COURT OF JUSTICE
OF THE EUROPEAN UNION

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# MONTHLY CASE-LAW DIGEST
# May 2021

# I. VALUES OF THE UNION

**Judgment of the Court (Grand Chamber) of 18 May 2021, Asociaţia "Forumul Judecătorilor Din România", C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19**

Link to the complete text of the judgment

Reference for a preliminary ruling – Treaty of Accession of the Republic of Bulgaria and Romania to the European Union – Act concerning the conditions of accession to the European Union of the Republic of Bulgaria and Romania – Articles 37 and 38 – Appropriate measures – Mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption – Decision 2006/928/EC – Legal nature and effects of the cooperation and verification mechanism and of the reports established by the Commission on the basis of that mechanism – Rule of law – Judicial independence – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Laws and government emergency ordinances adopted in Romania in the course of 2018 and 2019 concerning the organisation of the judicial system and the liability of judges – Interim appointment to management positions of the Judicial Inspectorate – Establishment of a section within the Public Prosecutor's Office for the investigation of offences committed within the judicial system – Financial liability of the State and personal liability of judges in the event of judicial error

Six requests for a preliminary ruling have been brought before the Court of Justice by Romanian courts in proceedings between legal persons or natural persons and authorities or bodies such as the Romanian Judicial Inspectorate, the Supreme Council of the Judiciary and the prosecutor's office attached to the High Court of Cassation and Justice.

The disputes in the main proceedings follow on from a wide-ranging reform in the field of justice and the fight against corruption in Romania, a reform which has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 on the occasion of Romania's accession to the European Union ('the CVM'). [1]

In the context of the negotiations for its accession to the European Union, Romania had, in the course of 2004, adopted three laws, known as 'the Justice Laws', on the rules governing judges and prosecutors, on the organisation of the judicial system and on the Supreme Council of the Judiciary, with the aim of improving the independence and effectiveness of the judicial system. Between 2017 and 2019, amendments were made to those laws by laws and government emergency ordinances adopted on the basis of the Romanian Constitution. The applicants in the main proceedings dispute whether certain of those legislative amendments are compatible with EU law. In support of their actions, they refer to certain opinions and reports drawn up by the European Commission on progress in Romania under the CVM, which in their view, are critical of the provisions adopted by Romania in the years 2017 to 2019 in the light of the requirements of the effectiveness of the fight against corruption and the guarantee of the independence of the judiciary.

In that context, the referring courts are uncertain as to the legal nature and effects of the CVM and the scope of the reports drawn up by the Commission under it. According to those courts, the content, nature and duration of that mechanism should be regarded as falling within the scope of the Treaty of Accession and the requirements set out in those reports should be binding on Romania. In

1 Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56).

that regard, however, the referring courts mention national case-law according to which EU law would not take precedence over the Romanian constitutional order and Decision 2006/928 could not constitute a reference provision in the context of a review of constitutionality, since that decision was adopted before Romania's accession to the European Union and has not been interpreted by the Court in terms of whether its content, nature and duration fall within the scope of the Treaty of Accession.

*Findings of the Court*

In the first place, the Court, sitting as the Grand Chamber, finds that Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute acts of an EU institution, which are amenable to interpretation under Article 267 TFEU. The Court holds, next, that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty of Accession, because that decision is a measure adopted on the basis of the Act of Accession which has been binding on Romania since the date of its accession to the European Union.

As regards the legal effects of Decision 2006/928, the Court holds that that decision is binding in its entirety on Romania as from its accession to the European Union and obliges it to address the benchmarks, which are also binding, set out in the annex to the decision. Those benchmarks, defined on the basis of the deficiencies established by the Commission before Romania's accession to the European Union, seek in particular to ensure that that Member State complies with the value of the rule of law. Romania is, therefore, required to take appropriate measures to meet the benchmarks and to refrain from implementing any measure which could jeopardise their being met.

As regards the legal effects of the reports drawn up by the Commission on the basis of Decision 2006/928, the Court makes clear that those reports formulate requirements with regard to Romania and address 'recommendations' to it with a view to the benchmarks being met. In accordance with the principle of sincere cooperation, Romania must take due account of those requirements and recommendations, and must refrain from adopting or maintaining measures in the areas covered by the benchmarks which could jeopardise the result prescribed by those requirements and recommendations.

**Interim appointments to management positions within the Judicial Inspectorate**

In the second place, after finding that the legislation governing the organisation of justice in Romania falls within the scope of Decision 2006/928, the Court points out that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the value of the rule of law, which is protected by the Treaty on European Union. The Court emphasises next that every Member State must ensure that the bodies which, as 'courts or tribunals', come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection. Since the national legislation at issue applies to the ordinary courts which are called upon to rule on questions relating to the application or interpretation of EU law, it must therefore meet those requirements. In that regard, maintaining the independence of the judges in question is essential, in order to protect them from external intervention or pressure, and thus preclude any direct influence but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.

Lastly, as regards the rules governing the disciplinary regime of judges, the Court finds that the requirement of independence means that the necessary guarantees must be provided in order to prevent that regime being used as a system of political control of the content of judicial decisions. National legislation cannot, therefore, give rise to doubts, in the minds of individuals, that the powers of a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors might be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

In the light of those general considerations, the Court holds that national legislation is likely to give rise to such doubts where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law.

**The creation of a special prosecution section with exclusive competence for offences committed by judges**

In the third place, and again in the light of those same general considerations, the Court examines whether national legislation providing for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to investigate offences committed by judges and prosecutors is compatible with EU law. The Court clarifies that, in order to be compatible with EU law, such legislation must, first, be justified by objective and verifiable requirements relating to the sound administration of justice and, secondly, ensure that that section cannot be used as an instrument of political control over the activity of those judges and prosecutors and that the section exercises its competence in compliance with the requirements of the Charter of Fundamental Rights of the European Union ('the Charter'). If it fails to fulfil those requirements, that legislation could be perceived as seeking to establish an instrument of pressure and intimidation with regard to judges, which would prejudice the trust of individuals in justice. The Court adds that the national legislation at issue cannot have the effect of disregarding Romania's specific obligations under Decision 2006/928 in the area of the fight against corruption.

It is for the national court to ascertain that the reform which resulted, in Romania, in the creation of a specialised section of the Public Prosecutor's Office responsible for investigating judges and prosecutors and the rules relating to the appointment of prosecutors assigned to that section are not such as to make the section open to external influences. As regards the Charter, it is for the national court to ascertain that the national legislation at issue does not prevent the case of the judges and prosecutors concerned being heard within a reasonable time.

**The State's financial liability and the personal liability of judges for a judicial error**

In the fourth place, the Court holds that national legislation governing the financial liability of the State and the personal liability of judges in respect of the damage caused by a judicial error can be compatible with EU law only in so far as the putting in issue, in an action for indemnity, of a judge's personal liability for such a judicial error is limited to exceptional cases and is governed by objective and verifiable criteria, arising from requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions. To that end, clear and precise rules defining the conduct which may give rise to the personal liability of judges are essential, in order to guarantee the independence inherent in their task and to avoid exposing them to the risk that their personal liability may be incurred solely because of their decision. The fact that a decision contains a judicial error cannot, in itself, suffice to render the judge concerned personally liable.

As regards the detailed rules for putting in issue the personal liability of judges, the national legislation must provide clearly and precisely the necessary guarantees ensuring that neither the investigation to determine whether the conditions and circumstances which may give rise to such liability are satisfied nor the action for indemnity appears capable of being converted into an instrument of pressure on judicial activity. In order to ensure that such detailed rules cannot have a chilling effect on judges in the performance of their duty to adjudicate with complete independence, the authorities empowered to initiate and conduct that investigation and bring that action must themselves be authorities which act objectively and impartially, and the substantive conditions and detailed procedural rules must be such as not to give rise to reasonable doubts concerning the impartiality of those authorities. Similarly, it is important that the rights enshrined in the Charter, in particular the rights of defence of a judge, should be fully respected and that the body with jurisdiction to rule on the personal liability of a judge should be a court. In particular, a finding of judicial error cannot be binding in the action for indemnity brought by the State against the judge concerned although that judge was not heard during the previous proceedings seeking to establish the financial liability of the State.

**The principle of the primacy of EU law**

In the fifth place, the Court holds that the principle of the primacy of EU law precludes national legislation with constitutional status which deprives a lower court of the right to disapply of its own motion a national provision falling within the scope of Decision 2006/928 and which is contrary to EU law. The Court recalls that, in accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without provisions of domestic law

relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that. Recalling also that national courts are required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, or to disapply of their own motion any conflicting provision of national law which could not be interpreted in conformity with EU law, the Court holds that, where it is proved that the EU Treaty or Decision 2006/928 has been infringed, the principle of the primacy of EU law will require the referring court to disapply the provisions at issue, whether they are of a legislative or constitutional origin.

## II. FUNDAMENTAL RIGHTS

### Judgment of the Court (Grand Chamber) of 12 May 2021, Bundesrepublik Deutschland (Notice rouge d'Interpol), C-505/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Convention implementing the Schengen Agreement – Article 54 – Charter of Fundamental Rights of the European Union – Article 50 – Ne bis in idem principle – Article 21 TFEU – Freedom of movement of persons – Interpol red notice – Directive (EU) 2016/680 – Lawfulness of the processing of personal data contained in such a notice

In 2012, the International Criminal Police Organisation ('Interpol') published, at the request of the United States and on the basis of an arrest warrant issued by the authorities of that country, a red notice in respect of WS, a German national, with a view to his potential extradition. Where a person who is the subject of such a notice is located in a State affiliated to Interpol, that State must, in principle, provisionally arrest that person or monitor or restrict his or her movements.

However, even before that red notice was published, a procedure investigating WS, which related, according to the referring court, to the same acts as those which formed the basis for that notice, had been carried out in Germany. That procedure was definitively discontinued in 2010 after a sum of money had been paid by WS as part of a specific settlement procedure provided for under German criminal law. The Bundeskriminalamt (Federal Criminal Police Office, Germany) subsequently informed Interpol that, in its view, as a result of that earlier procedure, the *ne bis in idem* principle was applicable in the present case. That principle, which is enshrined in both Article 54 of the Convention implementing the Schengen Agreement [2] and Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), prohibits, inter alia, a person whose trial has been finally disposed of from being prosecuted again for the same offence.

In 2017, WS brought an action against the Federal Republic of Germany before the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) seeking an order requiring that Member State to take the measures necessary to arrange for that red notice to be withdrawn. In that regard, WS relies not only on an infringement of the *ne bis in idem* principle, but also on an infringement of his right to freedom of movement, as guaranteed under Article 21 TFEU, since he cannot travel to any State that is a party to the Schengen Agreement or to any Member State without risking arrest. He also argues that, due to those infringements, the processing of his personal

2 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; 'the CISA').

data appearing in the red notice is contrary to Directive 2016/680, which concerns the protection of personal data in criminal matters. [3]

That is the context in which the Administrative Court, Wiesbaden decided to ask the Court about how the *ne bis in idem* principle is to be applied and, specifically, whether it is possible provisionally to arrest a person who is the subject of a red notice in a situation such as the one at issue. Furthermore, in the event that that principle does apply, that court wishes to know what the consequences are for the processing, by Member States, of the personal data contained in such a notice.

In its Grand Chamber judgment, the Court finds that Article 54 of the CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter, must be interpreted as not precluding the provisional arrest, by the authorities of a State that is a party to the Schengen Agreement or by those of a Member State, of a person in respect of whom Interpol has published a red notice, at the request of a third State, unless it is established, in a final judicial decision taken in a State that is a party to that agreement or in a Member State, that the trial of that person in respect of the same acts as those on which that red notice is based has already been finally disposed of by a State that is a party to that agreement or by a Member State respectively. The Court also finds that the provisions of Directive 2016/680, read in the light of Article 54 of the CISA and Article 50 of the Charter, must be interpreted as not precluding the processing of personal data appearing in a red notice issued by Interpol in the case where it has not been established, by means of such a judicial decision, that the *ne bis in idem* principle applies in respect of the acts on which that notice is based, provided that such processing satisfies the conditions laid down by that directive.

*Assessment of the Court*

As a preliminary point, the Court notes that the *ne bis in idem* principle may apply in a situation such as the one at issue in the present case, namely where a decision has been adopted which definitively discontinues criminal proceedings provided that the person concerned meets certain conditions, such as the payment of a sum of money set by the public prosecutor.

After having noted the foregoing, the Court rules, in the first place, that Article 54 of the CISA, Article 50 of the Charter and Article 21(1) TFEU do not preclude the provisional arrest of a person who is the subject of an Interpol red notice where it has not been established that that person's trial has been finally disposed of by a State that is a party to the Schengen Agreement or by a Member State in respect of the same acts as those forming the basis of the red notice and that, consequently, the *ne bis in idem* principle applies.

