what is appropriate and necessary in order to achieve the objectives pursued by the Republic of Finland.

In the third place, as regards the complaints alleging infringement of the freedom to provide services and the freedom of establishment, the Court finds that Ryanair has not established how the exclusive nature of the grant of the State guarantee is capable of dissuading it from establishing itself in Finland or from providing services to and from Finland. The Court states that Ryanair has failed to identify the factual or legal elements which would cause the individual aid at issue to produce restrictive effects which go beyond those which trigger the prohibition in Article 107(1) TFEU, but which are nevertheless necessary and proportionate to remedy the serious disturbance in the Finnish economy caused by the Covid-19 pandemic, in accordance with the requirements of Article 107(3)(b) TFEU.

Finally, the Court rejects as unfounded the pleas alleging breach of the obligation to state reasons and finds that it is not necessary to examine the merits of the plea alleging breach of the procedural rights under Article 108(2) TFEU.

Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021, Ryanair v Commission (SAS, Danemark; Covid-19), T-378/20

Link to the complete text of the judgment

and

Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021-- Ryanair v Commission (SAS, Suède; Covid-19), 379/20

Link to the complete text of the judgment

State aid – Danish air transport market – Aid granted by Denmark to an airline amid the Covid-19 pandemic – Guarantee – Decision not to raise any objections – Commitments as a condition to make the aid compatible with the internal market – Aid intended to make good the damage caused by an exceptional occurrence – Freedom of establishment – Free provision of services – Equal treatment – Duty to state reasons

In April 2020 the Kingdom of Denmark and the Kingdom of Sweden notified the European Commission of two separate aid measures for SAS AB ('SAS'), each involving a guarantee on a revolving credit facility of up to 1.5 billion Swedish kronor (SEK). [22] Those measures were intended to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions amid the Covid-19 pandemic.

By decisions of 15 April 2020 [23] and of 24 April 2020, [24] the Commission classified the notified measures as State aid [25] that was compatible with the internal market pursuant to Article 107(2)(b) TFEU. In accordance with that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is to be compatible with the internal market.

The airline Ryanair brought actions for annulment of those decisions, which are, however, dismissed by the Tenth Chamber (Extended Composition) of the General Court. In that respect, the Court confirms for the first time the legality of individual aid measures adopted in order to address the consequences of the Covid-19 pandemic in the light of Article 107(2)(b) TFEU. [26]

The Court's assessment

In the first place, the Court rejects the plea that the aid that has been granted is incompatible with the internal market because it is intended to make good the damage suffered by only one company. In that regard, the Court notes that in accordance with Article 107(2)(b) TFEU aid may be intended to

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22 The aid measure adopted by the Kingdom of Sweden is individual aid which Sweden decided to grant to SAS as a company eligible for the loan guarantees scheme intended to support all the Swedish airlines amid the Covid-19 pandemic ('the Swedish aid scheme), which had been notified to the Commission by Sweden before the notification of the individual aid measure and which the Commission had approved on 11 April 2020, pursuant to Article 107(3)(b) TFEU.

23 Commission Decision C(2020) 2416 final on State Aid SA.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines.

24 Commission Decision C(2020) 2784 final on State Aid SA.57061 (2020/N) – Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines.

25 Within the meaning of Article 107(1) TFEU.

26 In its judgment of 17 February 2021, *Ryanair* v *Commission*, (T-259/20, EU:T:2021:92), the Court carried out a similar examination of the legality of a State aid scheme adopted by the French Republic to address the consequences of the Covid-19 pandemic on the French air transport market. In its judgment of 14 April 2021, *Ryanair* v *Commission*, (T-388/20, EU:T:2021:196), the Court carried out an examination of another individual aid measure on the basis of Article 107(3)(b) TFEU.

make good the damage caused by an exceptional occurrence even if it benefits only an individual company, without making good the entirety of the damage caused by that occurrence. Consequently, the Commission had not erred in law solely because the aid measures for SAS did not benefit all of the victims of the damage caused by the Covid-19 pandemic.

In the second place, the Court rejects Ryanair's plea disputing the proportionality of the aid measures in relation to the damage caused to SAS by the Covid-19 pandemic. The Court notes, first of all, that Article 107(2)(b) TFEU allows compensation only for economic damage caused by natural disasters or exceptional occurrences. However, given the evolving nature of the pandemic and the fact that the quantification of the damage caused by it to SAS is necessarily prospective in nature, the Commission had set out in sufficiently precise terms a calculation method for assessing that damage, which was capable of avoiding the risk of possible overcompensation. [27] In that respect, the Court takes note, in addition, of the commitment by the Kingdom of Denmark and the Kingdom of Sweden to carry out an *ex post* assessment of the damage actually suffered by SAS, by no later than 30 June 2021, and to request from SAS, if necessary, the repayment of aid exceeding that damage, taking into account all the aid liable to be granted to SAS owing to the Covid-19 pandemic, including by foreign authorities.

In the third place, the Court rejects the plea claiming a breach of the principle of non-discrimination. Individual aid, by its nature, brings about a difference in treatment, or even discrimination, which is inherent in the individual character of that measure. To argue that such aid is contrary to the principle of non-discrimination would therefore amount to calling into question systematically the compatibility of any individual aid with the internal market, whereas EU law allows Member States to grant such aid, provided that all the conditions laid down in Article 107 TFEU are met.

In addition, even if the difference in treatment brought about by the measures at issue may amount to discrimination pursuant to that principle, this may be justified where it is a necessary, appropriate and proportionate means of achieving a legitimate objective. Similarly, since Ryanair also refers to Article 18 TFEU, the Court observes, in addition, that that provision prohibits any discrimination on grounds of nationality within the scope of application of the Treaties without prejudice to any special provisions contained therein. As Article 107(2)(b) TFEU is, according to the Court, among the special provisions laid down by the Treaties, it continues its examination of the measures at issue on that basis.

In that regard, the Court confirms, first, that the objective of the measures at issue satisfies the conditions laid down by Article 107(2)(b) TFEU in so far as it actually aims to make good in part the damage caused to SAS by an exceptional occurrence, that is to say the Covid-19 pandemic. The Court finds, secondly, that the difference in treatment in favour of SAS is appropriate for the purpose of achieving the objective of those measures and does not go beyond what is necessary to achieve that objective, given that SAS has the largest market share in Denmark and Sweden, and that that market share is much higher than that of its closest competitor in those two countries.

In the fourth place, the Court examines the Commission's decisions in the light of the free provision of services and the freedom of establishment. In that context, the Court notes that Ryanair does not demonstrate how the exclusivity of the measure is capable of discouraging it from establishing itself in Denmark or Sweden or providing services from either of those countries or to them.

As regards Case T-379/20, the Court finds, in addition, that the aid measure notified by the Kingdom of Sweden is subsidiary to the Swedish aid scheme adopted under Article 107(3)(b) TFEU in order to

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27 The Commission estimated the extent of the damage suffered by SAS as corresponding to the 'loss of added value', which consists of the difference between revenue for the period from March 2019 to February 2020 and that of the period from March 2020 to February 2021, from which were subtracted, first, avoided variable costs, calculated on the basis of the costs incurred between March 2019 and February 2020 and, secondly, the profit margin relating to the loss in revenue. The amount of damage was provisionally assessed by reference to a fall in air traffic of between 50 and 60% for the period from March 2020 to February 2021 in comparison with the period from March 2019 to February 2020 and amounted to between SEK 5 and 15 billion.

deal with the disturbance in the Swedish economy caused by the Covid-19 pandemic. [28] However, it rejects the argument that that measure could not, for that reason, have as its purpose the making good of an exceptional occurrence, within the meaning of Article 107(2)(b) TFEU. In that regard, the Court states that the FEU Treaty does not preclude a concurrent application of Article 107(2)(b) and Article 107(3)(b) TFEU, provided that the conditions of each of those two provisions are met. That applies in particular where the facts and circumstances giving rise to a serious disturbance in the economy are the result of an exceptional occurrence.

Lastly, the Court rejects as unfounded the pleas claiming an infringement of the duty to state reasons and finds that it is not necessary to examine the substance of the plea alleging an infringement of the procedural rights under Article 108(2) TFEU.

VIII. APPROXIMATION OF LAWS

1. MOTOR INSURANCE

Judgment of the Court (Fifth Chamber) of 29 April 2021, Ubezpieczeniowy Fundusz Gwarancyjny, C-383/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Compulsory insurance against civil liability in respect of the use of motor vehicles – Directive 2009/103/EC – Article 3, first paragraph – Obligation to take out a contract of insurance – Scope – Local government authority which has acquired a vehicle by judicial means – Registered vehicle which is on private land and intended to be destroyed

On 7 February 2018, the Powiat Ostrowski (District of Ostrów, Poland), a Polish local government authority, became the owner, by judicial means following a forfeiture order, of a vehicle registered in Poland. After service of that decision, on 20 April 2018, the district insured the vehicle from the next day the administration was open, Monday 23 April 2018.

Given its poor technical state, the district decided to have the vehicle destroyed. On the basis of the certificate issued by the disassembly facility, the vehicle was deregistered on 22 June 2018.

On 10 July 2018, the Ubezpieczeniowy Fundusz Gwarancyjny (Insurance Guarantee Fund, Poland) imposed a fine of PLN 4 200 (approximately EUR 933) on the district for failing to fulfil its obligation to take out a contract of insurance against civil liability in respect of the use of that vehicle during the period from 7 February to 22 April 2018 ('the period at issue').

The district brought an action before the Sąd Rejonowy w Ostrowie Wielkopolskim (District Court, Ostrów Wielkopolski, Poland) seeking a declaration that, during the period at issue, it was not obliged to insure the vehicle. That court asked the Court of Justice whether there was an obligation to

[28] In its judgment of 17 February 2021, *Ryanair* v *Commission*, (T-238/20, EU:T:2021:91), the Court dismissed an action by Ryanair against the Commission's decision declaring that Swedish aid scheme to be compatible with the internal market.

conclude a contract of insurance against civil liability [29] in respect of a vehicle registered in a Member State, which is on private land, which is not capable of being driven on account of its technical state and which, in accordance with the choice of its owner, is to be destroyed.

By its judgment, the Court held that the conclusion of a contract of insurance against civil liability in respect of the use of a motor vehicle is compulsory where the vehicle concerned is registered in a Member State, as long as that vehicle has not been officially withdrawn from use in accordance with the applicable national rules.

Findings of the Court

In the first place, the Court notes that the conclusion of a contract of insurance against civil liability in respect of the use of a motor vehicle is, in principle, compulsory for a vehicle registered in a Member State, which is on private land and is to be destroyed in accordance with the choice of its owner, even where that vehicle is not, at a given time, capable of being driven on account of its technical state.

In that regard, the Court points out that the concept of 'vehicle'[30] is objective and is independent of the use which is made or may be made of the vehicle in question or of the intention of the owner or of another person actually to use it.

The technical state of a vehicle may vary over time and whether it may be restored to a state in which it is capable of being driven depends on subjective factors, such as the intention of its owner or its keeper to carry out or have carried out the necessary repairs and the availability of the budget necessary for that purpose. Consequently, if the mere fact that a vehicle is not, at a given time, capable of being driven were sufficient to deprive it of its status as a vehicle and to exempt it from the insurance obligation, the objective nature of that concept of 'vehicle' would be called into question. Furthermore, the insurance obligation [31] is not linked to the use of the vehicle as a means of transport at a given time or to the question whether or not the vehicle concerned has caused damage. Consequently, a registered vehicle cannot be exempted from the insurance obligation by the mere fact that it is not, at a given time, capable of being driven on account of its technical state and is therefore not capable of causing loss or injury, even if that is the case as of the point at which the right of ownership is transferred. Similarly, the intention of the owner or of another person to have the vehicle destroyed cannot of itself lead to the conclusion that that vehicle loses its status as 'vehicle' and thereby avoids that insurance obligation. The classification as a 'vehicle' and the scope of the insurance obligation cannot be dependent on those subjective factors, since that would undermine the predictability, stability and continuity of that obligation, compliance with which is, however, necessary in order to ensure legal certainty.

In the second place, the Court holds that the obligation, in principle, to insure a vehicle registered in a Member State which is on private land and which is intended by its owner to be destroyed, even if, at a given time, that vehicle is not capable of being driven because of its technical state, is necessary, first, in order to ensure the protection of victims of traffic accidents, given that the intervention of the body providing compensation for damage to property or personal injuries caused by a vehicle which is not insured [32] is provided for only in cases in which taking out the insurance is compulsory. That interpretation guarantees that those victims are, in any event, compensated, either by the insurer, under a contract concluded for that purpose, or by the compensation body where the vehicle involved in the accident was not insured or where that vehicle has not been identified. Secondly, it

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29 Article 3, first paragraph, of Directive 2009/103 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).

30 Article 1, point 1, of Directive 2009/103.

31 Article 3, first paragraph, of Directive 2009/103.

32 Article 10(1) of Directive 2009/103.

ensures the best possible compliance with the objective of guaranteeing the free movement of both vehicles normally based in the territory of the European Union and of the persons who are travelling in them. It is only by ensuring robust protection of potential victims of motor vehicle accidents that it is possible to ask Member States [33] to refrain from carrying out systematic checks on the insurance of vehicles entering their territory from the territory of another Member State, which is essential in order to guarantee that free movement.

In the third place and lastly, the Court states that, in order for a vehicle to be exempted from the insurance obligation, it must be officially withdrawn from use, in accordance with the applicable national rules. While registration of a vehicle certifies, in principle, that it is capable of being driven and thus used as a means of transport, a registered vehicle may, objectively, be definitively not capable of being driven on account of its poor technical state. The finding that a vehicle is not capable of being driven and has lost its status as a 'vehicle' must, however, be made objectively. In that regard, although the deregistration of the vehicle may constitute such an objective finding, EU law [34] does not lay down the manner in which a vehicle may as a matter of law be withdrawn from use. Consequently, that withdrawal may, under the applicable national rules, be established other than by the deregistration of the vehicle in question.

2. TELECOMMUNICATIONS

Judgment of the Court (Second Chamber) of 15 April 2021, Eutelsat, C-515/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Approximation of laws – Telecommunications sector – Harmonised use of radio spectrum in the 2 GHz frequency bands for bringing into operation systems providing mobile satellite services – Decision No 626/2008/EC – Article 2(2)(a) and (b) – Article 4(1)(c)(ii) – Article 7(1) and (2) – Article 8(1) and (3) – Mobile satellite systems – Concept of 'mobile earth station' – Concept of 'complementary ground components' – Concept of 'required quality' – Respective role of satellite and ground components – Requirement for a selected operator of mobile satellite systems to provide service for a certain percentage of the population and territory – Non-compliance – Effect

In order to facilitate the development of a competitive internal market for mobile satellite services across the European Union and to ensure gradual coverage in all Member States, the European Parliament and the Council adopted Decision No 626/2008 ('the MSS decision'). [35] At the end of a selection procedure for operators of pan-European systems providing mobile satellite services, [36] the European Commission selected, among others, the Inmarsat Ventures SE company ('Inmarsat'). That company has developed a system called the 'European Aviation Network', which is designed to provide aviation connectivity services. By decision of 21 October 2014, the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of Electronic Communications and Postal Services, France) granted the company authorisation to use specific frequencies in metropolitan France and, by decision of 22 February 2018 granted it an authorisation

33 Article 4 of Directive 2009/103.

34 Directive 2009/103.

35 Decision No 626/2008/EC of the European Parliament and of the Council of 30 June 2008 on the selection and authorisation of systems providing mobile satellite services (MSS) (OJ 2008 L 172, p. 15), Articles 2(2)(a) and (b), and 8(1) and (3) of the MSS decision.

36 Article 2(2)(a) and (b) of the MSS decision, read in conjunction with Article 8(1) and (3) of that decision.

to operate complementary ground components ('CGCs') [37] of mobile satellite systems. Eutelsat, a competitor of Inmarsat, therefore brought an action before the Conseil d'État (Council of State, France) seeking annulment of that latter decision on the ground, inter alia, of an infringement of EU law.

Ruling on a request for a preliminary ruling from the supreme French administrative court, the Court, in its judgment, provides an interpretation of 'mobile satellite systems' and of the concepts of 'CGC' and 'mobile earth station' [38] in the light of the MSS decision. In addition, the Court provides clarification concerning the powers of the competent authorities of the Member States to grant, or to refuse to grant, to an operator the authorisations necessary for the provision of the components of mobile satellite systems.

The Court's assessment

The Court notes, first of all, that a 'mobile satellite system' does not necessarily have to be principally based, in terms of capacity of transmitted data, on the satellite component of that system. The relevant provisions of the MSS decision do not define, in terms of capacity of transmitted data, the relationship between the satellite component of a mobile satellite system, on the one hand, and the ground component of that system, on the other. Furthermore, it is not possible to draw any conclusion from the use of the word 'complementary' in the term 'complementary ground components', since that word is silent on the relative importance of the two components.

Next, the Court states that a ground-based station may be classified as a 'CGC of mobile satellite systems' when two main requirements are fulfilled. In terms of positioning, that station must be used at a fixed location and cover a geographical area within the footprint of the satellite or satellites of the mobile satellite system concerned. In addition, in terms of function, the ground-based station must be used to improve the availability of the mobile satellite service in areas where communications with the satellite component of that system cannot be ensured with the required quality. Where those requirements have been satisfied and the other common conditions [39] have been fulfilled, no limitation as to the number of CGCs that can be used or the extent of their geographical coverage may be inferred from the provisions of the MSS decision. [40] In that regard, the concept of 'required quality' must be understood as being the level of quality necessary to provide the service offered by the operator of that system and must be read with reference to the objective of promoting innovation, technological progress and consumer interests.

However, the operation of CGCs must not result in competition being distorted on the market concerned and the satellite component of the mobile satellite system must have real and specific usefulness, in that such a component must be necessary for the functioning of that system, save where there is independent operation of the CGCs, in the case of failure of the satellite component, which must not exceed 18 months. It is for the competent national authorities to oversee compliance with those conditions.

Lastly, according to the Court, in order to fall within the concept of 'mobile earth station', there is no requirement that such a station is capable of communicating, without the use of separate equipment, with both a CGC and a satellite. In that regard, after noting a number of requirements that have to be satisfied, the Court finds that those requirements are met by a combination of two separate reception terminals linked by a communication driver, the first terminal being located above the aircraft fuselage and communicating with a space station, and the second located below that fuselage and

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37 Article 2(2)(b) of the MSS decision, read in conjunction with Article 8(1) and (3) of that decision.

38 Article 2(2)(a) of the MSS decision.

39 Article 8(3) of the MSS decision.

40 In particular, Article 2(2)(b) of the MSS decision.

communicating with CGCs. The Court states that it is irrelevant, in that context, that the individual components do not form a physically indivisible whole.