In that regard, the Court notes that, where the applicability of the *ne bis in idem* principle remains uncertain, provisional arrest may be an essential step in order to carry out the necessary checks while avoiding the risk that the person concerned may abscond. That measure is therefore justified by the legitimate objective of preventing the impunity of the person concerned. By contrast, as soon as it has been established by a final judicial decision that the *ne bis in idem* principle applies, both the mutual trust between the States that are parties to the Schengen Agreement and the right to freedom of movement prohibit that person from being provisionally arrested or from being kept in custody. The Court points out that it is for the States that are parties to the Schengen Agreement and for Member States to ensure the availability of legal remedies enabling the persons concerned to obtain such a decision. It also finds that, where provisional arrest is incompatible with EU law, because the *ne bis in idem* principle is applicable, a State affiliated to Interpol which refrains from making such an arrest would therefore not fail to fulfil its obligations as an affiliate of that organisation.

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3 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

In the second place, as regards the matter of personal data appearing in an Interpol red notice, the Court notes that any operation performed on those data, such as registering them in a Member State's list of wanted persons, constitutes 'processing' which falls under Directive 2016/680. [4] Additionally, the Court finds, first, that that processing pursues a legitimate objective and, second, that it cannot be regarded as unlawful solely on the ground that the *ne bis in idem* principle may apply to the acts on which that red notice is based. [5] That processing, by the authorities of the Member States, may indeed be indispensable precisely in order to determine whether that principle applies.

In those circumstances, the Court also finds that Directive 2016/680, read in the light of Article 54 of the CISA and Article 50 of the Charter, does not preclude the processing of personal data appearing in a red notice where no final judicial decision has established that the *ne bis in idem* principle applies in the relevant case. However, such processing must be carried out in compliance with the conditions laid down by that directive. In that respect, it must, inter alia, be necessary for the performance of a task carried out by a competent national authority for purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. [6]

By contrast, where the *ne bis in idem* principle does apply, the recording, in the Member States' lists of wanted persons, of the personal data contained in an Interpol red notice is no longer necessary, because the person concerned can no longer be the subject of criminal proceedings in respect of the acts covered by that notice and, consequently, cannot be arrested for those same acts. It follows that the data subject must be able to request that his or her data be erased. If, nevertheless, those data remain recorded, they must be accompanied by a note to the effect that the person in question can no longer be prosecuted in a Member State or in a State that is a party to the Schengen Agreement for the same acts by reason of the *ne bis in idem* principle.

## III. INSTITUTIONAL LAW

### Judgment of the General Court (Tenth Chamber, Extended Composition) of 12 May 2021, Moerenhout and Others v Commission, T-789/19

Law governing the institutions – European citizens' initiative – Trade with territories under military occupation – Refusal of registration – Manifest lack of powers of the Commission – Article 4(2)(b) of Regulation (EU) No 211/2011 – Common commercial policy – Article 207 TFEU – Common foreign and security policy – Article 215 TFEU – Obligation to state reasons – Article 4(3) of Regulation No 211/2011

On 5 July 2019 Mr Tom Moerenhout and six other citizens communicated to the European Commission, in accordance with the regulation on the citizens' initiative, [7] a proposed citizens' initiative entitled 'Ensuring Common Commercial Policy conformity with EU Treaties and compliance with international law' ('the proposed ECI').

4 See Article 2(1) and Article 3(2) of Directive 2016/680.

5 See Article 4(1)(b) and Article 8(1) of Directive 2016/680.

6 See Article 1(1) and Article 8(1) of Directive 2016/680.

7 Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, p. 1, and corrigendum OJ 2012 L 94, p. 49). That regulation was repealed and replaced with effect from 1 January 2020 by Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative (OJ 2019 L 130, p. 55).

In accordance with the requirements laid down in that regulation, [8] the subject matter and the objectives of the proposed initiative, along with the provisions of the Treaties considered relevant by the citizens for the proposed action, were provided. In accordance with its subject matter, the proposed initiative sought the adoption of provisions regulating commercial transactions with an Occupant's entities based or operating in occupied territories by withholding products originating from there from entering the EU market. In that regard, the applicants referred to various provisions of the Treaties, the Charter of Fundamental Rights of the European Union, several regulations and Court of Justice judgments, and provisions and sources of international law.

By decision of 4 September 2019 [9] ('the contested decision'), the Commission refused to register the proposed ECI. The reason it gave for that refusal was that a legal act covering the subject matter of the proposed ECI could be adopted only on the basis of Article 215 TFEU, which requires that a decision be adopted which provides for the interruption or reduction, in part or completely, of economic and financial relations with the third country concerned. However, the Commission found that it did not have the power to submit a proposal for a legal act on that basis.

By its judgment, delivered in extended composition, the General Court annuls the contested decision because it does not contain enough information to make it possible for the applicants to know the reasons for the refusal to register the proposed ECI and for the General Court to exercise its power of review of the lawfulness of that refusal. That decision does not comply with the duty to state reasons arising from the Treaty [10] and the regulation on the citizens' initiative. [11] The General Court accordingly explains the extent of the Commission's duty to state reasons when it refuses to register a proposed ECI which has been submitted under that regulation.

*The General Court's assessment*

The General Court notes that the objectives of the regulation on the citizens' initiative are to reinforce European citizenship, enhance the democratic functioning of the European Union, encourage the participation of citizens in democratic life, and make the European Union more accessible. It states that the attainment of those objectives would be seriously compromised if a decision refusing a proposed ECI does not have a full statement of reasons.

Under that regulation, [12] a proposed citizens' initiative is to be registered by the Commission provided that that proposed initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the European Union for the purpose of implementing the Treaties. In the present case, the General Court finds that the contested decision does not state sufficient reasons for the Commission's lack of competence to submit a proposal able to respond to the subject matter and objectives of the proposed ECI. After reiterating the principles of the duty to state reasons for acts of the institutions, the General Court describes the factors which had to be taken into consideration in order for the contested decision to have an sufficient statement of reasons concerning the Commission's lack of competence for the purpose of the regulation on the citizens' initiative.

In the first place, the General Court observes that simply referring to Article 215 TFEU, on restrictive measures, does not make it possible to understand why the Commission considered that the proposed action came exclusively within the scope of the Common Foreign and Security Policy (CFSP). The Commission did not explain why it considered that the measure envisaged by the proposed ECI

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8 Article 4(1) of Regulation No 211/2011.

9 Commission Decision (EU) 2019/1567 of 4 September 2019 on the proposed citizens' initiative entitled 'Ensuring Common Commercial Policy conformity with EU Treaties and compliance with international law' (OJ 2019 L 241, p. 12).

10 Article 296 TFEU.

11 Second subparagraph of Article 4(3) of Regulation No 211/2011.

12 Article 4(2)(b) of Regulation No 211/2011.

had to be categorised as aiming at an act providing for the interruption or reduction of commercial relations with one or more third countries for the purposes of Article 215(1) TFEU.

In the second place, it observes that the assessment of whether the statement of reasons is sufficient must take account of the relevant context. In their proposed ECI, the applicants referred, explicitly and repeatedly, to the common commercial policy and to provisions relating to that area, such as Article 207 TFEU. In the present case, it was therefore for the Commission to explain the reasons which led it to conclude, implicitly in the contested decision, that the measure aimed at by the proposed ECI, in the light of its subject matter and objectives, did not fall within the scope of the common commercial policy and could not, therefore, be adopted on the basis of Article 207 TFEU. That assessment was of fundamental importance in the Commission decision refusing to register the proposed ECI since, unlike the CFSP, the common commercial policy is an area in which the Commission has the power to draw up a proposal for an EU act on the basis of Article 207 TFEU.

In the third place, the General Court states that the adequacy or otherwise of the statement of reasons for the contested decision must also be assessed in the light of the objectives of the provisions of the Treaties [13] and the regulation on the citizens' initiative, consisting in encouraging the participation of citizens in democratic life and making the European Union more accessible. On account of those objectives, the Commission was obliged to make clear the reasons justifying the refusal to register the proposed ECI. In the absence of a full statement of reasons, the Commission's objections to the admissibility of the proposed ECI could seriously compromise the possible submission of a new proposed ECI.

Consequently, the General Court annuls the contested decision owing to an inadequate statement of reasons.

## IV. FREE MOVEMENT OF GOODS

**Judgment of the Court (Third Chamber) of 20 May 2021, Renesola UK, C-209/20**

Link to the complete text of the judgment

Reference for a preliminary ruling – Customs union – Assessment of validity – Implementing Regulation (EU) No 1357/2013 – Determination of the country of origin of solar modules assembled in a third country from solar cells manufactured in another third country – Regulation (EEC) No 2913/92 – Community Customs Code – Article 24 – Origin of goods whose production involved more than one third country – Concept of 'last substantial processing or working'

In 2016, the Commissioners for Her Majesty's Revenue and Customs (United Kingdom) imposed anti-dumping and countervailing duties on Renesola UK Ltd ('Renesola') in respect of the import, into the United Kingdom, of solar modules assembled in India from solar cells originating in China. Their imposition was founded, in particular, on Implementing Regulation No 1357/2013, [14] which has the effect of rendering those duties applicable, inter alia, to solar modules and panels produced in third countries other than China from solar cells coming from China, by classifying solar modules whose

13 Article 11(4) TEU and the first paragraph of Article 24 TFEU.

14 Commission Implementing Regulation (EU) No 1357/2013 of 17 December 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 2013 L 341, p. 47) ('Implementing Regulation No 1357/2013').

production involved more than one country as originating in the country from which their constituent solar cells come. That classification of origin is based on the principle set out in Article 24 of the Community Customs Code, [15] according to which the country of origin is determined by the last, substantial, economically justified processing or working of a product in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

Renesola contested the imposition of those duties in legal proceedings on the ground that Implementing Regulation No 1357/2013 was invalid and that, in the light of Article 24 of the Community Customs Code, the solar modules at issue should be regarded as originating in India. The Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), before which an appeal was brought, decided to make a reference to the Court on the validity of Implementing Regulation No 1357/2013 in so far as it determines the country of origin of solar modules in the light of the criteria set out in Article 24 of the Community Customs Code. That tribunal takes the view that the assembly of solar modules carried out in India using solar cells produced in China must be regarded as a technically complex and delicate process that enables products possessing specific properties to be obtained, with the result that the solar modules at issue should be regarded as products which underwent their last substantial processing in India and, on that basis, as being products originating in that country and not in China.

In its judgment, the Court confirms the validity of Implementing Regulation No 1357/2013, holding in particular that the assessment of the European Commission is free of any error of law or manifest error of assessment and, furthermore, that the adoption of that regulation is justified by the objective of coherent and uniform implementation of not only EU customs rules but also EU anti-dumping rules.

*Findings of the Court*

First of all, the Court points out that the Community Customs Code empowers the Commission to take any measure which is necessary or useful for its implementation. In particular, on the basis of Articles 247 and 247a of the Community Customs Code, the Commission may adopt implementing measures, such as Implementing Regulation No 1357/2013, for the purposes of interpretation and application of the abstract criteria set out in Article 24 of that code. Thus, where there are one or more specific categories of goods whose production involved more than one country, the country in which those goods must be regarded as originating may be specified by means of an implementing measure, provided that the criteria set out in Article 24 of the code are fulfilled and that the country selected consequently constitutes the country in which the goods underwent their 'last substantial processing or working'. The Court explains in particular that the term 'last substantial processing or working' refers to the production stage during which the use to which the goods are to be put is established and they acquire specific properties and composition, which they did not possess previously, and which are not required to undergo significant qualitative changes subsequently.

The Court observes, next, that an implementing measure adopted by the Commission must be justified by objectives such as those of ensuring legal certainty or the uniform application of EU customs rules. Finally, the reasons stated for such a measure must enable the EU judicature to review its legality, whether in the context of a direct action or of a reference for a preliminary ruling.

In the present instance, the Court holds, first, relying upon recitals 1, 3 and 4 of Implementing Regulation No 1357/2013, that the objective of coherent and uniform implementation of EU customs and anti-dumping rules, in the course of which anti-dumping and countervailing duties are laid down, justifies the adoption of that regulation.

15 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17) ('the Community Customs Code').

Second, as regards the reasons stated for that regulation, the Court holds that the Commission set out to the requisite legal standard the grounds which led it to specify the origin of the solar modules and panels, grounds which enable the operators concerned to understand and contest the Commission's reasoning and the Court to assess the validity of the regulation at issue.