IX. ECONOMIC AND MONETARY POLICY

Judgment of the General Court (Second Chamber) of 14 April 2021, Crédit lyonnais v ECB, T-504/19

Economic and monetary policy – Prudential supervision of credit institutions – Article 4(1)(d) and Article 4(3) of Regulation (EU) No 1024/2013 – Calculation of the leverage ratio – ECB's partial refusal to authorise the exclusion of exposures meeting certain conditions – Article 429(14) of Regulation (EU) No 575/2013 – Failure to examine all the relevant aspects of the individual case – *Res judicata* – Article 266 TFEU

The applicant, Crédit lyonnais, is a joint-stock company governed by French law and is approved as a credit institution. It is a subsidiary of Crédit agricole SA. As such, it comes under the direct prudential supervision of the European Central Bank (ECB).

On 5 May 2015, Crédit agricole, on its own behalf and on behalf of the entities in the Crédit agricole group, including the applicant, sought authorisation from the ECB to exclude from the calculation of the leverage ratio the exposures (investments) made up of the sums associated with a number of savings passbooks (Livret A (Savings Passbook A), the Livret de développement durable et solidaire (Sustainable and Socially Responsible Passbook) ('the LDD') and the Livret d'épargne populaire (Popular Savings Passbook) ('the LEP')) taken out with Crédit agricole, which had been transferred to the Caisse des dépôts et consignations (CDC), a French public institution.

By a decision of 24 August 2016, the ECB refused to exclude from the calculation of the leverage ratio the exposures to the CDC made up of the proportion of the sums deposited on the basis of the three savings passbooks referred to above.

By its judgment of 13 July 2018 in *Crédit agricole* v *ECB*, [41] the General Court annulled the ECB's decision. It confirmed that the ECB had a discretion that allowed it to exclude or not to exclude such exposures as laid down by the regulation on prudential requirements for credit institutions. [42] Nevertheless, the General Court found that the ECB had erred in law by having regard to Crédit agricole's contractual obligation to reimburse customers' deposits, without taking into account the fact that the funds transferred to the CDC are returned. It also considered that the ECB had made a manifest error of assessment concerning the existence of a period before the CDC returns the funds to Crédit agricole, which could be forced to have recourse to a fire sale of assets.

On 26 July 2018, on its own behalf and on behalf of various entities in the Crédit agricole group, including the applicant, Crédit agricole again sought authorisation to exclude from the calculation of the leverage ratio the sums that it was obliged to transfer to the CDC. On 3 May 2019, the ECB granted authorisation to exclude those exposures to Crédit agricole and the entities in its group

41 Judgment of 13 July 2018, *Crédit agricole* v *ECB* (T-758/16, EU:T:2018:472).

42 Article 429(14) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6).

concerned, with the exception of the applicant, to whom only a 66% derogation was granted. The ECB adopted the contested decision applying a methodology that took into account, first, the creditworthiness of the French central government, second, the risk of a fire sale of assets and, third, an assessment of the concentration of exposures in question.

By its judgment, the General Court annulled the ECB's decision in respect of its refusal to authorise Crédit lyonnais to exclude from the calculation of its leverage ratio 34% of its exposure to the CDC. For the first time in litigation on prudential supervision, it explicitly set out the circumstances in which methodologies that limit discretion are lawful.

Assessment by the General Court

After verifying whether the ECB had adopted measures to comply with the judgment in *Crédit agricole* v *ECB* which annulled its original decision, the General Court examined the methodology that the ECB imposed on itself by merely setting out a rule indicating the conduct it would follow. It stated that such a methodology cannot be treated as the adoption of a normative act extending beyond the powers delegated to the ECB and does not relieve the ECB of the need to carry out a specific examination of each individual situation, which may cause it not to apply that methodology.

In response to the third plea in law, the General Court examined the grounds on which the ECB refused to fully grant Crédit lyonnais's application. It recalled that the ECB had a duty to examine carefully and impartially all the relevant aspects of the individual case and to carry out a thorough analysis of the characteristics of regulated savings.

First, the General Court noted that the ECB did not dispute the 'safe investment' status of regulated savings, which the applicant had demonstrated to the requisite legal standard by submitting evidence. It also emphasised that the applicant correctly stated, in essence, that regulated savings are unlikely to contribute to creating excessive leverage since the sums transferred to the CDC cannot be invested in high-risk or illiquid assets. Furthermore, the sums transferred to the CDC benefit from a dual guarantee by the French Republic.

Secondly, the General Court found that, in the light of those considerations, the fact that regulated savings are liquid does not, in itself, demonstrate that there is a risk of a fire sale of assets. Although the ECB justified its decision on the basis of the experience of the recent banking crises, it failed to bear in mind that, in the present case, regulated savings serve as a safe investment during crisis situations.

Thirdly, the General Court found that the ECB relied on a single example of massive withdrawals in the recent banking crises, while the deposits mentioned in the example were not sufficiently close in terms of their characteristics to regulated-savings deposits.

The General Court concluded that the ECB had failed to take into account all the characteristics of regulated savings and, thereby, failed properly to apply the judgment in *Crédit agricole* v *ECB*.

X. ECONOMIC AND SOCIAL COHESION

Judgment of the General Court (Tenth Chamber, Extended Composition) of 14 April 2021, Romania v Commission, T-543/19

Cohesion Fund and ERDF – Article 139(6) of Regulation (EU) No 1303/2013 – Temporal application of an increased co-financing rate adopted after submission of the final application for an interim payment but before acceptance of the accounts – Legitimate expectation – Obligation to state reasons – Principle of good administration

Support from the Cohesion Fund and the European Regional Development Fund (ERDF) was granted to Romania, under the 'Investment for growth and jobs' goal, for the period from 1 January 2014 to 31 December 2020 ('the operational programme'). [43]

The co-financing rate for two of the priority axes of that operational programme, namely improving mobility through the development of the Trans-European Transport Network and the metro and developing a multimodal, high quality, sustainable and efficient transport system, was fixed at 75%. That rate was subsequently increased to 85%, [44] but after the submission to the European Commission by the Romanian authorities of the final application for an interim payment relating to the operational programme for the accounting year 2017/2018.

On 15 February 2019, the Romanian authorities forwarded to the Commission the operational programme accounts for the accounting year 2017/2018. Those authorities requested that the co-financing rate of 85% be applied in respect of those priority axes for that accounting year. By Decision C(2019) 4027 final of 23 May 2019, the Commission accepted the operational programme accounts for that accounting year and calculated the amount chargeable to the Cohesion Fund and the ERDF for that year, the co-financing rate applied in respect of the two priority axes concerned being 75%.

Romania brought an action for annulment in part of that decision, in so far as it applied the co-financing rate of 75%, and not of 85%, in respect of those priority axes. However, that action is dismissed by the Court.

This case leads the Court, for the first time, to rule on the question of the applicable co-financing rate, within the meaning of Regulation No 1303/2013, [45] where that rate is amended after submission of the final application for an interim payment but before acceptance of the accounts. In fact, there is at present a legal void with regard to that question, which is significant for all Member States and for the Commission.

Findings of the Court

The Court observes, first of all, that, although the co-financing rate initially fixed by a Commission decision may be subsequently amended, Regulation No 1303/2013 does not contain any specific provision regulating the temporal application of such an amendment. Nor does the 2018

43 By Commission Implementing Decision C(2015) 4823 final of 9 July 2015, adopted on the basis of Article 29(4) and Article 96(10) of 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), as amended.

44 By Commission Implementing Decision C(2018) 8890 final of 12 December 2018 ('the 2018 Implementing Decision'), adopted on the basis of Article 96(10) of Regulation No 1303/2013.

45 Article 139(6)(a) of that regulation.

Implementing Decision specify whether the amendment of the co-financing rate stated in that decision was already applicable for the accounting year 2017/2018. [46]

Therefore, in order to determine the applicable co-financing rate, within the meaning of Article 139(6) of Regulation No 1303/2013, in the event of such an amendment, the Court applies a literal, contextual and teleological interpretation of Regulation No 1303/2013.

In the first place, as regards the wording of Article 139(6) of Regulation No 1303/2013, the Court notes that it follows from that provision that the Commission is to calculate the amount chargeable to the Cohesion Fund and the ERDF 'for the accounting year' concerned and that the factors to be taken into account in that calculation are also connected with the accounting year to which the accounts which have been accepted relate.

In the second place, as regards the context to which that provision belongs, the Court emphasises that Regulation No 1303/2013 is based on the principle that accounts relate to a specific year, as regards both the financial management of the expenditure chargeable to the Cohesion Fund and the ERDF and the preparation, examination and acceptance of accounts. In accordance with that principle, the procedures laid down in Regulation No 1303/2013 are structured around the concept of 'accounting year'.

Thus, as regards the procedure relating to the financial management of chargeable expenditure, the Court refers to the possibility, for the certifying authority of the Member State concerned, to submit interim payment applications to the Commission covering amounts entered in its accounting system 'in the accounting year' concerned. In that regard, the final application for an interim payment, which is to be submitted following the end of an accounting year, is the basis on which the accounts are to be prepared and the amount chargeable to the Cohesion Fund and the ERDF is to be calculated, and determines the eligible expenditure and the total amount of interim payments which the Commission is to take into account in that calculation.

According to the Court, the final application for an interim payment relating to an accounting year consolidates both the total cumulative amount of eligible expenditure for the accounting year in question and the co-financing rate applicable to all of that expenditure. The eligible expenditure taken into consideration is that entered during the accounting year concerned and set out in the final application for an interim payment. The eligible expenditure and the co-financing rate that applies to that expenditure are two intrinsically linked factors on the basis of which that amount is to be calculated. Thus, as the total amount of the eligible expenditure relating to a given accounting year is settled at the time when the final application for an interim payment for that year is submitted, the determination of the co-financing rate applicable to that expenditure must follow the same logic, so that that rate must be the one that was in force, at the latest, at the time when the final application for an interim payment was submitted.

Furthermore, concerning the procedure for the preparation, examination and acceptance of accounts, the Court observes that the operational programme accounts are verified and accepted 'every year' and that the accounts that serve as the basis for the Commission's calculation are prepared, examined and accepted by reference to the accounting year concerned.

In the third place, as regards the objectives pursued by Regulation No 1303/2013, the Court states that that regulation aims to specify the conditions that allow the Commission to exercise its responsibilities for implementation of the budget of the European Union and to clarify the responsibilities that cooperation entails for Member States. Those conditions must enable the Commission to obtain assurance that Member States are using the European Structural and Investment Funds in a legal and regular manner and in accordance with the principle of sound financial management. The EU legislature considered that the sound financial management of those

46 'Accounting year' refers to the period from 1 July of one year to 30 June of the following year. In this instance, the accounting year 2017/2018 had ended on the date on which the 2018 Implementing Decision was adopted.

funds would be better ensured on the basis of the obligation, for the Member States and for the Commission, respectively, to submit and accept the operational programme accounts on an annual basis. The application, to expenditure incurred during an accounting year and entered in the accounting system, of a co-financing rate adopted following the final application for an interim payment – and therefore not in force either during the accounting year in question or on the date of that final application – would amount to a breach of the principle that accounts relate to a specific year.

Accordingly, on the basis of that analysis, the Court concludes that the co-financing rate applicable in respect of the calculation of the amount chargeable to the Cohesion Fund and the ERDF for a given accounting year is that in force on the date of submission, by the Member State concerned, of the final application for an interim payment corresponding to the accounting year concerned.

XI. ENVIRONMENT

Judgment of the Court (First Chamber) of 15 April 2021, Friends of the Irish Environment, C-470/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Aarhus Convention – Directive 2003/4/EC – Right of access to environmental information held by public authorities – Article 2, point 2 – Notion of 'public authority' – Bodies or institutions when acting in a judicial or legislative capacity – Information in the file of closed court proceedings

In 2016, the non-governmental organisation, Friends of the Irish Environment, submitted to the Courts Service of Ireland a request for access to environmental information contained in the court file relating to proceedings challenging a building permit issued for the construction of wind turbines in County Cork (Ireland). That request, made under the Aarhus Convention [47] and the Directive on public access to environmental information, [48] referred to certain procedural documents and final orders bringing those judicial proceedings to an end.

The Courts Service of Ireland refused the request for access on the ground that Irish law does not provide for access to environmental information connected with judicial proceedings. Seised of an action against the decision refusing access, the Commissioner for Environmental Information confirmed that decision, taking the view, first, that the Courts Service of Ireland held the files requested in the exercise of judicial powers on behalf of the judicial authority and, second, that that Service, when exercising such powers, was not a 'public authority' within the meaning of Irish law. The national legislation transposing the Directive on public access to environmental information excludes

47 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

48 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

from the notion of public authorities bodies when acting in a judicial or legislative capacity, thus making use of the option which the directive gives to the Member States in that regard. [49]

The organisation brought an action against the decision of the Commissioner for Environmental Information before the High Court (Ireland). In its action, it claimed that the derogation from the right of access for which Member States may provide for bodies acting in the exercise of judicial powers does not cover court files in closed cases.

Harbouring doubts as to the scope of the option to exclude from the notion of 'public authority' bodies or institutions when acting in a judicial or legislative capacity, [50] the High Court decided to refer a question to the Court of Justice on that point.

Findings of the Court

As a preliminary point, the Court recalls that the purpose of the Directive on public access to environmental information is to ensure that citizens have access to environmental information held by the public authorities of the Member States. However, it allows the latter to exclude from the scope of that directive public authorities when acting 'in the exercise of judicial powers'. That option to derogate concerns only bodies or institutions coming within the definition of 'public authority' set out in that directive.

For that reason, the Court first of all examines whether courts and natural or legal persons under their control constitute 'public authorities' within the meaning of the directive on public access to environmental information and, accordingly, whether they fall within the scope of that directive.

In that regard, it considers, first, that the reference to 'public authorities', in the Aarhus Convention and in the Directive on public access to environmental information, does not cover judicial authorities, in particular courts, but only administrative authorities of the Member States, since it is they which are normally required, in the exercise of their functions, to hold environmental information. Courts are not in any of the categories of bodies referred to in the definition of 'public authorities' given in that directive. More specifically, the Court considers that they do not fall within any of the categories of public authorities referred to in the directive, since they do not form part of either the government or other public authorities referred to in the directive, or natural or legal persons performing public administrative functions in relation to the environment, a category which concerns only natural or legal persons performing executive functions or assisting in the performance of those functions. Consequently, the courts are not, a fortiori, included in the persons or bodies under the control of a body or institution falling within those categories.

The Court also notes that although, by adopting the Directive on public access to environmental information, the EU legislature intended to promote public access to environmental information held by administrative authorities and participation by the public in administrative environmental decision-making, it did not intend to promote public information in judicial matters and public involvement in decision-making in that area. On the contrary, the EU legislature took into account the diversity of national rules on access to information contained in court files by giving Member States the option of excluding from the scope of the right of access to that information bodies or institutions which may occasionally be called upon to act in the exercise of judicial powers without themselves having the nature of a court, such as certain independent administrative authorities. Similarly, the EU legislature has provided for the option that Member States may derogate from the principle of public access to environmental information when disclosure could adversely affect the course of justice, the ability of

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49 First sentence of the second subparagraph of Article 2, point 2, of the Directive on public access to environmental information.

50 Article 2, point 2, of the Directive on public access to environmental information.

a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature. [51]

From all the foregoing, the Court concludes that courts and natural or legal persons under their control are not 'public authorities' within the meaning of the directive. They do not therefore fall within the scope of that directive and, accordingly, are not subject to the obligation laid down in the directive to provide public access to environmental information in their possession. In those circumstances, it is for the Member States alone to provide, where appropriate, for a right of public access to information contained in court files and to determine the manner in which it may be exercised.

In the present case, the Court observes that, according to the information in the file before it, the Courts Service of Ireland is responsible for storing, archiving and managing court files on behalf of and under the supervision of the court concerned. It states that it is for the referring court to ascertain whether, because that body has close links with the Irish courts, under the supervision of which it is placed, it must be regarded, like those courts, as a judicial authority, which has the effect of removing it from the scope of that directive.

51 Article 4(2)(c) of the Directive on public access to environmental information.

XII. INTELLECTUAL PROPERTY

1. TRADE MARK

Judgment of the General Court (Sixth Chamber, Extended Composition) of 21 April 2021, Hasbro v EUIPO - Kreativni Dogadaji (MONOPOLY), T-663/19

Link to the complete text of the judgment

EU trade mark – Invalidity proceedings – EU word mark MONOPOLY – Absolute ground for refusal – Bad faith – Article 52(1)(b) of Regulation (EC) No 207/2009 (now Article 59(1)(b) of Regulation (EU) 2017/1001)

Hasbro, Inc. is the proprietor of three earlier EU word marks MONOPOLY. Following an application filed on 30 April 2010 with the European Union Intellectual Property Office (EUIPO), Hasbro obtained the registration of another word mark MONOPOLY, which was contested in the present case. Kreativni Događaji d.o.o. filed an application for a declaration that that mark was invalid pursuant to Article 52(1)(b) of Regulation No 207/2009, [52] under which a trade mark is to be declared invalid where the applicant was acting in bad faith when he or she filed the application for the trade mark.

By decision of 22 July 2019, EUIPO declared the contested mark invalid for some of the goods and services and dismissed the appeal as to the remainder. EUIPO found that, with regard to the goods and services covered by the contested mark which were identical to the goods and services covered by the earlier marks, Hasbro had acted in bad faith when it filed the application for registration of that mark.

Hasbro brought an action before the General Court seeking the annulment of EUIPO's decision, to the extent that that decision declared the contested mark invalid.

In its judgment, the General Court dismissed Hasbro's action and explained the rules relating to the assessment of whether there is bad faith on the part of the trade mark applicant. In particular, it stated that any re-filing of a trade mark cannot, in itself, establish that there was bad faith on the part of the trade mark applicant. However, in the present case, the fact that the aim of Hasbro's repeat filing was that of not having to prove use of the earlier marks, was capable of establishing bad faith on its part.

Findings of the Court

As regards the principal line of argument, alleging infringement of Article 52(1)(b) of Regulation No 207/2009, the Court pointed out at the outset that the absolute ground for invalidity referred to in that article applies where the proprietor of an EU trade mark has filed the application for registration 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. [53] The General Court also referred to the clarification of the Court of Justice regarding the criteria for the assessment of whether there is bad faith, [54] by stating that the factors listed in the case-law are only examples and that the fact that any one of those factors is not present does not necessarily preclude a finding of bad faith.

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52 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended.

53 Judgment of 12 September 2019, *Koton Mağazacilik Tekstil Sanayi ve Ticaret* v *EUIPO* (C-104/18 P, EU:C:2019:724, paragraph 46).

54 Judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli* (C-529/07, EU:C:2009:361, paragraph 53).

In the first place, the General Court dealt with the application of the rules relating to the assessment of whether there was bad faith in the context in which EUIPO had found that Hasbro's aim in filing the contested mark was that of avoiding having to prove genuine use of the earlier marks. It stated, first of all, that the exclusive right conferred on the proprietor of a mark can be protected only if, on expiry of the five-year grace period, the proprietor is able to prove genuine use of its mark. Non-use of an EU trade mark also risks restricting the free movement of goods and services. The entry of a trade mark in the register cannot be regarded as a strategic and static filing granting an inactive proprietor a legal monopoly for an unlimited period. On the contrary, the register must faithfully reflect what companies actually use. Furthermore, the Court pointed out that a repeat filing of a mark which is carried out in order to avoid the consequences entailed by non-use of earlier marks may constitute a factor which is capable of establishing bad faith on the part of the person who filed that mark.