Third and last, the Court reviews the Commission's reasoning relating to the determination of the country of origin of the products at issue in the light of the criterion of the 'last substantial processing or working' set out in Article 24 of the Community Customs Code. In that regard, the Court states that the Commission did not commit any error of law or manifest error of assessment. In particular, the Court upholds the Commission's assessment that the ability to capture solar energy, and the ability then to convert it into electricity, constitute fundamental properties of the solar cells, modules and panels and determine the use to which they are to be put, so that the processing of silicon wafers into solar cells possesses an importance greater than that of the improvements made in the subsequent stage of assembling solar cells in solar modules or panels and thus constitutes the 'last substantial processing' of those various products for the purposes of Article 24 of the Community Customs Code.

## V. ASYLUM POLICY

**Judgment of the Court (Fourth Chamber) of 20 May 2021, L. R., C-8/20**

Link to the complete text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Border controls, asylum and immigration – Asylum policy – Directive 2013/32/EU – Common procedures for granting and withdrawing international protection – Application for international protection – Grounds of inadmissibility– Article 2(q) – Concept of 'subsequent application' – Article 33(2)(d) – Rejection by a Member State of an application for international protection as inadmissible due to the rejection of a previous application made by the person concerned in a third State with which the European Union has concluded an agreement on the criteria and mechanisms for establishing the State responsible for examining an application for asylum lodged in one of the States parties to that agreement – Final decision taken by the Kingdom of Norway

In 2008, L.R., an Iranian national, lodged an application for asylum in Norway. His application was rejected and he was surrendered to the Iranian authorities. In 2014, L.R. lodged a further application in Germany. In so far as the Dublin III Regulation, [16] which allows the Member State responsible for examining an application for international protection to be determined, is also implemented by Norway, [17] the German authorities contacted the authorities of that country requesting it to take charge of L.R. However, those authorities refused to do so, taking the view that Norway was no longer responsible for examining his application, in accordance with the Dublin III Regulation. [18] Subsequently, the German authorities rejected L.R.'s application for asylum as inadmissible, taking

16 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').

17 Pursuant to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway – Declarations (OJ 2001 L 93, p. 40; 'the Agreement between the European Union, Iceland and Norway').

18 See Article 19(3) of the Dublin III Regulation.

the view that it was a 'second application' and that in such a case the necessary conditions for the initiation of a further asylum procedure were not met. L.R. then brought an action against that decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany).

In that context, that court decided to seek the guidance of the Court of Justice as regards the concept of 'subsequent application', defined in Directive 2013/32 ('the Procedures Directive'). [19] Member States may reject a subsequent application as inadmissible where it does not refer to any new elements or findings. [20]

To the Administrative Court, Schleswig-Holstein, it is apparent from the Procedures Directive that an application for international protection may not be classified as a 'subsequent application' where the first procedure, which led to a rejection, took place not in another EU Member State but in a third State. Nevertheless, in that court's view, that directive should be interpreted more broadly, in the light of Norway's participation in the Common European Asylum System, pursuant to the Agreement between the European Union, Iceland and Norway, with the result that the Member States are not obliged to conduct a complete first asylum procedure in a situation such as that at issue.

In its judgment, the Court does not share that view and rules that EU law [21] precludes legislation of a Member State which provides for the possibility of rejecting an application for international protection as inadmissible on the ground that the person concerned had made a previous application seeking the grant of refugee status in a third State implementing the Dublin III Regulation in accordance with the Agreement between the European Union, Iceland and Norway and that application had been rejected.

*Findings of the Court*

The Court recalls that a 'subsequent application' is defined in the Procedures Directive as a 'further application for international protection made after a final decision has been taken on a previous application'. [22] It follows clearly from that directive, [23] first, that an application addressed to a third State cannot be understood as an 'application for international protection' and, second, that a decision taken by a third State cannot fall within the definition of 'final decision'. Therefore, the existence of a previous decision of a third State rejecting an application seeking the grant of refugee status does not permit the classification as a 'subsequent application' of an application for international protection made to a Member State by the person concerned after that previous decision has been adopted.

The Court adds that the existence of an agreement between the European Union, Iceland and Norway is irrelevant in that regard. While, pursuant to that agreement, Norway is to implement certain provisions of the Dublin III Regulation, that is not the case with regard to the provisions of Directive 2011/95 ('the Qualification Directive') [24] or the Procedures Directive. In addition, in a situation such as that at issue, it is true that the Member State to which the person concerned has made a further application for international protection may, where appropriate, request Norway to take back that person. However, where such taking back is not possible or does not take place, the Member State concerned is not entitled to regard the further application as a 'subsequent application', which would allow it to declare it inadmissible, as the case may be. Furthermore, even assuming that the

19 Article 2(q) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60; 'the Procedures Directive').

20 See Article 33(2)(d) of the Procedures Directive.

21 More specifically, Article 33(2)(d) of the Procedures Directive, read in conjunction with Article 2(q) thereof.

22 Article 2(q) of the Procedures Directive.

23 Article 2(b) and (e) of the Procedures Directive.

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

Norwegian asylum system provides for a level of protection for asylum seekers equivalent to that under EU law, that fact cannot lead to a different conclusion. First, it is clear from the wording of the provisions of the Procedures Directive that currently, a third State cannot be treated in the same way as a Member State for the purpose of applying the ground of inadmissibility in question. Second, such treatment cannot depend, on the risk of affecting legal certainty, on an assessment of the specific level of protection of asylum seekers in the third State concerned.

## VI. TRANSPORTS

### Judgment of the Court (Third Chamber) of 20 May 2021, X (Véhicules-citernes GPL), C-120/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Inland transport of dangerous goods – Directive 2008/68/EC – Article 5(1) – Concept of 'construction requirement' – Prohibition on laying down more stringent construction requirements – Authority of a Member State requiring a service station to be supplied with liquefied petroleum gas (LPG) only from road tankers fitted with a particular heat-resistant lining not provided for by the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) – Unlawfulness – Decision legally unchallengeable by a category of persons – Strictly limited possibility of obtaining the annulment of such a decision where there is clear conflict with EU law – Principle of legal certainty – Principle of effectiveness

X, a Netherlands resident living in the vicinity of a service station which sells, inter alia, liquefied petroleum gas (LPG), wishes to put an end to that sale on grounds of safety. She therefore requested the College van burgemeester en wethouders van de gemeente Purmerend (Board of the Mayor and Aldermen of the municipality of Purmerend, Netherlands) to withdraw the environmental licence issued to that service station. Although it rejected that request, the Board took a decision by which it imposed two additional requirements on that service station regarding the way it is supplied with LPG. One of those requirements provides that that supply must henceforth be carried out solely by road tankers that are fitted with a particular heat-resistant lining capable of delaying the 'boiling liquid expanding vapour explosion' scenario by at least 75 minutes after the start of a fire.

Taking the view that the additional requirements imposed by the administrative decision should be annulled on the ground that they could not be implemented because they were incompatible with Directive 2008/68, [25] X brought an action before the rechtbank Noord-Holland (District Court, North Holland, Netherlands). After that action was dismissed, X brought an appeal before the Raad van State (Council of State, Netherlands).

In those circumstances, that court stayed the proceedings in order to refer questions to the Court on the interpretation of Article 5(1) of Directive 2008/68. [26] First, it asks whether that provision precludes a requirement such as that relating to the particular heat-resistant lining at issue. Second, it seeks to

25 Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (OJ 2008 L 260, p. 13), as amended by Commission Directive 2014/103/EU of 21 November 2014 (OJ 2014 L 335, p. 15).

26 Under that provision, 'Member States may on grounds of transport safety apply more stringent provisions, with the exception of construction requirements, concerning the national transport of dangerous goods by vehicles, wagons and inland waterway vessels registered or put into circulation within their territory'.

ascertain whether the principle of effectiveness, under which a national procedural provision must not make the application of EU law impossible or excessively difficult, precludes a rule of Netherlands law which provides that, in order for a requirement contrary to EU law, imposed by an administrative decision which is legally unchallengeable by a category of persons, to be annulled on the ground that it would be unenforceable if it were implemented by a subsequent decision, the person must establish that it is clearly contrary to EU law.

*Findings of the Court*

In the first place, the Court notes that it is clear from the wording of Article 5(1) of Directive 2008/68 that, as regards the national transport of dangerous goods carried out inter alia by vehicles registered or put into circulation within their territory, Member States may not apply more stringent construction requirements on grounds of transport safety. Although Directive 2008/68 does not define the concept of 'construction requirements', it provides that the transport of dangerous goods must be carried out in compliance with the conditions laid down in the European Agreement concerning the International Carriage of Dangerous Goods by Road. [27] In the present case, given that the ADR contains 'construction requirements', that concept must be understood by reference to the corresponding requirements contained in the ADR. However, none of the construction requirements provided for by the ADR corresponds to a requirement for a heat-resistant lining such as that at issue in the main proceedings. Accordingly, such a lining constitutes a more stringent construction requirement, prohibited by Article 5(1) of Directive 2008/68.

The Court adds that that provision, which imposes a clear, general and absolute prohibition, precludes any measure taken by a Member State, including a measure adopted by a municipal authority in the form of an individual administrative decision, which would run counter to that prohibition, even if that measure only indirectly imposed a construction requirement on the operators of road tankers ensuring the supply of LPG to the addressee of that measure. In addition, the use by the national authorities of instruments introduced to ensure that road tankers transporting LPG comply with the requirement relating to the particular heat-resistant lining cannot justify an administrative decision imposing a construction requirement prohibited by Article 5(1) of Directive 2008/68.

Furthermore, the Court points out that Article 1(5) of Directive 2008/68 also does not allow Member States to lay down more stringent construction requirements than those provided for by the ADR. Under that provision, a Member State may prohibit or regulate the inland transport of dangerous goods strictly for reasons other than safety during transport. Construction requirements are intended to increase transport safety. Accordingly, Member States cannot lay down, pursuant to Article 1(5) of that directive, transport safety rules other than those laid down in that directive and in Annexes A and B to the ADR, otherwise they would risk jeopardising the dual objective of harmonising safety rules and ensuring the proper functioning of the common transport market.

In the second place, the Court examines the compatibility with EU law of the national procedural rule of the 'clearness test', which allows an individual to obtain a finding that a requirement in a final administrative decision cannot be enforced and to obtain, as a consequence, the annulment of that requirement, on condition that a clear conflict between that requirement and EU law is established. According to the Court, that rule seeks to strike a fair balance between the principles of legal certainty and of legality under EU law, by giving preponderant weight to the finality of the requirement in question in order to safeguard legal certainty, while allowing, under strict conditions, exceptions thereto. In the light of that objective, the principle of effectiveness does not, in principle, preclude such a rule. However, in order to ensure that that objective is actually achieved, the clearness test should not be applied so strictly that the condition of clear incompatibility with EU law renders illusory

27 European Agreement concerning the International Carriage of Dangerous Goods by Road, concluded at Geneva on 30 September 1957 ('ADR'), in the version in force on 1 January 2015.

in practice the possibility, for an individual, of obtaining the effective annulment of the requirement at issue.

## VII. STATE AID

### Judgment of the General Court (Second Chamber, Extended Composition) of 12 May 2021, Luxembourg v Commission, T-516/18 and T-525/18

State aid – Aid implemented by Luxembourg in favour of ENGIE – Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery – Tax rulings – State resources – Advantage – Combined effect of two tax measures – Participation exemption regime – Taxation of profit distributions – Abuse of law – Selectivity – Reference framework – Finding of a derogation – Comparability of situations – Parent-subsidiary arrangement – Group of companies – Recovery – Indirect harmonisation – Procedural rights – Obligation to state reasons

Between 2008 and 2014, the Luxembourg tax authorities adopted two sets of tax rulings ('the contested tax rulings') in connection with intra-group financing structures relating to the transfer of activities between companies of the Engie group resident in Luxembourg.

In broad outline, the transactions carried out under each structure are implemented in three successive stages. First, a holding company transfers shares to a subsidiary. Secondly, in order to finance the shares transferred, that subsidiary takes out an interest-free mandatorily convertible loan (ZORA) with an intermediary. Besides the fact that the loan granted generates no periodic interest, the subsidiary that has received the ZORA repays the loan, upon its conversion, by issuing shares the amount of which is equivalent to the nominal amount of the loan, plus a premium representing, in essence, all of the profits made by the subsidiary during the term of the loan (ZORA accretions). Thirdly, the intermediary finances the loan granted to the subsidiary by entering into a prepaid forward sale contract with the holding company under which the holding company pays to the intermediary an amount equal to the nominal amount of the loan in exchange for the acquisition of the rights to the shares that the subsidiary will issue on conversion of the ZORA. Therefore, if the subsidiary makes profits during the life of the ZORA, the holding company will own the right to all the shares issued, which will incorporate the value of any profits made as well as the nominal amount of the loan.