In the light of those considerations, the Court confirmed EUIPO's assessment, holding that Hasbro's aim in re-filing was that of not having to prove use of the contested mark, thus extending, with regard to the earlier marks, the five-year grace period provided for in Article 51(1)(a) of Regulation No 207/2009. [55] Although there is nothing to prohibit the proprietor of a trade mark from re-filing that mark, in the present case Hasbro's intention had to be held to be contrary to the objectives of that regulation and to the principles governing EU trade mark law. In particular, that strategy indicated an intention to circumvent the fundamental rule relating to proof of use in order to derive an advantage therefrom to the detriment of the balance of the EU trade mark system. According to the Court, such conduct called to mind a case of an abuse of law, which is characterised by the fact that, first, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and that, secondly, there is an intention to obtain an advantage from those rules by creating artificially the conditions laid down for obtaining it.

The Court added that, in the context of the assessment of whether there was bad faith, EUIPO had taken other relevant factors into account, inter alia Hasbro's objective of protecting the contested mark with regard to other goods and services in order to keep up with developments in technology and its expanding business. However, those factors did not make the filing strategy with regard to that mark acceptable.

In the second place, the Court clarified that it was not apparent either from Regulation No 207/2009 or from the case-law that, in the present case, obtaining an advantage or causing harm was relevant for the purposes of assessing whether there was bad faith.

In the third place, the Court stated that, regardless of the fact that the extensions of the grace periods in respect of the earlier marks were not particularly long, what mattered was the intention of Hasbro, which had itself admitted that one of the advantages which justified the filing of the contested mark was not having to furnish proof of its genuine use.

In the fourth place, the Court stated that Hasbro's unsubstantiated arguments that it pursued a filing strategy that was common and that it had acted in accordance with advice from counsel did not necessarily make that strategy legal and acceptable.

In the fifth place, the Court upheld EUIPO's assessment that goods in respect of which the contested mark had been declared invalid were included in a more general category of goods covered by one of the earlier marks and were therefore identical to those goods.

In the sixth place and lastly, the Court rejected Hasbro's argument that EUIPO had erred in finding that the administrative burden placed on Hasbro could not be reduced by the re-filing of a mark which was identical to the earlier marks.

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55 That article provides, in essence, that the rights of the proprietor of an EU trade mark are to be declared to be revoked if, within a continuous period of five years, the trade mark has not been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered.

2. DESIGNS

Judgment of the General Court (Fifth Chamber) of 21 April 2021, Bibita Group v EUIPO - Benkomers (Bouteille pour boissons), T-326/20

Link to the complete text of the judgment

Community design – Invalidity proceedings – Registered Community design representing a beverage bottle – Prior international design – Ground for invalidity – Conflict with a prior design – Individual character – Informed user – Degree of freedom of the designer – Different overall impression – Article 6 and Article 25(1)(d)(iii) of Regulation (EC) No 6/2002

On 13 March 2017, Benkomers OOD filed an application for registration of a Community design representing a beverage bottle with the European Union Intellectual Property Office (EUIPO). Following registration of the design, the applicant, Bibita Group, filed an application for a declaration of invalidity of that design, in support of which it relied on Article 25(1)(d)(iii) of Regulation No 6/2002. [56] Bibita Group submitted that, since, in the context of Article 25(1)(d)(iii) of Regulation No 6/2002, the same criteria as for the assessment of individual character under Article 25(1)(b), read in conjunction with Article 6 of that regulation, should be applied, the contested design lacked individual character in relation to the design of which it was the holder, which had been protected from a date prior to the application for registration of the contested design. The application for a declaration of invalidity was rejected by the Invalidity Division and the Board of Appeal of EUIPO dismissed the appeal.

The Court dismisses the action brought by Bibita Group against the decision of the Board of Appeal and clarifies the concept of 'conflict' within the meaning of Article 25(1)(d) of Regulation No 6/2002.

Findings of the Court

First of all, the Court recalls that, according to settled case-law, Article 25(1)(d) of Regulation No 6/2002 must be interpreted as meaning that a Community design is in conflict with a prior design when, taking into consideration the freedom of the designer in developing the Community design, that design does not produce on the informed user a different overall impression from that produced by the prior design relied on.

Next, as regards the argument that the prior design enjoyed particularly broad protection, the Court states that, despite the reference in recital 14 of Regulation No 6/2002 to the existence of a 'clear' difference between the overall impressions produced by the designs at issue, the wording of Article 6 of that regulation is clear and unambiguous. Thus, a design is eligible for the protection afforded by the Community design if it produces on the informed user a different overall impression from that produced by a prior design.

Furthermore, the Court points out that, even if it were established that, at the date of its registration, the shape of the prior design would have been entirely new in the industrial sector concerned, the uniqueness of such a shape does not confer on the prior design broader protection than that which it

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56 In accordance with Article 25(1)(d)(iii) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), as amended, a Community design may be declared invalid if it is in conflict with a prior design which has been made available to the public after the date of filing of the application or, if priority is claimed, the date of priority of the Community design, and which is protected from a date prior to the said date by a design right registered under the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, adopted in Geneva on 2 July 1999, which was approved by Council Decision 2006/954/EC of 18 December 2006 (OJ 2006 L 386, p. 28), and which has effect in the Community, or by an application for such a right.

enjoys under Regulation No 6/2002. Moreover, the allegedly unprecedented character or originality of the appearance of the prior design has no influence on the assessment of the individual character of the contested design.

Lastly, after recalling the criteria for assessing the individual character of a Community design, the Court carries out an assessment of the overall impression produced by the designs at issue on the informed user. It points out that the assessment to be made in that regard involves taking into account all the elements that distinguish the designs at issue, other than those which remain insufficiently significant to affect that overall impression. The designs at issue have significant differences.

Consequently, the Court holds that the Board of Appeal was correct in concluding that the contested design was not in conflict with the prior design within the meaning of Article 25(1)(d)(iii) of Regulation No 6/2002.

XIII. COMMON FOREIGN AND SECURITY POLICY

Judgment of the General Court (Fifth Chamber) of 21 April 2021, El-Qaddafi v Council, T-322/19

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures taken in view of the situation in Libya – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Restrictions on entry into and transit through the territory of the European Union – List of persons subject to restrictions on entry into and transit through the territory of the European Union – Retention of the applicant's name on the lists – Period allowed for commencing proceedings – Admissibility – Obligation to state reasons – Error of assessment

Following the war in Libya in 2011 and the fall of the regime of Muammar Qadhafi, the United Nations Security Council adopted, on 26 February 2011, Resolution 1970 (2011), which introduced restrictive measures against Libya and against persons and entities involved in serious human-rights abuses, including by being involved in attacks on civilian populations. [57] The Council of the European Union, for its part, adopted restrictive measures in view of the situation in Libya [58] on 28 February and 2 March 2011; these provide that the Member States are to take the necessary measures to prevent the entry into, or transit through, their territories of persons covered by Resolution 1970 (2011), and for the funds, other financial assets and economic resources of such persons to be frozen. After the adoption in 2014 and 2015 by the United Nations Security Council of further restrictive measures against persons and entities threatening the peace, stability or security of Libya or the successful completion of its political transition, [59] the Council adopted further acts [60] for the purpose, in particular, of extending the original designation criteria.

The applicant, a Libyan national, is the daughter of former Libyan leader Mr Muammar Qadhafi. She was included on the lists annexed to the Council's acts initially because of her close association with the regime and subsequently because she had travelled in violation of Resolution 1970 (2011). After carrying out a review of the lists of the names of the persons and entities concerned, the Council, by Decision 2017/497 and Regulation 2017/489, [61] and subsequently, maintaining the same grounds in the applicant's case, by Decision 2020/374 and Regulation 2020/371, [62] kept the applicant's name on those lists pursuant to Resolution 1970 (2011) specifying the travel ban and asset freeze. The applicant challenged those acts.

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57 United Nations Security Council Resolution 1970 (2011) of 26 February 2011.

58 Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya (OJ 2011 L 58, p. 53), and Council Regulation (EU) No 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya (OJ 2011 L 58, p. 1).

59 United Nations Security Council Resolution 2174 (2014) of 27 August 2014, and United Nations Security Council Resolution 2213 (2015) of 27 March 2015.

60 Council Decision (CFSP) 2015/818 of 26 May 2015 amending Decision 2011/137 (OJ 2015 L 129, p. 13), and Council Regulation (EU) 2015/813 of 26 May 2015 amending Regulation No 204/2011 (OJ 2015 L 129, p. 1).

61 Council Implementing Decision (CFSP) 2017/497 of 21 March 2017 implementing Decision (CFSP) 2015/1333 concerning restrictive measures in view of the situation in Libya (OJ 2017 L 76, p. 25), and Council Implementing Regulation (EU) 2017/489 of 21 March 2017 implementing Article 21(5) of Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya (OJ 2017 L 76, p. 3).

62 Council Decision (CFSP) 2020/374 of 5 March 2020 implementing Decision 2015/1333 (OJ 2020 L 71, p. 14), and Council Implementing Regulation (EU) 2020/371 of 5 March 2020 implementing Article 21(5) of Regulation 2016/44 (OJ 2020 L 71, p. 5).

The General Court annuls those acts in so far as they concern the applicant, on the ground that the contested acts have no factual basis. With regard to the admissibility of the action, the General Court rules, in particular, that the Council is required to communicate decisions amending a listing to the persons concerned, even if no obligation arises directly from the contested acts in the present case.

Findings of the General Court

With regard to the admissibility of the action, which the Council claimed was out of time, the Court notes first of all that, while the entry into force of the contested acts is effected by their publication in the *Official Journal of the European Union*, the period for the bringing of an action for annulment of the contested acts under the fourth paragraph of Article 263 TFEU runs, for each of the persons listed, from the date of the communication which they must receive. The Court states in that respect that although Decision 2015/1333 and Regulation 2016/44, on the basis of which the contested acts were adopted, do not place the Council under an express obligation to notify the persons concerned of the acts by which it maintained their names on the lists, the obligation to notify stems from the principle of effective judicial protection, including in the case of a decision to maintain the listing, independently of whether that decision was based on new factors. In the present case, the contested acts were not adopted at regular intervals and, in view of the lack of foreseeability as to their adoption, if the period for bringing an action were to start to run only from their publication, the persons concerned would have to check the Official Journal continually, which could impede their access to the Courts of the European Union. The Court concludes from this that the Council cannot legitimately claim that the period for bringing an action in the present case started to run, with respect to the applicant, from the date of publication of the contested acts in the Official Journal.

As regards the manner in which the Council was required to communicate the acts to the applicant for the purpose of establishing the point from which the period for bringing an action started to run, the Court recalls that indirect communication of such acts through the publication of a notice in the Official Journal is permissible only if it is impossible for the Council to undertake individual communication. Since the contested acts were not the subject of a notice published in the Official Journal and it was not impossible for the Council to communicate those acts to the applicant or to her lawyer, who was duly authorised to accept such notification on behalf of her client, the Court finds, in the light of the file, that individual communication of the 2017 acts was effected by a letter of 25 March 2019, and that the applicant could have become aware of the 2020 acts, at the earliest, as a result of a reply from the Council of 13 July 2020 in the context of a measure of organisation of procedure of the Court. The Court concludes that the action was not, therefore, time-barred.

On the substance, as regards, in the first place, the alleged failure to provide a statement of reasons for the contested acts, the Court notes that the contested acts state the reason why the Council maintained the applicant's name on the lists at issue in March 2017 and in March 2020, which corresponds to the justification given for the entry of her name on the lists annexed to the 2011 acts and subsequently on the lists at issue. The Court recalls that the Council provided information to the applicant, referring, first, to the public statements she had made in 2011 and in 2013 calling for the overthrow of the legitimate Libyan authorities and revenge for her father's death, and, second, to the ongoing instability in Libya, while reaffirming the need to prevent individuals associated with the former regime of Mr Qadhafi from continuing to undermine the situation in Libya. The Court concludes from this that the applicant was able to understand that her name had been maintained on the lists at issue because of her listing pursuant to Resolution 1970 (2011), those statements, which are part of the context in which the contested acts were adopted, and the fact that the Council considered those measures still to be necessary.

As regards, in the second place, the claim that there is no factual basis for maintaining the applicant's name on the lists, the Court notes that the contested acts do not refer to any justification for maintaining the applicant's name on the lists at issue in March 2017 and March 2020 other than that put forward for the entry of her name on the lists annexed to the 2011 acts and the application of Resolution 1970 (2011). It notes that although the reasons relied on in the contested acts, namely being the daughter of Muammar Qadhafi and the closeness of her association with his regime, were not challenged in good time before the Courts of the European Union, the Council was not relieved of its obligation to establish that the retention of the applicant's name on the lists at issue had a sufficiently solid factual basis.

In addition, the Court observes that the Council merely refers to the public statements which the applicant reportedly made in 2011, in the immediate aftermath of reports concerning the death of Mr Qadhafi and Mr Mutassim Qadhafi, and in 2013. The Court notes that several years have elapsed since those statements were reported in the press and brought to the attention of the Council, yet the Council does not give the slightest indication as to why the content of those statements might have shown that the applicant still represented a threat subject to sanctions within the framework of the objectives of Resolution 1970 (2011), notwithstanding the intervening changes in relation to her individual situation. In that regard, the Court observes that, since the 2011 listing measures and the subsequent listing measures, the applicant has ceased to reside in Libya and the file does not mention any participation on her part in Libyan political life or statements other than those attributed to her in 2011 and 2013. Despite those changes in her individual situation, the Council does not explain why she represented a threat to international peace and security in the region in 2017 and 2020, when the contested acts were adopted. The Court concludes that, in the light of all those considerations, the applicant's criticisms that the contested acts have no factual basis justifying the retention of her name on the lists at issue are well founded, and that the Council made an error of assessment such as to lead to the annulment of Decisions 2017/497 and 2020/374 and Regulations 2017/489 and 2020/371.

XIV. PUBLIC PROCUREMENT BY THE EU INSTITUTIONS

Judgment of the General Court (First Chamber) of 21 April 2021, Intering and Others v Commission, T-525/19

Public contracts – Tendering procedure – Reduction of dust and nitrogen oxide emissions at the Kosovo B thermal power plant, Units B1 and B2 – Rejection of the application – Application for annulment submitted in the reply – New claims – Manifest inadmissibility – Amendment of the selection criteria during the procedure – Equal treatment

On 19 March 2019, the European Union, represented by the European Commission, published a contract notice relating to a call for tenders for the award of a contract for dust and nitrogen oxide reduction measures at Kosovo B thermal power plant, Units B1 and B2 [63] ('the contract notice'). The applicants, four commercial companies, formed a consortium and expressed their interest in participating in the restricted tendering procedure in question.

On 7 June 2019, the Commission informed the applicants that their tender had not been pre-selected on the ground that it did not meet the criteria set out in paragraph 17.2(a) and (c) of the contract notice relating to the selection and award criteria with regard to the technical and professional capacity of the tenderer ('the decision of 7 June 2019'). In accordance with paragraph 17.2(a) of the contract notice, the tenderer must have completed at least one project of the same nature and complexity covering certain categories clearly defined in the contract notice, executed on lignite fired power plants with rated electrical output of at least 200 MW in the last 8 years. Pursuant to paragraph 17.2(c), in the case of a tender from a joint venture or consortium, its Lead member must have the ability to carry out at least 40% of the contract works by its own means.

63 EuropeAid/140043/DH/WKS/XK.

On 30 July 2019, the Commission informed the applicants, first, that the decision of 7 June 2019 had been annulled due to the lack of clarity of the selection criterion set out in paragraph 17.2(c) of the contract notice which had consequently been removed from the selection criteria and, second, that their tender had again been rejected ('the decision of 30 July 2019'). It was found that their tender did not contain any evidence that the criterion relating to technical and professional capacity set out in paragraph 17.2(a) of the contract notice had been met.

On 18 October 2019, the contract was definitively awarded to another consortium ('the decision of 18 October 2019'). Consequently, the applicants brought an action seeking annulment of the decision of 30 July 2019 to exclude the applicants from the restricted tendering procedure in question and, in the reply, annulment of the decision of 18 October 2019 relating to the award of the contract.

By its judgment, the General Court upholds in part the applicants' action and annuls the Commission's decision of 30 July 2019 on the ground that, by removing the criterion set out in paragraph 17.2(c) of the contract notice, whilst continuing the public procurement procedure, the Commission failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency. The Court thus decides, for the first time that, where the review body annuls a decision relating to a selection criterion, the contracting authority cannot, without infringing those principles, validly continue the tender procedure leaving aside that criterion. That rule, which already existed for award criteria, now also applies to selection criteria.

Findings of the Court

First, with regard to the argument put forward by the applicants that the Commission failed to submit its defence within the time limit set, the Court finds that the applicants' claim stems from confusion between the date of lodging the defence at the Court Registry, on the one hand, and its notification to the applicants, on the other. The Court observes in that regard that it is apparent from the documents in the file that the defence was lodged at the Court Registry on 8 October 2019, [64] and therefore within the two-month time limit, [65] extended on account of distance. [66] Accordingly, it was appropriate for the written stage of the procedure to be continued.

Second, as regards the application for annulment of the decision of 18 October 2019 put forward by the applicants in their reply, the Court points out that a case is brought before the Court of Justice of the European Union by a written application addressed to the Registrar and not, like in the present case, by lodging a document in the course of the proceedings which are pending. [67] In that regard, the Court notes that the applicants, in the event that they simply intended to modify the form of order sought to cover that decision as well, must indicate the subject matter of the proceedings and set out the form of order sought in the application initiating proceedings. [68] Subject to the existence of certain circumstances, [69] only the form of order set out in the originating application may be taken into consideration and the substance of the application must be examined solely with reference to the order sought in the application initiating proceedings.

In that regard, having examined whether the application for annulment of the decision of 18 October 2019 falls within the scope of such circumstances, the Court notes that, whilst that decision was taken subsequent to the commencement of the present action, it neither replaces nor modifies the decision of 30 July 2019. Consequently, by noting that the applicants cannot modify, at the time of the reply,

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64 Article 6 of the Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia.

65 Article 81(1) of the Rules of Procedure of the General Court.

66 Article 60 of the Rules of Procedure of the General Court.

67 Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court pursuant to Article 53 thereof.

68 Article 76 of the Rules of Procedure of the General Court.

69 Article 86 of the Rules of Procedure of the General Court.

the form of order sought to cover the decision of 18 October 2019 as well, the Court considers that the application for annulment thereof is manifestly inadmissible.

Third, as for the action brought against the decision of 30 July 2019, the Court notes that the principles of equal treatment and transparency of award procedures imply an obligation on the part of contracting authorities to interpret the award criteria in the same way throughout the procedure and that they must not be amended in any way during the procedure. It follows that, where the contracting authority annuls a decision relating to an award criterion, that authority cannot, without infringing the principles of equal treatment and transparency, validly continue the tender procedure leaving aside that criterion, since that would be tantamount to amending the criteria applicable to the procedure in question.