Those structures were endorsed by the contested tax rulings. For tax purposes, under the contested tax rulings, only the subsidiary is taxed on a margin agreed with the Luxembourg tax administration. After requesting information about the contested tax rulings from the Luxembourg authorities, the Commission initiated a formal investigation procedure at the end of which it determined that the result of the structures approved by the tax administration is that almost all of the profits made by the subsidiaries established in Luxembourg have not been taxed. Consequently, in a decision adopted in 2018 ('the contested decision'), the Commission concluded that the contested tax rulings constitute illegal State aid that is incompatible with the internal market, which must be recovered from the recipients by the Luxembourg authorities.

Luxembourg (Case T-516/18) and the Engie group companies (Case T-525/18) brought an action for annulment of the contested decision before the General Court of the European Union.

In its judgment, the General Court approves the Commission's approach, when presented with a complex intra-group financing structure, which entails looking at the economic and fiscal reality, rather than a formalistic approach that takes in isolation each of the transactions under the structure. In addition, the General Court finds that the Commission was right to determine that a selective advantage was conferred as a result of the non-application of national provisions relating to abuse of law.

*The General Court's assessment*

Direct taxation being a matter that falls within the exclusive competence of the Member States, the General Court noted that, when examining whether the contested tax rulings comply with State aid rules, the Commission did not engage in any 'tax harmonisation in disguise' but exercised the power conferred on it by EU law. Since the Commission is competent to ensure compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers when it examined the contested tax rulings in order to ascertain whether they constitute State aid and, if so, whether that State aid is compatible with the internal market. In the present case, the General Court notes that, when investigating whether the contested tax rulings comply with State aid rules, the Commission carried out an assessment only of 'normal' taxation, defined by Luxembourg tax law as applied by the Luxembourg tax authorities.

The General Court also rejects the pleas alleging, in essence, errors of assessment and of law in the identification of a selective advantage giving rise to State aid.

When examining those pleas, the General Court, first of all, rejects the arguments alleging confusion of the conditions for finding an advantage and for demonstrating the selectivity of the contested tax rulings. In that regard, the General Court points out that, having regard to the fiscal nature of the contested tax rulings, those two conditions may be assessed simultaneously. In tax matters, the examination of an advantage overlaps with the examination of selectivity in so far as, for those two conditions to be satisfied, it must be shown that the contested tax measure leads to a reduction in the amount of tax which would normally have been payable by the recipient of the measure under the ordinary tax regime and, therefore, applicable to other taxpayers in the same situation. In the present case, the General Court notes that the Commission sought to demonstrate that the contested tax rulings led to a reduction in the amount of tax which would normally have been payable under the ordinary tax regime and that, consequently, those measures constitute a derogation from tax rules applicable to other taxpayers in the same factual and legal situation.

Next, the General Court rejects the arguments relating to the absence of a selective advantage at the level of the holding companies in the light of a narrow reference framework established on the basis of Luxembourg tax provisions relating to the taxation of profit distributions and the participation exemption. [28] As regards the definition of that reference framework, after stating that it is apparent from an analysis of those tax provisions that the participation exemption is applicable only to income which has not been deducted from the taxable income of subsidiaries, the General Court finds that the Commission did not err in law in determining that the participation exemption at the level of a parent company is dependent on the taxation at the level of its subsidiary of profits distributed by that subsidiary. As regards the identification of a derogation from the defined reference framework, the General Court states that, contrary to a formalistic approach that entails taking in isolation each of the transactions that make up the sophisticated financing structure, it is important to go beyond the legal form in order to look at the economic and fiscal reality of the structure. In the present case, the General Court notes that the contested tax rulings approve various transactions which constitute a system for implementing, in a circular and interdependent fashion, the transfer of a business activity and its financing between three companies belonging to the same group. Those transactions were designed to be implemented in three successive but interdependent stages, involving the intervention of a holding company, an intermediary and a subsidiary. In those circumstances, the General Court considers that the Commission was entitled to determine that the Luxembourg tax administration derogated from the reference framework by confirming the exemption, at the level of the holding companies, of participations which correspond, from an economic perspective, to an amount that was deducted, as part of an intra-group financing structure, as expenses at the level of the subsidiaries. [29]

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28 Articles 164 and 166 of the loi concernant l'impôt sur le revenu (Law on income tax).

29 The ZORA accretions were deducted by the subsidiary as expenses.

In the light of the links established by the Commission within that structure, the General Court finds that the Commission did not err in law by looking at the combined effect, at the level of the holding companies, of the deductibility of income at the level of a subsidiary and the subsequent exemption of that income at the level of its parent company.

After rejecting the arguments alleging, first, that the Commission had not established an infringement of the national tax provisions and, secondly, that no companies had been identified which would be refused identical tax treatment for an identical financing structure, the General Court concludes that the Commission has demonstrated the selectivity of the contested tax rulings in the light of the narrow reference framework.

In the contested decision, the Commission also investigated the selectivity of the contested tax rulings in the light of the provision relating to abuse of law, as an integral part of the Luxembourg corporate income tax system. In view of the unprecedented nature of the reasoning seeking to demonstrate the selectivity of the contested tax rulings, the General Court considers it appropriate to examine the merits of the arguments that were put forward against it. In that regard, in so far as the Commission ascertained that the criteria laid down by Luxembourg law in order to find that there has been an abuse of law were met, [30] the General Court finds that it cannot be disputed that the Engie group received preferential tax treatment owing to the non-application, in the contested tax rulings, of the provision relating to abuse of law. In the light of the objective pursued by the provision relating to abuse of law, namely to combat abusive practices in tax matters, Engie and, in particular, the holding companies are in the same factual and legal situation as all Luxembourg taxpayers, who cannot reasonably expect to benefit as well from the non-application of the provision relating to abuse of law in cases where the conditions for its application have been satisfied. Consequently, the General Court holds that the Commission demonstrated to the requisite legal standard a derogation from the reference framework comprising the provision relating to abuse of law.

**Judgment of the General Court (Seventh Chamber, Extended Composition) of 12 May 2021, Luxembourg v Commission, T-816/17 and T-318/18**

Link to the complete text of the judgment

State aid – Aid implemented by Luxembourg in favour of Amazon – Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery – Tax ruling – Transfer pricing – Selective tax advantage – Transfer pricing arrangement – Functional analysis

From 2006, the Amazon group pursued its commercial activities in Europe through two companies established in Luxembourg, namely Amazon Europe Holding Technologies SCS ('luxscs'), a Luxembourg limited partnership, the partners of which were US entities of the Amazon group, and Amazon EU Sàrl ('luxopco'), a wholly owned subsidiary of luxscs.

Between 2006 and 2014, luxscs held the intangible assets necessary for the Amazon group's activities in Europe. To that end, it concluded various agreements with US entities of the Amazon group, namely licence and assignment agreements for pre-existing intellectual property with Amazon Technologies, Inc. (ATI) ('the Buy-In agreements') and an agreement for the sharing of costs linked to the development of those intangible assets ('the cost-sharing agreement') with ATI and a second entity, A9.com, Inc. Under those agreements, luxscs obtained the right to exploit certain intellectual

30 The conditions for finding an abuse of law are, first, use of a private law legal form, secondly, a reduction in the tax burden, thirdly, use of an inappropriate legal form and, fourthly, the absence of non-tax related reasons.

property rights, consisting essentially of technology, customer data and trade marks and to sub-licence those intangible assets. On that basis, luxscs concluded, inter alia, a licence agreement with luxopco, as the principle operator of the Amazon group's business in Europe. Under that agreement, luxopco undertook to pay a royalty to luxscs in return for the use of the intangible assets.

On 6 November 2003, in response to a request from the Amazon group, the Luxembourg tax authorities granted that group a tax ruling ('the tax ruling'). The Amazon group had requested confirmation of the treatment of luxopco and luxscs for the purposes of Luxembourg corporate income tax. As regards, more specifically, the determination of luxopco's annual taxable income, the Amazon group had proposed that the 'arm's length' royalty to be paid by luxopco to luxscs should be calculated according to the transactional net margin method ('the TNMM'), using luxopco as 'the tested party'.

The tax ruling, first, confirmed that luxscs was not subject to Luxembourg corporate income tax because of its legal form and, secondly, endorsed the method of calculating the annual royalty to be paid by luxopco to luxscs under the abovementioned licence agreement.

In 2017, the European Commission found that, in so far as it had endorsed the 'arm's length' nature of the method of calculating the royalty to be paid by luxopco to luxscs, that tax ruling, and its annual implementation from 2006 to 2014, constituted State aid for the purpose of Article 107 TFEU, in this case operating aid which is incompatible with the internal market. [31] More specifically, the Commission found an advantage in favour of luxopco, considering essentially that the royalty paid by luxopco to luxscs during the relevant period - calculated in accordance with the method endorsed in the tax ruling - was too high, with the result that luxopco's remuneration and, consequently, its tax base were artificially reduced. In that respect, the Commission's decision was based on a primary finding and three subsidiary findings. The primary finding concerned an error as regards the 'tested party' for the purposes of applying the TNMM. The three subsidiary findings concerned, respectively, an error in the choice of the TNMM as such, an error in the choice of the profit level indicator as a relevant parameter for the application of the TNMM and an error consisting in the inclusion of a ceiling mechanism in the context of the TNMM. Having found, ultimately, that the tax ruling had been implemented by Luxembourg without having been notified to the Commission in advance, the Commission ordered the recovery, from luxopco, of that aid which was unlawful and incompatible with the internal market.

Luxembourg and the Amazon group each brought an action seeking the annulment of that decision. In their actions, they contested, inter alia, each of the findings on which the Commission based its reasoning as regards the existence of an advantage.

In its judgment delivered today, the General Court of the European Union upholds, in essence, the applicants' pleas and arguments contesting both the primary and subsidiary findings of an advantage and consequently annuls the contested decision in its entirety.

Relying on the principles previously set out concerning the implementation of the criteria of 'State aid' in the context of tax rulings, the General Court provides important clarifications as regards the scope of the Commission's burden of proof in establishing the existence of an advantage where the level of taxable income of an integrated company belonging to a group is determined by the choice of transfer pricing method.

31 Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (OJ 2018 L 153, p. 1).

*Assessment of the General Court*

The General Court notes, first of all, the settled case-law according to which, in examining tax measures in the light of the EU rules on State aid, the very existence of an advantage may be established only when compared with 'normal' taxation, with the result that, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his or her position in the absence of the measure at issue and under the normal rules of taxation.

In that respect, the General Court observes that the pricing of intra-group transactions carried out by an integrated company in that group is not determined under market conditions. However, where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, it may be considered that that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. In those circumstances, when examining a fiscal measure granted to such an integrated company, the Commission may compare the tax burden of that undertaking resulting from the application of that fiscal measure with the tax burden resulting from the application of the normal rules of taxation under national law of an undertaking, placed in a comparable factual situation, carrying on its activities under market conditions.

In addition, the General Court points out that, in examining the method of calculating an integrated company's taxable income endorsed by a tax ruling, the Commission can find an advantage only if it demonstrates that the methodological errors which, in its view, affect the transfer pricing do not allow a reliable approximation of an arm's length outcome to be reached, but rather lead to a reduction in the taxable profit of the company concerned compared with the tax burden resulting from the application of normal taxation rules.

In the light of those principles, the General Court then examines the merits of the Commission's analysis in support of its finding that, by endorsing a transfer pricing method that did not allow a reliable approximation of an arm's length outcome to be reached, the tax ruling at issue granted an advantage to luxopco.

In that context, the General Court holds, in the first place, that the primary finding of an advantage is based on an analysis which is incorrect in several respects. Thus, first, in so far as the Commission relied on its own functional analysis of luxscs in order to assert, in essence, that contrary to what was taken into account in granting the tax ruling at issue, that company was merely a passive holder of the intangible assets in question, the General Court considers that analysis to be incorrect. In particular, according to the General Court, the Commission did not take due account of the functions performed by luxscs for the purposes of exploiting the intangible assets in question or the risks borne by that company in that context. Nor did it demonstrate that it was easier to find undertakings comparable to luxscs than undertakings comparable to luxopco, or that choosing luxscs as the tested entity would have made it possible to obtain more reliable comparison data. Consequently, contrary to its findings in the contested decision, the Commission did not, according to the General Court, establish that the Luxembourg tax authorities had incorrectly chosen luxopco as the 'tested party' in order to determine the amount of the royalty.

Secondly, the General Court holds that, even if the 'arm's length' royalty should have been calculated using luxscs as the 'tested party' in the application of the TNMM, the Commission did not establish the existence of an advantage since it was also unfounded in asserting that luxscs's remuneration could be calculated on the basis of the mere passing on of the development costs of the intangible assets borne in relation to the Buy-In agreements and the cost sharing agreement without in any way taking into account the subsequent increase in value of those intangible assets.

Thirdly, the General Court considers that the Commission also erred in evaluating the remuneration that luxscs could expect, in the light of the arm's length principle, for the functions linked to maintaining its ownership of the intangible assets at issue. Contrary to what appears from the contested decision, such functions cannot be treated in the same way as the supply of 'low value adding' services, with the result that the Commission's application of a mark-up most often observed in relation to intra-group supplies of a 'low value adding' services is not appropriate in the present case.

In view of all the foregoing considerations, the General Court concludes that the elements put forward by the Commission in support of its primary finding are not capable of establishing that luxopco's tax burden was artificially reduced as a result of an overpricing of the royalty.

In the second place, after examining the three subsidiary findings of an advantage, the General Court concludes that the Commission also failed to establish, in that context, that the methodological errors identified had necessarily led to an undervaluation of the remuneration that luxopco would have received under market conditions and, accordingly, the existence of an advantage consisting of a reduction of its tax burden. More specifically, although the Commission could validly consider that certain functions performed by luxopco in connection with the intangible assets went beyond mere 'management' functions, it nevertheless did not justify to the requisite legal standard the methodological choice it inferred from this. Nor did it demonstrate why luxopco's functions, as identified by the Commission, should necessarily have led to a higher remuneration for luxopco. Likewise, as regards both the choice of the most appropriate profit level indicator and the ceiling mechanism endorsed by the tax ruling at issue for the purposes of determining luxopco's taxable income, even if they were erroneous, the Commission did not satisfy the evidential requirements it is required to meet.

On those grounds, the General Court concludes that none of the findings set out by the Commission in the contested decision are sufficient to demonstrate the existence of an advantage for the purposes of Article 107(1) TFEU, with the result that the contested decision must be annulled in its entirety.

**Judgment of the General Court (Tenth Chamber, Extended Composition) of 19 May 2021, Ryanair v Commission (TAP; Covid-19), T-465/20**

Link to the complete text of the judgment

State aid – Portuguese air transport market – Aid provided by Portugal to TAP owing to the COVID-19 pandemic – State loan – Decision not to raise any objections – Point 22 of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Company belonging to a group – Intrinsic difficulties not resulting from an arbitrary allocation of costs within the group – Difficulties which are too serious to be dealt with by the group itself – Duty to state reasons – Maintenance of the effects of the decision

In June 2020, the Portuguese Republic notified the Commission of State aid for the airline Transportes Aéreos Portugueses SGPS SA ('the beneficiary'), the parent company and 100% shareholder in TAP Air Portugal. The notified aid, the maximum budget of which is EUR 1.2 billion, concerns a loan agreement concluded between, in particular, the Portuguese Republic as lender, TAP Air Portugal as borrower and the beneficiary as guarantor. By that measure, the Portuguese Republic intended to keep the beneficiary in operation for six months, between July 2020 and December 2020.

Finding that the notified scheme constituted State aid within the meaning of Article 107(1) TFEU, the Commission appraised it by reference to Article 107(3)(c) TFEU [32] and its Guidelines on State aid for

[32] Under that provision, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the internal market.

rescuing and restructuring non-financial undertakings in difficulty. [33] By decision of 10 June 2020, the Commission declared the measure at issue to be compatible with the internal market. [34]

The General Court (Tenth Chamber, Extended Composition) has upheld an action brought by the airline Ryanair for annulment of that decision, while suspending the effects of the annulment pending the adoption of a new decision by the Commission. In its judgment, the Court clarifies the scope of the Commission's duty to state reasons when, pursuant to the guidelines on aid to undertakings in difficulty, it declares aid granted to a company belonging to a group to be compatible with the internal market under Article 107(3)(c) TFEU.

*The Court's assessment*

In support of its action for annulment, Ryanair alleged, inter alia, a breach by the Commission of the duty to state reasons, in that it failed to set out the reasons for regarding the notified measure as compatible with the internal market.

In that regard, the Court states, first of all, that point 22 of the guidelines on aid to undertakings in difficulty [35] sets out three cumulative conditions which must be satisfied in order for rescue aid granted to a company belonging to a group to be classified as compatible with the internal market under Article 107(3)(c) TFEU. In accordance with point 22, it falls to the Commission to examine, first, whether the beneficiary of the aid belongs to a group, secondly, whether the difficulties faced by the beneficiary are intrinsic and are not the result of an arbitrary allocation of costs within the group and, thirdly, whether those difficulties are too serious to be dealt with by that group itself. Those conditions aim at preventing a group of undertakings from being able to have the State bear the cost of a rescue operation for one of the undertakings belonging to the group, when that undertaking is in difficulty and the group itself has created those difficulties or has the means to deal with them.

In the light of those considerations, the Court observes that, in the contested decision, the Commission neither found nor specified whether the beneficiary belonged to a group within the meaning of point 22 of those guidelines. It failed to carry out any analysis at all in that regard and to specify the relationship between the beneficiary and its shareholder companies. [36]

Furthermore, if the beneficiary, along with its shareholder companies, did belong to a group, within the meaning of point 22 of the guidelines on aid to undertakings in difficulty, the Court finds that the Commission had not substantiated in any way its assertions, first, that the beneficiary's difficulties were intrinsic and were not the result of an arbitrary allocation of costs to the benefit of its shareholders or other subsidiaries and, secondly, that those difficulties were too serious to be dealt with by its controlling shareholders or other shareholders. The Commission had, in fact, merely provided details on the beneficiary's financial situation and the difficulties caused by the COVID-19 pandemic.

In view of those shortcomings in the statement of reasons for the contested decision, the Court is not in a position either to determine whether the conditions laid down in point 22 of the guidelines on aid to undertakings in difficulty were satisfied in the present case, or whether the Commission was entitled to conclude that there were no serious difficulties in assessing the compatibility of the aid in

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33 OJ 2014 C 249, p. 1; 'the guidelines on aid to undertakings in difficulty'.

34 Commission Decision C(2020) 3989 final of 10 June 2020 on State aid SA.57369 (2020/N) – COVID-19 – Portugal – Aid to TAP (OJ 2020 C 228, p. 1; 'the contested decision').

35 Point 22 of the guidelines on aid to undertakings in difficulty states: 'A company belonging to or being taken over by a larger business group is not normally eligible for aid under these guidelines, except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself.'

36 On the date the contested decision was adopted, half of the shares in the beneficiary were held by Participações Públicas SGPS SA, which managed the Portuguese State's shareholdings. Atlantic Gateway SGPS Lda held 45% of the beneficiary's shares while 5% of the shares were owned by other shareholders.

question with the internal market and was right not to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

Consequently, the Court rules that the Commission failed to state the reasons for the contested decision to the requisite legal standard and that that inadequacy of the statement of reasons requires annulment of the decision.

The Court, in applying the second paragraph of Article 264 TFEU, considers that there are overriding considerations of legal certainty which justify limiting the temporal effect of the annulment of the contested decision. The Court observes, first, that the application of the aid measure at issue is part of a process which is still ongoing and which consists of various successive phases, [37] and, secondly, that the immediate calling into question of the receipt of the sums of money envisaged by the aid measure would have particularly damaging consequences for Portugal's economy and its air services, in an economic and social context which has already been affected by the serious disturbance in the economy caused by the COVID-19 pandemic. In those circumstances, the Court decides to suspend the effects of the annulment of the contested decision pending the adoption of a new decision by the Commission. In that regard, the Court states, however, that if the Commission decides to adopt that new decision without initiating the formal investigation procedure for the purpose of Article 108(2) TFEU, that suspension of the effects of the annulment may not exceed two months from the date of delivery of the judgment. If, on the other hand, the Commission decides to initiate the formal investigation procedure, the suspension will be maintained for a further reasonable period.

**Judgment of the General Court (Tenth Chamber, Extended Composition) of 19 May 2021, Ryanair v Commission (Espagne; Covid-19), T-628/20**

Link to the complete text of the judgment

State aid – Spain – Recapitalisation measures to support undertakings that are systemic and strategic for the Spanish economy in response to the COVID-19 pandemic – Decision not to raise any objections – Temporary Framework for State aid – Measure aimed at remedying a serious disturbance in the economy of a Member State – Measure aimed at the whole of the economy of a Member State – Principle of non-discrimination – Freedom to provide services and freedom of establishment – Proportionality – Criterion requiring that the beneficiaries of the aid are established in Spain – Failure to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition – Article 107(3)(b) TFEU – Concept of 'aid scheme' – Obligation to state reasons

In July 2020, Spain notified the European Commission of an aid scheme to establish a solvency support fund for strategic Spanish undertakings which are experiencing temporary difficulties due to the impact of the COVID-19 pandemic. That support fund is authorised to adopt various recapitalisation measures in favour of non-financial undertakings that are established in Spain and have their principal places of business there, which are considered systemic or strategic for the

37 The Court finds, in that regard, that the measure at issue was granted for an initial period of six months, which has already elapsed, after which the Portuguese Republic was to communicate to the Commission, in accordance with point 55(d) of the guidelines on aid to undertakings in difficulty, either proof that the loan had been reimbursed in full, a restructuring plan or a liquidation plan.

Spanish economy. [38] The budget for that aid scheme, financed by the State budget, was fixed at EUR 10 billion until 30 June 2021.

Taking the view that the notified scheme constituted State aid within the meaning of Article 107(1) TFEU, the Commission assessed it in the light of its Communication of 19 March 2020, entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [39] By decision of 31 July 2020, the Commission declared the notified scheme compatible with the internal market in accordance with Article 107(3)(b) TFEU. [40] Under that provision, aid to remedy a serious disturbance in the economy of a Member State may, under certain conditions, be considered to be compatible with the internal market.

The airline Ryanair brought an action for annulment of that decision, which is nevertheless dismissed by the Tenth Chamber, Extended Composition, of the General Court of the European Union. In that context, the Court examines the compatibility with the internal market of the State aid scheme adopted to address the consequences of the COVID-19 pandemic in the light of Article 107(3)(b) TFEU. [41] The Court also clarifies the relationship between the rules on State aid and the principle of non-discrimination on grounds of nationality laid down in the first paragraph of Article 18 TFEU and the concept of an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. [42]

*Findings of the Court*

In the first place, the Court reviews the Commission's decision in the light of the principle of non-discrimination, by ascertaining whether the difference in treatment introduced by the aid scheme at issue, in that it benefits only undertakings that are established in Spain and have their principal places of business there, is justified by a legitimate aim and whether it is necessary, appropriate and proportionate in order to attain it. The Court also examines the effect of the first paragraph of Article 18 TFEU which prohibits any discrimination on grounds of nationality within the scope of application of the Treaties, and without prejudice to any special provisions contained therein. Since Article 107(3)(b) TFEU is, according to the Court, among the special provisions laid down by the Treaties, the Court examines whether the scheme at issue may be declared compatible with the internal market under that provision.

In that regard, the Court confirms, first, that the objective of the scheme at issue satisfies the conditions laid down in Article 107(3)(b) TFEU in so far as it is seeks to remedy the serious disturbance in the Spanish economy caused by the COVID-19 pandemic. Furthermore, the Court adds that the criterion of the strategic and systemic importance of the beneficiaries of the aid properly reflects the objective of the aid scheme at issue.

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38 In order to benefit from the aid scheme at issue, the undertakings concerned must, in any event, fulfil a number of cumulative eligibility criteria required by that scheme and, accordingly, must show: (i) that they are at risk of ceasing operations or having serious difficulties remaining in business in the absence of temporary public support, (ii) that a forced cessation of their activities would have a high negative impact on economic activity or employment at national or regional level, (iii) that their medium- to long-term viability is demonstrated in the application by a viability plan to overcome the crisis situation and describing the planned use of the public support, (iv) that they have a planned schedule of reimbursement of the State support through the Fund, (v) that they were not in difficulty on 31 December 2019, (vi) that sources of private funding from banks and financial markets are either not available or are accessible at costs that would prevent them from becoming viable.

39 Communication C/2020/1863 (OJ 2020 C 91 I, p. 1), amended on 3 April 2020 (OJ 2020 C 112 I, p. 1), 13 May 2020 (OJ 2020 C 164, p. 3) and 29 June 2020 (OJ 2020 C 218, p. 3).

40 Decision C(2020) 5414 final on State Aid SA.57659 (2020/N) – Spain COVID-19 – Recapitalisation fund.

41 In its judgment of 17 February 2021, Ryanair v Commission (T-238/20, (EU:T:2021:91), the Court carried out a similar assessment of the legality of a State aid scheme adopted by Sweden in order to address the consequences of the COVID-19 pandemic on the Swedish air transport market (see CP 16/21). In its judgment of 14 April 2021, Ryanair v Commission (Finnair I; Covid-19) (T-388/20, EU:T:2021:196), the Court also examined, on the basis of Article 107(3)(b) TFEU, an individual aid measure adopted by Finland in the context of the COVID-19 pandemic (see CP 53/21).

42 Under Article 1(d) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), aid scheme means 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time [or] for an indefinite amount'.