In that regard, the Court notes that those principles are applicable *mutatis mutandis* to the selection criteria. Even though the selection criteria, applied during the first stage of a restricted tendering procedure, are more objective in nature, in so far as they do not involve a weighing or balancing exercise, the fact remains that the withdrawal, during a tendering procedure, of one of the selection criteria may have an effect on and conflict with the principle of equal treatment. Accordingly, such withdrawal has an impact on any tenderer excluded from the further tendering procedure for failing to meet the selection criterion which was subsequently removed. Similarly, such withdrawal affects the position of potential tenderers who did not respond to the call for tenders on the ground, in particular, that they considered that they were unable to meet the criterion which, unbeknownst to them, was subsequently removed.

The Court thus finds that, by removing the criterion set out in paragraph 17.2(c) of the contract notice, whilst continuing the public procurement procedure, the Commission failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency.

Consequently, the Court upholds in part the applicants' action and annuls the Commission's decision of 30 July 2019 rejecting their request to participate in the restricted tendering procedure in question.

XV. EUROPEAN CIVIL SERVICE

Judgment of the General Court (Fourth Chamber) of 28 April 2021, HR v EESC, T-843/19

Civil service – EESC staff – Members of the temporary staff – Refusal to regrade – Action for annulment – Time limit for complaints – Burden of proving expiry of the time limit – Act adversely affecting an official – Admissibility – Equal treatment – Legal certainty – Action for damages – Non-material damage

In September 2000, the applicant was recruited by the European Economic and Social Committee (EESC) – a consultative body representing European organisations of employers, employees and other participants in civil society – as a member of the temporary staff, under a contract for an indefinite period. In the course of her career at the EESC, the applicant was regraded on only two occasions, most recently in 2016.

On 10 July 2019, the applicant brought a complaint against the decision not to regrade her in a higher grade in the 2019 regrading process (the 'contested decision').

After that complaint was rejected, the applicant brought an action before the General Court, seeking annulment of the contested decision and an award of damages in the sum of EUR 2 000 by way of compensation for the non-material damage suffered.

The Court annulled the contested decision, which had been adopted on a date unknown to the applicant, and ruled for the first time on the issue of regrading of members of the temporary staff, in the absence of clear, objective and transparent criteria or evaluation material. It held, in that regard, that the absence of such criteria or material is liable to undermine the principles of equal treatment and legal certainty, and consequently the rights of members of the temporary staff assigned to the institutions, bodies, offices and agencies of the European Union who are eligible for regrading. The Court also ordered the EESC to pay the applicant the claimed sum of EUR 2 000 in respect of the non-material damage she suffered.

Findings of the Court

The Court observed, first of all that, in respect of a decision relating to a specific individual, evidence of the point at which the person concerned had knowledge of such a decision, which marks the beginning of the periods for submitting a complaint and bringing an action, as laid down in Articles 90 and 91 of the Staff Regulations of Officials of the European Union (the 'Staff Regulations'), may be obtained from circumstances other than formal notification of that decision. In that regard, while mere circumstantial evidence suggesting that the decision was received is not sufficient, such evidence may be obtained from an email from the person concerned from which it is undoubtedly clear that he or she had had effective knowledge of the decision before the date alleged.

The Court also observed that the acts or decisions in respect of which an action for annulment may be brought are limited to those measures which produce binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in his or her legal position. Where the acts or decisions in question are formulated in several stages, for example in the course of an internal procedure such as that relating to the procedure for regrading of members of the temporary staff, the only acts which can be challenged are the measures definitively determining the position of the institution at the conclusion of that procedure. By contrast, the intermediary measures whose purpose is to prepare the final decision are not acts adversely affecting an official for the purposes of Article 90(2) of the Staff Regulations and can be challenged only incidentally in an action against the acts capable of being annulled. In that regard, it is only when the duly published list of regraded members of the temporary staff is established that the legal position of members of the temporary staff eligible for regrading can be affected.

Next, as regards the lack of any decision adopting rules for the regrading of members of the temporary staff within the EESC, the Court noted that, while the EU institutions are not obliged to adopt one particular appraisal and regrading system rather than another, any regrading procedure must be carried out in accordance with general principles of law such as the principles of equal treatment and legal certainty. Compliance with the principle of equal treatment requires the

institution, body, office or agency of the European Union to ensure that it has a set of evaluation material, for example staff reports, available to provide the basis for its assessment of merits, so as to avoid arbitrariness and ensure equal treatment of candidates eligible for promotion. The Court added that considerations of a budgetary nature or relating to the 'eminently political' nature of the body in question cannot release it from that obligation.

Furthermore, the Court indicated that the failure of the EESC to publish regrading decisions, in accordance with the third paragraph of Article 25 of the Staff Regulations, infringes the principle of legal certainty and the obligation of transparency, which is a corollary of the principle of equal treatment, intended to enable the impartiality and non-arbitrariness of the administration to be reviewed. Consequently, the EESC's non-publication of regrading decisions is not only contrary to the Staff Regulations, but also infringes the rights of members of the temporary staff assigned to the secretariats of the various EESC groups, in that it prevents review of the impartiality of the administration in relation to a regrading procedure.

Lastly, in relation to the claim for damages, the Court found that, in the present case, the annulment of the contested decision cannot, in itself, constitute full compensation for the non-material damage suffered by the applicant, and particularly her feelings of uncertainty as regards her career development. It is impossible to predict the nature of the evaluation material which could be adopted by the EESC, and difficult to determine how the applicant's performance could be assessed in the light of that material. Thus, whatever system the EESC may adopt by way of implementation of the judgment, doubt will remain as to the applicant's prospects of retroactive regrading and, as the case may be, as to how she might have performed if the evaluation material to be used for the purposes of regrading had been defined from the outset.

Nota :

The summaries of the following cases are currently finalised and will be published in a subsequent issue of the Monthly Case-Law Bulletin :

- Judgment of 14 April 2021, Verband Deutscher Alten und Behindertenhilfe and CarePool Hannover v Commission, Case T-69/18, ECLI:EU:T:2021:189
- Judgment of 14 April 2021, The KaiKai Company Jaeger Wichmann v EUIPO (and articles de gymnastique ou de sport), Case T-579/19, ECLI:EU:T:2021:186
- Order of 27 April 2021, Macías Chávez and Others v Spain and Parliament, Case T-719/20, ECLI:EU:T:2021:216

XVI. JUDGMENTS PUBLISHED IN MARCH 2021

Judgment of the Court (Grand Chamber) of 2 March 2021, Commission v Italy and Others , C-425/19

Link to the complete text of the judgment

Appeal – State aid – Measures adopted by a consortium of banks governed by private law for the benefit of one of its members – Measures authorised by the Central Bank of the Member State – Concept of 'State aid' – Whether imputable to the State – State resources – Evidence supporting the conclusion that a measure is imputable – Distortion of elements of fact and of law – Decision declaring the aid incompatible with the internal market

In 2013, the Italian bank Banca Popolare di Bari SCpA ('BPB') expressed its interest in subscribing to a capital increase in Banca Tercas ('Tercas'), another Italian private equity bank, which had been placed under special administration following irregularities identified by Banca d'Italia, the Italian supervisory authority of the banking sector.

That expression of interest by BPB was, however, subject to the condition that the negative equity of Tercas be covered in full by the Fondo Interbancario di Tutela dei Depositi ('the FITD'). The latter is a mutual consortium of banks governed by private law which is obliged to intervene under the statutory deposit guarantee in the event of compulsory liquidation of one of its members. The FITD also has the power to take preventive measures in order to support a member placed under special administration. Such a possibility requires, however, that the prospects of recovery exist and that a lesser burden be expected compared with the burden that would be incurred by the intervention of the FITD under the statutory deposit guarantee in the event of a compulsory liquidation of the member concerned.

In 2014, after satisfying itself that preventive measures for the benefit of Tercas were economically more advantageous than the repayment of that bank's depositors in the event of compulsory liquidation, the FITD decided to cover Tercas' negative equity and to grant it certain guarantees. Those measures were approved by Banca d'Italia.

By decision of 23 December 2015, [70] the European Commission found that the intervention of the FITD for the benefit of Tercas constituted an unlawful State aid granted by the Italian Republic to Tercas, and ordered its recovery.

The Italian Republic, BPB and the FITD, supported by Banca d'Italia, brought actions for annulment of that decision. By judgment of 19 March 2019, [71] the General Court upheld those actions and annulled the decision of the Commission, on the ground that the conditions for the intervention of the FITD to be classified as State aid were not fulfilled, since that intervention was neither imputable to the Italian State nor financed through the resources of that Member State. [72]

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70 Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451(2015/C) (ex 2015/NN)) (OJ 2016 L 203, p. 1).

71 Judgment of 19 March 2019, *Italy and Others* v *Commission* (T-98/16, T-196/16 and T-198/16, EU:T:2019:167).

72 Classification of a measure as 'State aid' for the purposes of Article 107(1) TFEU requires four conditions to be satisfied, namely, that there be intervention by the State or through State resources, that the intervention be liable to affect trade between Member States, that it confer a selective advantage on the beneficiary and that it distort or threaten to distort competition.

By dismissing the appeal brought by the Commission, the Court of Justice, sitting as the Grand Chamber, clarifies its case-law on the imputability to the State of aid measures granted by an entity governed by private law which is neither an organisation of the State nor a public undertaking.

Findings of the Court

The Court, first, recalls that, in order for it to be possible to classify advantages as 'aid' within the meaning of Article 107(1) TFEU, they must be granted directly or indirectly through State resources and be imputable to the State.