The Court also finds that the restriction of the scheme at issue to non-financial undertakings which are of systemic or strategic importance for the Spanish economy, which are established in Spain and have their principal places of business in its territory, is both appropriate and necessary in order to achieve the objective of remedying the serious disturbance in the Spanish economy. According to the Court, both the eligibility criteria for the scheme and the conditions for the grant of aid, consisting of the Spanish State temporarily acquiring an interest in the capital of the undertakings concerned, and the *ex post* restrictions laid down by that scheme vis-à-vis the beneficiaries of the aid, [43] bear witness to Spain's willingness to support undertakings which are genuinely and enduringly linked to the Spanish economy. That approach is consistent with the objective of the scheme which is to remedy the serious disturbance in the Spanish economy with a view to the medium- and long-term development of that economy.

As regards the proportionality of the aid scheme, the Court finds that, by laying down conditions for granting the benefit of a general and multisectoral aid scheme without distinction as to the economic sector concerned, Spain could legitimately rely on eligibility criteria designed to identify undertakings which are both systemically or strategically important for its economy and have durable and stable links to it. A different eligibility criterion, including undertakings operating in Spain as mere service providers, could not have ensured the need for a stable and durable link of the beneficiaries of the aid to the Spanish economy, which underlies the aid scheme at issue.

Having regard to those findings, the Court confirms that the objective of the aid scheme at issue satisfies the requirements of the derogation laid down in Article 107(3)(b) TFEU and that the conditions for granting the aid do not go beyond what is necessary to achieve that objective. Thus, that scheme does not infringe the principle of non-discrimination or the first paragraph of Article 18 TFEU.

In the second place, the Court examines the Commission's decision in the light of the freedom to provide services and the freedom of establishment set out in Article 56 TFEU and Article 49 TFEU respectively. In that regard, the Court points out that the freedom to provide services does not apply as such to the field of transport, which is governed by a special legal regime, to which Regulation No 1008/2008 [44] belongs. The very purpose of that regulation is to define the conditions for the application, in the air transport sector, of the principle of freedom to provide services. That being said, Ryanair had not, in any event, established how being deprived of access to recapitalisation measures covered by the scheme at issue would deter it from establishing itself in Spain or from providing services to and from Spain.

In the third place, the Court rejects the plea according to which the Commission allegedly infringed the obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. In that regard, the Court notes that such a balancing exercise is not required by Article 107(3)(b) TFEU, contrary to what is laid down in Article 107(3)(c) TFEU and that, in the circumstances of the present case, such a balancing exercise would have no *raison d'être* as its result is presumed to be positive.

In the fourth place, as regards the allegedly incorrect classification of the measure at issue as an 'aid scheme', the Court rules that the provisions of Spanish law constituting the legal basis of the measure at issue [45] constitute acts of general application which govern all the characteristics of the aid measure at issue. In fact, those provisions enable, in themselves, without further implementing

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43 Those entail, inter alia, transparency and accountability obligations on the national authorities regarding the use of the aid at issue and, as long as they have not repaid the aid obtained in part or in full, beneficiaries are prohibited from taking excessive risks or pursuing aggressive commercial expansion financed by the aid, from carrying out certain mergers or acquisitions and making dividend payments.

44 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

45 In particular, Real Decreto-ley 25/2020, de 3 de julio, de medidas urgentes para apoyar la reactivación económica y el empleo (« BOE » núm. 185, de 6 de julio de 2020) and the Acuerdo del Consejo de Ministros sobre el funcionamiento del Fondo de Apoyo a la Solvencia de las Empresas Estratégicas (Orden PCM/679/2020 de 23 de julio 2020, « BOE » núm. 201, de 24 de julio de 2020).

measures being required, both the individual grant of aid to the undertakings which have applied for it and define, in a general and abstract manner, the beneficiaries of the aid. Consequently, the Court concludes that Commission was able to classify, without committing an error of law, the aid at issue as an aid scheme, pursuant to Article 1(d) of Regulation 2015/1589.

Lastly, the Court rejects as unfounded the pleas alleging an infringement of the obligation to state reasons and finds that there is no need to examine the merits of the plea alleging an infringement of procedural rights under Article 108(2) TFEU.

**Judgment of the General Court (Tenth Chamber, Extended Composition) of 19 May 2021, Ryanair v Commission (KLM; Covid-19), T-643/20**

Link to the complete text of the judgment

State aid – Netherlands – State guarantee for loans and subordinated loan by the State to KLM amid the COVID-19 pandemic – Temporary Framework for State aid measures – Decision not to raise any objections – Decision declaring the aid compatible with the internal market – Aid granted previously to another company in the same group of companies – Duty to state reasons – Maintenance of the effects of the decision

In June 2020, the Kingdom of the Netherlands notified the European Commission of State aid for the airline KLM, a subsidiary of the Air France–KLM holding company. The notified aid, with a total budget of EUR 3.4 billion, consisted, first, of a State guarantee for a loan to be granted by a consortium of banks and, secondly, a State loan. By that measure, the Kingdom of the Netherlands intended to provide temporary liquidity needed by KLM to deal with the adverse effects of the COVID-19 pandemic. Bearing in mind KLM's importance for the country's economy and air transport connectivity, the Kingdom of the Netherlands considered that the company's failure would have exacerbated the serious disturbance in its economy caused by that pandemic.

On 4 May 2020 the Commission had already declared individual aid granted by the French Republic to Air France, another subsidiary of the Air France–KLM holding company, in the form of a State guarantee and a shareholder loan, totalling EUR 7 billion, to be compatible with the internal market. [46] That aid measure was intended to finance Air France's immediate liquidity needs.

Finding that the aid notified in favour of KLM constituted State aid within the meaning of Article 107(1) TFEU, the Commission appraised it in the light of its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [47] By decision of 13 July 2020, the Commission declared that aid compatible with the internal market, in accordance with Article 107(3)(b) TFEU. [48] Under that provision, aid 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 that decision, which is upheld by the Tenth Chamber (Extended Composition) of the General Court of the European Union after an expedited

46 Commission Decision C(2020) 2983 final of 4 May 2020 on State aid SA.57082 (2020/N) – France – COVID-19: Temporary Framework [Article 107(3)(b) TFEU] – Guarantee and shareholder loan for Air France ('the Air France decision').

47 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), 13 May 2020 (OJ 2020 C 164, p. 3) and 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework').

48 Commission Decision C(2020) 4871 final of 13 July 2020 on State aid SA.57116 (2020/N) – The Netherlands – COVID-19: State loan guarantee and State loan for KLM (OJ 2020 C 355, p. 1; 'the contested decision').

procedure, although it suspends the effects of the annulment pending the adoption of a new decision by the Commission. In its judgment, the Court provides clarification on the scope of the Commission's duty to state reasons when it declares aid granted to the subsidiary of a holding company to be compatible with the internal market, where another subsidiary of the same holding company has already benefited from similar aid.

*The Court's assessment*

In support of its action for annulment, Ryanair alleged, inter alia, a breach by the Commission of the duty to state reasons, in that the Commission failed to set out the reasons why the aid previously granted to Air France had no impact on the assessment of whether the aid adopted for KLM was compatible with the internal market, even though Air France and KLM are two subsidiaries of the same holding company.

In that regard, the Court states, first of all, that the previously adopted decision on aid granted to Air France constitutes a contextual factor that has to be taken into consideration for the purpose of examining whether the contested decision's statement of reasons satisfies the requirements of Article 296 TFEU. In addition, where there are grounds to fear the effects on competition of an accumulation of State aid within the same group, the onus is on the Commission to exercise particular vigilance when examining the links between the companies belonging to that group, in order to determine whether those companies can regarded as forming one economic unit, and, therefore, a sole beneficiary, for the purposes of the application of State aid rules. [49]

In the light of those considerations, the Court observes that the contested decision does not contain any details as to the shareholder structure of Air France and KLM or any information about the functional, economic and organic links between the Air France–KLM holding company and its subsidiaries, even though it makes it apparent that the holding company is involved in the grant and administration of the aid envisaged for both KLM and Air France. Nor does the contested decision set out the possible existence of any kind of mechanism which would prevent the aid granted to Air France via the Air France–KLM holding company from benefiting KLM, through that same holding company, and vice versa.

In that context, the Court rejects as inadmissible the explanations put forward for the first time by the Commission at the hearing to demonstrate that the aid granted previously to Air France was not able to benefit KLM. Furthermore, while the Commission has a broad discretion in determining whether companies which form part of a group should be regarded as an economic unit for the purposes of applying the rules governing State aid, it nevertheless failed to set out, in the contested decision, in a sufficiently clear and precise fashion, all the relevant matters of fact and law to be taken into account in order to assess a complex situation, featuring the parallel grant of two State aid measures to two subsidiaries of the same holding company, which is, moreover, involved in the grant and administration of that aid.

In addition, in view of the inadequacy of the statement of reasons vitiating the contested decision, the Court was not able to verify the necessity and proportionality of the aid or compliance with the conditions for cumulation and the ceilings laid down in paragraph 25(d) and paragraph 27(d) of the Temporary Framework. [50] For the same reasons, the Court found that it was impossible to review

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49 In accordance with paragraph 11 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1), several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. To that end, it is necessary to take into consideration the existence of a controlling share and the existence of other functional, economic and organic links.

50 In accordance with paragraph 25(d)(i) of the Temporary Framework, State aid in the form of new public guarantees on loans is considered to be compatible with the internal market on the basis of Article 107(3)(b) TFEU provided that, for loans with a maturity beyond 31 December 2020, the total amount of loans per beneficiary is not more than double the annual wage bill of the beneficiary for 2019, or for the last year available. The same threshold applies to State aid in the form of subsidies to public loans, in accordance with paragraph 27(d)(i) of that framework.

whether the Commission was faced with serious difficulties in assessing the compatibility of the aid in question with the internal market.

Consequently, the Court rules that the Commission, by merely finding, first, that KLM was the beneficiary of the measure at issue and, secondly, that the Netherlands authorities had confirmed that the financing granted to KLM would not be used by Air France, failed to provide reasons for the contested decision to the requisite legal standard, and that that inadequacy of the statement of reasons requires that it be annulled.

However, given that the cause of that annulment is the inadequacy of the statement of reasons for the contested decision and that the immediate calling into question of the receipt of the sums of money envisaged by the notified aid measure would have had particularly damaging consequences for the Netherlands economy and air transport connectivity in an economic and social context which is already affected by the serious disturbance in the economy caused by the COVID-19 pandemic, the Court decides to suspend the effects of the annulment of the contested decision pending the adoption of a new decision by the Commission.

## VIII. ECONOMIC AND MONETARY POLICY

### Judgment of the Court (Third Chamber) of 6 May 2021, ABLV Bank v ECB, C-551/19 P and C-552/19 P

Link to the complete text of the judgment

Appeal – Economic and monetary union – Banking union – Regulation (EU) No 806/2014 – Resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism (SRM) and a Single Resolution Fund – Article 18 – Resolution procedure – Conditions – Entity failing or likely to fail – Declaration by the European Central Bank (ECB) that an entity is failing or is likely to fail – Preparatory measure – Act not open to judicial review – Inadmissibility

The appellants are ABLV Bank AS, a credit institution established in Latvia and the parent company of the ABLV group (Case C-551/19 P), and shareholders of ABLV Bank AS (Case C-552/19 P). ABLV Bank Luxembourg SA is a credit institution established in Luxembourg and is one of the subsidiaries of the ABLV group; ABLV Bank is the sole shareholder of ABLV Bank Luxembourg. Those two institutions were considered to be significant and, as such, were subject to supervision by the European Central Bank (ECB) as part of the single supervisory mechanism introduced by the Regulation on the Single Supervisory Mechanism [51] ('the SSM Regulation').

On 13 February 2018, the United States Department of the Treasury (United States of America) announced proposed measures to prevent the ABLV group from accessing the financial system in US dollars (USD). Following that announcement, the group found itself in difficulty, triggering the launch of an assessment as to whether a resolution should be adopted as provided for by the Regulation on the Single Resolution Mechanism [52] ('the SRM Regulation').

51 Within the meaning of Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

52 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

The resolution procedure is a complex procedure which, depending on the case, may involve several European authorities, such as the ECB, the Single Resolution Board ('the SRB'), the European Commission and the Council of the European Union, as well as the national resolution authorities concerned.

In the present case, on 18 February 2018, the ECB requested the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia), Latvia's national resolution authority, to impose a moratorium to enable ABLV Bank to stabilise its situation. It also invited the Commission de surveillance du secteur financier (Financial Sector Supervisory Commission, Luxembourg), Luxembourg's national resolution authority, to adopt similar measures with respect to ABLV Bank Luxembourg.

In accordance with the SRM Regulation, on 22 February 2018 the ECB sent to the SRB its draft assessment as to whether ABLV Bank and ABLV Bank Luxembourg were failing or were likely to fail. On 23 February 2018, it concluded that ABLV Bank and ABLV Bank Luxembourg were failing or were likely to fail. [53] On the same day, however, the SRB found that a resolution measure was not necessary in the public interest in the case of those banks. [54]

By applications of 3 May 2018 lodged at the General Court, [55] the appellants sought annulment of the acts of the ECB by which it was concluded that the banks were to be deemed to be failing or to be likely to fail. By orders of 6 May 2019, the General Court dismissed the actions as being inadmissible, finding that the contested acts were preparatory measures in the procedure designed to allow the SRB to take a decision. [56]

The Court of Justice dismisses the appellants' appeals. In its judgment, it distinguishes the functions of the SRB and the ECB.

*Findings of the Court*

By their first ground of appeal, the appellants submitted that, in order to assess the admissibility of the actions, the General Court should have taken account of the ECB's assessment of the banks' failure.

The Court considers that the General Court did not infringe the case-law according to which, in order to assess the admissibility of an action, it is necessary to analyse the substance of the contested act by reference to the objective criteria of its content, the context in which it was adopted and the powers of the institution which adopted it. Moreover, the General Court did not err in law when it also took account of the ECB's intention, albeit leaving that subjective criterion to play a complementary role.

According to the Court, it is incorrect to presume that all acts of the institutions are in the nature of a decision, unless it is clearly stated that that is not the case. Such a presumption would run counter to the case-law referred to by the Court. In response to the appellants' arguments, the Court notes that the ECB's assessment of the proportionality of the proposed measure is not sufficient evidence that that assessment is binding. Any measure must comply with the general principles of EU law, including the principle of proportionality, and the proportionality of a measure may therefore be analysed in an intermediate measure during an administrative procedure comprising several stages. As to the fact that the ECB communicates and publishes the acts in question, that does not mean that it intended to make them binding or that those acts are binding in their own right. As regards the ECB's statement regarding the inevitable liquidation of the credit institutions, the Court notes that such a liquidation

53 According to point (a) of the first subparagraph of Article 18(1) of the SRM Regulation.

54 Within the meaning of point (c) of the first subparagraph of Article 18(1) and Article 18(5) of the SRM Regulation.

55 Cases T-281/18 and T-283/18.

56 By applications also lodged at the General Court on 3 May 2018, the appellants brought actions for annulment of the decisions of the SRB of 23 February 2018 (T-280/18 and T-282/18). Those actions are pending before the General Court.

did not arise because of the acts of the ECB, but by a decision of the shareholders following the SRB's decision that it was not necessary, in the public interest, to apply resolution schemes.

Before addressing the second ground of appeal, the Court sets out the characteristics of the SRM Regulation. One of the objectives of that regulation is to adopt decisions speedily, so that financial stability is not jeopardised. Recognition of the decisional nature of the assessment, by the ECB, as to whether an entity is failing or is likely to fail could significantly affect the speediness of that procedure. Furthermore, the Court notes that the fact that provision is made for judicial review only in respect of decisions of the SRB [57] would seem to confirm that the legislature did not intend to confer a decision-making power on the ECB in this area.

The Court notes that the SRB may adopt a resolution scheme only if three conditions are met [58]: the entity is failing or is likely to fail, there is no reasonable prospect that any measures other than resolution would prevent its failure within a reasonable timeframe, and a resolution action is necessary in the public interest.

The Court states that the ECB's assessment that an entity is failing or is likely to fail concerns only one of those conditions. It also notes that the ECB has a primary role in respect of the assessment because of its expertise and its access to supervisory information. However, the SRB may itself carry out the assessment as to whether an entity is failing or is likely to fail, for example where the ECB considers that there is no failure, and the SRB has exclusive competence to determine whether the three conditions are met. It is not bound by the ECB's assessment and may not agree with that assessment. On the contrary, it is for the SRB to correct an irregularity since it is against the SRB's decisions that provision is made for judicial remedies. [59]

According to the Court, the ECB has particular expertise as supervisory authority. However, the distinction between supervision and resolution of credit institutions has no bearing on the nature of the assessment as a preparatory measure: a measure withdrawing an entity's authorisation is therefore not equivalent to an assessment as to whether an entity is failing or is likely to fail.

57 Article 86(2) of the SRM Regulation.

58 Points (a) to (c) of the first subparagraph of Article 18(1) of the SRM Regulation.

59 Article 86(2) of the SRM Regulation.

# IX. PUBLIC HEALTH

**Judgment of the General Court (Seventh Chamber, Extended Composition) of 5 May 2021, Pharmaceutical Works Polpharma v EMA, T-611/18**

Link to the complete text of the judgment

Medicinal products for human use – Application for marketing authorisation for a generic version of the medicinal product Tecfidera – Decision of the EMA not to validate the application for marketing authorisation – Previous decision of the Commission taking the view that Tecfidera – Dimethyl fumarate was not covered by the same global marketing authorisation as Fumaderm – Plea of illegality – Admissibility – Previously authorised combination medicinal product – Subsequent marketing authorisation for a component of the combination medicinal product – Assessment of the existence of two different global marketing authorisations – Manifest error of assessment

The applicant, Pharmaceutical Works Polpharma S.A., is a pharmaceutical company that develops and markets various medicinal products, including generic medicinal products. In June 2018, the applicant submitted to the European Medicines Agency (EMA) an application for marketing authorisation for a generic version of the medicinal product Tecfidera, composed of a single active substance. [60]

By its decision of 30 July 2018 ('the contested decision'), the EMA refused that application on the basis of the assessments that appeared in the Commission's implementing decision of 2014 ('the implementing decision'), by which the Commission had granted the company Biogen Idec marketing authorisation for the medicinal product Tecfidera. [61] The EMA stated, inter alia, that, given that that reference medicinal product benefited from an eight-year period of data protection as from the date on which that authorisation was granted, [62] the applicant's application for authorisation would be accepted only when that period expired. In addition, the EMA noted that, in the implementing decision, the Commission had taken the view that Tecfidera was not covered by the same global marketing authorisation [63] as another medicinal product, Fumaderm, which had been authorised and placed on the market in Germany and which was composed of, inter alia, the same active substance as Tecfidera. The authorisation for Fumaderm was granted in 1994 and transferred to the same company Biogen Idec.

By its action brought before the General Court, the applicant raised a plea of illegality in respect of the implementing decision in so far as, in that decision, the Commission had taken the view that Tecfidera was not covered by the same global marketing authorisation as Fumaderm. In addition, the applicant sought annulment of the contested decision.

The General Court annuls the contested decision, while ruling, first, on the admissibility of the plea of illegality and, second, on the conditions under which the Commission may consider that a marketing authorisation for a medicinal product composed of a single active substance which forms part of the composition of a previously authorised combination medicinal product is not covered by the same global marketing authorisation as that combination.

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60 On the basis of Article 10(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).

61 Commission Implementing Decision C(2014) 601 final of 30 January 2014 granting marketing authorisation for 'Tecfidera – Dimethyl fumarate', a medicinal product for human use, under Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

62 Pursuant to Article 14(11) of Regulation No 726/2004.

63 Within the meaning of Article 6(1) of Directive 2001/83.

*Findings of the Court*

In the first place, the Court finds that the plea of illegality raised by the applicant in respect of the implementing decision is admissible.

First of all, the Court classifies the implementing decision as an 'act of general application', [64] inasmuch as the implementing decision finds that Tecfidera does not belong to the same global marketing authorisation as Fumaderm, which had previously been authorised. That decision applies to objectively determined situations on account of the finding as to the characteristics of those two medicinal products. Moreover, that decision, in so far as it implies that a period of regulatory protection of the data relating to Tecfidera is applicable, is capable of producing legal effects with respect to any operator whose activities are linked to Tecfidera and, in particular, any operator that is capable of manufacturing a generic medicinal product derived from Tecfidera.

Next, the Court notes that, in order to demonstrate the unlawfulness of the implementing decision, the applicant is entitled to challenge the assessments that appear in the documents of the Committee for Medicinal Products for Human Use ('the CHMP') [65] relating to Tecfidera, which form the basis of, and are an integral part of the statement of reasons for, that decision. The Commission expressly relied on the CHMP's assessments in order to infer that Tecfidera and Fumaderm did not belong to the same global marketing authorisation.

Lastly, after carrying out a detailed analysis of the information in the file, the Court concludes that the applicant would not have been entitled to bring a direct action for annulment of the implementing decision because it did not satisfy the relevant criteria. In that regard, first, the Court states that that decision was not of individual concern to the applicant in so far as it concerned the applicant solely by reason of its objective capacity as a manufacturer of generic medicinal products, in the same way as any other economic operator in an identical situation. Second, the Court considers that the implementing decision entails implementing measures, in so far as that decision finds that Tecfidera does not belong to the same global marketing authorisation as Fumaderm, and that the contested decision, addressed to the applicant, constitutes one of those measures. In any event, the Court notes that the applicant's interest in seeking annulment of the implementing decision was not vested and current, but future and uncertain on the date on which it would have been entitled to bring an action for annulment of that implementing decision, in so far as it was not conceivable that it would submit an application for marketing authorisation for a generic medicinal product derived from Tecfidera on that date.

In the second place, the Court upholds the plea of illegality and finds that the contested decision, which is based on the implementing decision, is unfounded and must be annulled.

First of all, the Court observes that, in adopting the implementing decision, the Commission was faced, for the first time at EU level, with the question of whether or not an authorised combination medicinal product, on the one hand, and a component of that combination, on the other, belonged to the same global marketing authorisation. Furthermore, in answering the question of whether or not the marketing authorisation for Tecfidera, the only active substance of which was a component of Fumaderm, belonged to the same global marketing authorisation, the Commission had to take account of the fact that the EU law relating to combination medicinal products and the scientific knowledge available were significantly different from those applicable in 1994 when the national authority had granted authorisation for Fumaderm. The Commission was therefore fully entitled to request the CHMP to assess whether the only active substance in Tecfidera differed from Fumaderm, which contained, inter alia, that substance.

Next, the Court notes that, in particular cases of interest to the European Union, the Member States, the Commission, the applicant or the marketing authorisation holder may refer the matter to the

64 Article 277 TFEU.

65 Established by Article 5(1) of Regulation No 726/2004 and forming part of the EMA.

CHMP, which is responsible for carrying out, at EU level, its own assessment of the medicinal product concerned, independent of that carried out by the national authorities. Thus, in the context of marketing-authorisation procedures for medicinal products, in particular at EU level, the EMA and the Commission have a particular function that differs from that of the national authorities. In that sense, the principle of mutual recognition does not preclude the CHMP from examining the assessments previously carried out by a national authority or from carrying out an independent assessment. That is the case where an application for marketing authorisation is submitted at EU level for a substance that forms part of the composition of a combination medicinal product authorised 15 years previously at national level. That is all the more true since the question of whether Tecfidera was covered by the same global marketing authorisation as Fumaderm, on which the EMA, through the CHMP, and then the Commission, took a decision, constituted a particular case of interest to the European Union in the light of the objectives pursued by Directive 2001/83, in general, and by the concept of global marketing authorisation, in particular.

Lastly, the Court notes that, when the implementing decision was adopted, the EMA and the Commission had, or could have had, data capable of rendering implausible the theory that the other active substance forming part of Fumaderm, but not of Tecfidera, played a role within Fumaderm. Thus, the Commission was not entitled to conclude that Tecfidera was covered by a different global marketing authorisation than Fumaderm, which had previously been authorised, without verifying or requesting the CHMP to verify the role played by that other active substance. Therefore, in the absence of such verification and in view of the fact that the Commission did not analyse all the relevant data which had to be taken into consideration in order to conclude that Tecfidera and Fumaderm were covered by separate global marketing authorisations, the implementing decision is vitiated by a manifest error of assessment.

## X. EUROPEAN CIVIL SERVICE

### Judgment of the General Court (Fourth Chamber) of 12 May 2021, Alba Aguilera and Others v EEAS, T-119/17 RENV

Civil service – Officials – Members of the temporary staff – Members of the contract staff – Remuneration – EEAS staff posted to a third country – Article 10 of Annex X to the Staff Regulations – Annual assessment of the allowance for living conditions – Decision reducing the allowance for living conditions in Ethiopia from 30% to 25% – Regional coherence – Manifest errors of assessment

The applicants, Mr Ruben Alba Aguilera and others, are officials or agents of the European External Action Service (EEAS) who were posted to Ethiopia when the EEAS adopted the decision revising the amount of the allowance for living conditions ('the ALC') paid to agents posted to third countries with effect from 1 January 2016 ('the contested decision'). [66]

By that decision, the ALC rate applicable to EU staff posted to Ethiopia was reduced from 30% to 25% of the reference amount. That reduction resulted, for the applicants, in the loss of the benefit of rest leave. [67]

In order to challenge the reduction in the ALC rate, the applicants each lodged complaints against the contested decision, in so far as it reduces, with effect from 1 January 2016, the ALC paid to EU staff posted to Ethiopia. Since those complaints were not upheld, the applicants brought an action before the General Court seeking, in essence, annulment of the contested decision.