As regards, specifically, the imputability to the Italian authorities of the measures adopted by the FITD for the benefit of Tercas, the Court of Justice finds, next, that the General Court did not err in holding that the evidence put forward by the Commission to demonstrate the influence of the Italian public authorities on the FITD does not allow the measures adopted for the benefit of Tercas to be imputed to the Italian authorities.

In that respect, the Court of Justice considers that the General Court correctly applied the case-law according to which it is for the Commission to demonstrate, on the basis of a set of indicators, that the measures at issue were imputable to the State and, therefore, did not require the Commission to meet a higher standard of proof in relation to the imputability of an advantage to the State solely on account of the fact that the FITD is a private entity.

In that regard, the Court of Justice asserts that it follows from the fact that the entity that provided the aid is a private entity that the appropriate evidence for the purpose of demonstrating that the measure is imputable to the State differs from that required in a situation where the entity providing the aid is a public undertaking.

Accordingly, the General Court did not impose different standards of proof but, rather, applied the settled case-law of the Court of Justice according to which the appropriate evidence for the purpose of demonstrating the imputability of an aid measure necessarily arises from the circumstances of the case and the context in which that measure was taken, and the absence of a link of a capital nature between the FITD and the State is clearly relevant in that regard.

The Court also clarifies that its case-law on the concept of 'emanation of the State', which allows individuals to rely on unconditional and sufficiently precise provisions of a directive that is not transposed or is incorrectly transposed, against organisations or bodies which are subject to the authority or control of the State, cannot be applied to the question whether aid measures are imputable to the State for the purposes of Article 107(1) TFEU.

Furthermore, the Court of Justice rejects the Commission's argument alleging the risk of circumvention of Banking Union legislation. The Commission submitted in that regard that the refusal to impute to the State authorities measures adopted by a body such as the FITD for the benefit of a private equity bank entailed a risk of circumvention of Article 32 of Directive 2014/59, [73] which provides for resolution where a credit institution requires extraordinary public financial support, amounting to State aid. In that regard, the Court of Justice notes that the classification of a measure taken by a deposit guarantee scheme as State aid capable of triggering that resolution procedure remains possible, depending on the features of that scheme and of the particular measure.

Lastly, the Court of Justice confirms that it is on the basis of the analysis of all of the evidence on which the Commission relied, taken in its proper context, that the General Court found that the Commission had erred in law when it considered that the Italian authorities had exercised substantial public control in establishing the measures adopted by the FITD for the benefit of Tercas.

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[73] Article 32(4) of 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.

Order of the General Court (Eighth Chamber) of 17 March 2021, 3M Belgium v ECHA, T-160/20

Link to the complete text of the judgment

Action for annulment – REACH – Identification of perfluorobutanesulfonic acid (PFBS) and of its salts as a substance of very high concern – Inclusion in the list of substances identified with a view to their eventual inclusion in Annex XIV to Regulation (EC) No 1907/2006 – Time limit for bringing an action – Article 59(10) of Regulation No 1907/2006 – Article 59 of the Rules of Procedure – Inadmissibility

On 5 August 2019, the competent Norwegian authority submitted a dossier proposing the identification of perfluorobutanesulfonic acid ('PFBS') and its salts as a substance of very high concern. [74] The European Chemicals Agency (ECHA) invited interested parties to submit their observations on the dossier in the context of a public consultation. Accordingly, 3M Belgium, the sole representative of the company 3M for all imports of a flame retardant additive composed of one of the PFBS salts, submitted its observations.

Subsequently, the dossier was referred by ECHA to the Member State Committee ('the MSC'). The MSC reached a unanimous agreement on the identification of PFBS and its salts as a substance for which there is scientific evidence of probable serious effects to human health or the environment which give rise to an equivalent level of concern to those of other substances listed in Article 57(a) to (e) of the REACH Regulation.

On 16 January 2020, ECHA adopted a decision ('the contested decision') by which PFBS and its salts were identified as a substance of very high concern and were included in the list of substances identified with a view to their eventual inclusion in the list of substances subject to authorisation ('the candidate list').

3M Belgium brought an action before the General Court seeking annulment of the contested decision. The Court dismisses the action as inadmissible and, in particular, rules, for the first time since the reform of the Rules of Procedure of the General Court in 2015, on the application of the additional time limit of 14 days for bringing an action against measures published on ECHA's website.

Findings of the Court

As regards, first of all, the argument that the contested decision should have been published in the *Official Journal of the European Union*, the General Court holds that the concept of 'publication' in Article 263 TFEU [75] does not necessarily have to correspond to the concept of 'publication' in Article 297 TFEU. [76] First, that finding is corroborated by the fact that it appears from the wording of Article 263 TFEU that the concept of 'publication' is not limited only to publication in the Official Journal but to the publication of measures in general. Second, although the Court of Justice has indeed read Articles 263 and 297 TFEU together for the purpose of interpreting the concept of

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74 Pursuant to Article 57(f) of 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, 'the REACH Regulation').

75 The sixth paragraph of Article 263 TFEU provides that 'the proceedings provided for in this article are to 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'.

76 Under the second subparagraph of Article 297(2) TFEU, 'regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the *Official Journal of the European Union*' and, under the third subparagraph, 'other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification'.

'publication' in the context of bringing an action, that case-law concerned the subsidiary nature of the criterion of publication as compared to that of notification of the measure to the addressee and not, as in the present case, the interpretation of the criterion of publication alone.

Next, the General Court notes that the argument concerning the unverifiable nature of a publication on ECHA's website as compared to a publication in the Official Journal amounts to depriving of utility any other form of publication which would not meet the requirements applicable to a publication in the Official Journal. The fact that the EU legislature wished to regulate the electronic publication of the Official Journal does not mean that similar requirements must govern dissemination on ECHA's website. Furthermore, the General Court finds that, in view of the fact that the contested decision has no addressee, the taking effect of that decision on 16 January 2020 did not depend on its notification to an addressee, nor on its notification to the applicant. In addition, the General Court states that a specific method of publication is provided for in respect of the candidate list. ECHA publishes and updates the candidate list on its website as soon as a decision has been taken on the inclusion of a substance in that list. [77] Moreover, since the decisions ordering the updating of the candidate list are published only in that list, the date of publication of such a decision corresponds to the date of publication of the updated candidate list. Consequently, first, ECHA was entitled validly to publish the contested decision on its website and, second, that publication was able to cause the two-month time limit for bringing an action to run.

Moreover, as regards the time limit for bringing the present action, the General Court finds, first, that it was not to run from the end of the 14th day following the date of publication of the contested decision. The rule on the deferral of the beginning of the time limit for bringing an action by 14 days applies only to measures published in the Official Journal. [78] In that regard, the General Court notes, first, that there is an objective difference between measures published in the Official Journal and those published solely on the internet, specifically on ECHA'S website, as regards their form of publication. The General Court is therefore entitled to lay down, in its Rules of Procedure, specific rules extending the time limit for bringing an action only in respect of measures of the institutions published in the Official Journal. Second, the contested decision was published only on ECHA's website, with the result that all potential applicants benefited from the same time limit for bringing an action. Third, the publication in the Official Journal or on ECHA's website of a decision on the identification of a substance as being of very high concern, and thus the question of whether or not to apply the rule on the deferral of the beginning of the time limit for bringing an action by 14 days, is not a question of choice on the part of ECHA, but of whether such a decision is adopted by ECHA or by the Commission, as provided for in Article 59 of the REACH Regulation.

In the second place, the General Court notes that the Court of Justice had indeed extended to ECHA's publications on the internet the application of the rule, laid down in the former Rules of Procedure of the General Court, according to which the time limit for bringing an action against a measure adopted by an institution is to be calculated from the end of the 14th day following the date of publication of the measure in the Official Journal. [79] However, the General Court points out that, although publication in the Official Journal was the only conceivable option at the time of the adoption of the former Rules of Procedure, that finding cannot apply with regard to the analogous rule laid down in its current Rules of Procedure, which were adopted on 4 March 2015, that is to say, on a date on which publication on the internet, as distinct from publication in the Official Journal, was conceivable. Moreover, first, the latter rule refers exclusively to publication in the Official Journal and, second, the

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77 Article 59(10) of the REACH Regulation.

78 Under Article 59 of the Rules of Procedure of the General Court of 4 March 2015, '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 of the European Union*, that time limit shall be calculated … from the end of the fourteenth day after such publication'.

79 Judgment of 26 September 2013, *PPG and SNF* v *ECHA* (C-625/11 P, EU:C:2013:594). Rules of Procedure of the General Court of 2 May 1991, Article 102(1).

Rules of Procedure had been amended precisely in order to limit the scope of the additional 14-day time limit. Furthermore, the General Court notes that its Rules of Procedure and those of the Court of Justice are different acts, adopted by different courts, which govern different proceedings before separate courts and are therefore not identical. [80] Consequently, no unjustified discrimination results from the difference between the articles, contained in each of those two acts as regards the rule on the deferral of the beginning of the time limit for bringing an action by 14 days.

In the light of the foregoing, the General Court concludes that the action, brought on 27 March 2020, should be dismissed as inadmissible on the ground that it was out of time. Since the contested decision was published on 16 January 2020 on ECHA's website and the time limit for bringing an action started to run from 17 January 2020, the two-month time limit expired on 16 March 2020, since a time limit expressed in months ends with the expiry of whichever day in the last month falls on the same date as the day during which the event or action from which the time limit is to be calculated occurred or took place. In view of the extension on account of distance of 10 days which must be added to the procedural time limits, the time limit for bringing an action expired on 26 March 2020, namely the day before the application was lodged.

80 Article 63 of the Protocol on the Statute of the Court of Justice of the European Union (OJ 2016 C 203, p. 72).