The Court annuls the contested decision and rules for the first time on the issue of the principle of regional coherence in order to fix the ALC in a place of employment.

*Findings of the Court*

First of all, the Court rules on the alleged obligation of the EEAS to adopt general implementing provisions concerning Article 10 of Annex X to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), which refers to the ALC. In that regard, the Court considers that, on account of its wording, its objectives and the procedural safeguards which it lays down for the revision of the ALC, each year and after the opinion of the Staff Committee, that article, in so far as it governs the ALC, is not lacking in clarity or precision in order to prevent it from being applied arbitrarily and, therefore, does not require the adoption, exceptionally, of general implementing provisions.

Next, as regards the detailed rules for the application of Article 10 of Annex X to the Staff Regulations, the Court notes that the appointing authority has a broad discretion as regards the factors and elements to be taken into consideration when adjusting the remuneration of officials. As a consequence, the Court holds that the guidelines adopted by the EEAS and establishing the methodology for fixing, in particular, the ALC ('the Guidelines'), in so far as they take account of the principle of regional coherence, do not infringe Article 10 of Annex X to the Staff Regulations.

In that regard, the Court notes that the principle of regional coherence is intended, in accordance with the purpose of the ALC, to ensure the objectivity of the comparison between the living conditions in

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66 Decision ADMIN(2016)7 of the EEAS Director-General for Budget and Administration of 19 April 2016, fixing the allowance for living conditions referred to in Article 10 of Annex X to the Staff Regulations – Financial Year 2016.

67 Article 8 of Annex X to the Staff Regulations, entitled 'Special and exceptional provisions applicable to officials serving in a third country', provides that 'by way of exception, the appointing authority may, by special reasoned decision, grant an official rest leave on account of particularly difficult living conditions at his place of employment. For each such place, the appointing authority shall determine the town(s) where rest leave may be taken'.

the places of employment with those in the European Union, while respecting the purpose of the ALC. The application of that principle is intended to ensure that similar conditions obtaining in two countries situated in the same region are assessed in a similar manner.

Lastly, the General Court rules on the assessment made by the EEAS of the 'health and hospital environment' and the 'other local living conditions' parameters.

In that connection, the Court notes that the Guidelines provide that the score for the 'health and hospital environment' parameter is to be determined on the basis of the comparative Health Map established by International SOS, but does not require the levels on the scale used by that Health Map to correspond to the score to be given for that parameter. Accordingly, the EEAS's decision to award Ethiopia a score of four points out of a total of five does not exceed the limits of the discretion which the legislature intended to confer on the EEAS in fixing the ALC.

Finally, the General Court ruled on the 'public services' criterion which led to a change in the score awarded to the 'other local conditions' parameter. In that regard, taking into account, first, the applicants' arguments that the quality of the public services in Ethiopia did not improve between 2014 and 2015 and, second, the EEAS's failure to provide any explanation justifying the reduction in the score awarded to that criterion, the Court concludes that the EEAS made a manifest error of assessment with regard to the assessment of that criterion. That error is such as to justify the annulment of the contested decision, given that it was the 'public services' criterion that led to a reduction of one point in the score awarded to the 'other local conditions' parameter, so that the total score given to Ethiopia fell below the threshold of 14 points required for fixing the ALC rate at 30%.

## XI. JUDGMENTS PUBLISHED IN APRIL 2021

### Order of the General Court (Fourth Chamber) of 27 April 2021, Macías Chávez and Others v Spain and Parliament, T-719/20

Link to extracts of the judgment

Action for failure to act and for damages – Institutional law – Parliament's Committee on Petitions – Petition concerning the infringement by the Spanish courts of EU law in the field of fundamental rights – Decision to declare the petition closed – Article 28 of the Rules of Procedure – Request for referral to a Chamber sitting in extended composition – Action in part brought before a court or tribunal manifestly lacking jurisdiction to hear it, in part manifestly inadmissible and in part manifestly lacking any foundation in law

Three Spanish nationals, R.A. Macías Chávez, F. Presencia, J.M. Castillejo ('the applicants') submitted a petition to the Committee on Petitions of the European Parliament ('the Committee') concerning the infringement by the Spanish courts of EU law in the field of fundamental rights. After examining that petition, the Committee took the decision to declare it closed.

The applicants, first, brought an action before the Court under Article 265 TFEU seeking a declaration that the Parliament had unlawfully failed to act on their petition and, second, made a claim based on Article 268 TFEU seeking compensation for the damage allegedly suffered by the applicants from that as well as from the conduct of the Kingdom of Spain.

By its order, the Court sets out, in the context of the examination of the request to refer the case back to a Chamber sitting in extended composition, the position adopted by each of the entities with jurisdiction to propose such a referral, that is to say, the President of the General Court, the Vice-President of the General Court and the Chamber hearing the case, respectively. It concludes that the action should be dismissed in part as being brought before a court or tribunal manifestly lacking jurisdiction to hear it, in part as being manifestly inadmissible and in part as manifestly lacking any foundation in law.

*Findings of the Court*

First of all, the Court recalls that referral of a case to a Chamber sitting in extended composition is an option and not an obligation, the use of which is subject to the criteria defined in Article 28 of the Rules of Procedure of the General Court. [68] In this case, neither the President nor the Vice-President of the General Court considered exercising that option. The Chamber hearing the case, for its part, considers that none of the criteria justifying the referral of a case to a Chamber sitting in extended composition, mentioned in Article 28 of the Rules of Procedure, [69] has been satisfied. The case-law on which the present order relies is well established and the applicants do not claim any legal difficulty justifying its being called into question. In addition, the fact that an institution and a Member State may be criticised in relation to fundamental rights, even those deemed 'absolute', does not constitute a special circumstance as such and does not confer significant weight on the case. Consequently, the

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68 Article 28(1) of the Rules of Procedure of the General Court provides that, 'whenever the legal difficulty or the importance of the case or special circumstances so justify, a case may be referred to the Grand Chamber or to a Chamber sitting with a different number of Judges'. Paragraph 2 of that article reads as follows: 'The Chamber seised of the case, the Vice-President of the General Court or the President of the General Court may, at any stage in the proceedings, either of its or his own motion or at the request of a main party, propose to the plenum that the case be referred as provided for in paragraph 1.'

69 Article 28(1) of the Rules of Procedure of the General Court.

Court concludes that there is no need to grant the request for referral to a Chamber sitting in extended composition submitted by the applicants.

The Court next recalls that an application for interim measures must be made by a separate document. [70] Accordingly, it dismisses as manifestly inadmissible the application for interim measures made by the applicants in the application.

Moreover, as regards the request for failure to act directed against the Parliament, [71] the Court finds, first, that the Committee in no way failed to rule on the petition submitted by the applicants, but, on the contrary, considered the petition to be admissible and took a position, deciding to declare it closed after having examined it. Second, it recalls that natural and legal persons may bring an action for failure to act against an institution only where that institution has failed to adopt a measure the legality of which those persons would be entitled to challenge by means of an action for annulment. In that respect, the Court emphasises that the Parliament has a broad discretion, of a political nature, as regards how that petition should be dealt with and that, accordingly, a decision taken in that regard is not a challengeable act and is beyond the scope of judicial review. Therefore, the Committee's decision to declare the applicants' petition closed does not constitute a challengeable act and, as a result, is beyond the scope of judicial review. For the same reason, the fact that, by that decision, the Committee did not take the action desired by the applicants on the petition cannot be challenged by means of an application for failure to act.

Finally, the Court rules, first, that it is not necessary to grant the request of the applicants seeking to obtain compensation for the damage allegedly suffered as a result of the follow-up by the Parliament on their petition. It emphasises that, since it is unable to find that a failure to act can be attributed to that institution, the non-contractual liability of the European Union cannot be engaged. Second, the Court recalls that it manifestly lacks jurisdiction to hear actions brought by natural or legal persons against Member States and thus claims directed against the Kingdom of Spain, whether they be claims seeking an order that that Member State pay compensation for the damage allegedly suffered by the applicants as a result of acts carried out by the Spanish courts or those seeking the adoption of declarations and control measures concerning that Member State.

### Judgment of the General Court (Eighth Chamber) of 14 April 2021, Verband Deutscher Alten und Behindertenhilfe and carepool Hannover v Commission, T-69/18

State aid – Independent social action – Subsidies granted to associations in a regional working group for charity action – Rejection of a complaint – Decision not to raise any objections at the end of the preliminary examination stage – Action for annulment – Status of interested party – Safeguarding of procedural rights – Substantial effect on competitive position – Admissibility – No serious difficulties – No substantial alteration to existing aid

The *Land* of Lower Saxony (Germany) has implemented various measures for the benefit of entities in the field of independent social action, operating in that *Land*. Those national measures include financial support which has been granted since 1956, on the basis of legislation and regulations which have evolved over time, to independent umbrella charitable associations ('the financial support'). Those associations provide, through member associations, services which may be of an economic nature, such as outpatient, inpatient or mixed care, or of a non-economic nature, such as the support and accommodation of the homeless, spiritual support or support for refugees.

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70 Article 156(5) of the Rules of Procedure of the General Court.

71 Third paragraph of Article 265 TFEU.

The applicants, Verband Deutscher Alten- und Behindertenhilfe, Landesverband Niedersachsen/Bremen und Hamburg/Schleswig-Holstein ev and carepool Hannover gmbh, two private entities which provide certain services similar to those mentioned above or represent undertakings which provide such services, believe that they have suffered harm as a result of the financial support. Arguing that they were in competition with the charitable associations benefiting from that support, the applicants made two separate complaints to the European Commission, seeking, inter alia, to have that support classified as aid which was unlawful and incompatible with the internal market.

After examining the legislative changes which had taken place since 1956, and without opening the formal investigation procedure, the Commission, by decision of 23 November 2017, [72] considered that the substance of the financial support at issue had not been altered since 1956 and that, in so far as it constituted aid within the meaning of Article 107(1) TFEU, that support had to be classified as existing aid within the meaning of Article 1(b)(i) of the regulation laying down detailed rules for the application of Article 108 TFEU. [73]

The applicants brought an action for annulment against the contested decision, which was dismissed by the Eighth Chamber of the General Court. In its judgment, it closely examined whether the action was admissible inasmuch as those parties had contested the merits of that decision, in the light of the case-law resulting from the judgment in *Scuola Elementare Maria Montessori*. [74]

*Findings of the General Court*

In the first place, inasmuch as the applicants' action sought to contest the Commission's implicit refusal to open the formal investigation procedure, the General Court pointed out that the applicants, which had argued that they were, on the one hand, an undertaking competing with the beneficiaries of the financial support at issue and, on the other, a trade association defending the interests of such competing undertakings, whose interests might be affected by the financial support, were interested parties within the meaning of Article 108(2) TFEU and Article 1(h) of the regulation laying down detailed rules for the application of Article 108 TFEU. Thus, in so far as their action sought to safeguard their procedural rights, it had to be regarded as admissible.

The General Court added, in that regard, that the fact that the applicants had already benefited from certain 'procedural rights' inasmuch as their views had been heard by the Commission in the context of its preliminary examination could not affect the admissibility of that action. The concept of 'procedural rights' which interested parties have in the context of the procedure provided for in Article 108(2) TFEU is not to be confused with the sole right, for a complainant, to secure the opening of the formal investigation procedure, as part of which that complainant would be able, where appropriate, to submit comments.

Regarding the substantive question of whether the preliminary examination procedure had given rise to serious difficulties, which should have led the Commission to open the formal investigation procedure, the General Court took the view that the factors invoked by the applicants, including the duration of the preliminary examination procedure, the statement of reasons for the contested decision and the attitude of the Commission, assessed as a whole, did not attest to the existence of such difficulties as regards the classification of the financial support. Consequently, inasmuch as the

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72 Commission Decision C(2017) 7686 final of 23 November 2017 concerning State aid schemes SA.42268 (2017/E) – Deutschland, Staatliche Beihilfe zur Förderung wohlfahrtspflegerischer Aufgaben, and SA.42877 (2017/E) – Deutschland, CarePool Hannover GmbH, implemented by Germany in favour of charitable associations for social welfare projects (OJ 2018 C 61, p. 1, 'the contested decision').

73 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9, 'the regulation laying down detailed rules for the application of Article 108 TFEU').

74 Judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

action sought to safeguard the applicants' procedural rights, the General Court dismissed it as unfounded.

In the second place, in so far as the applicants' action sought to call into question the merits of the contested decision, in particular the Commission's assessment that the financial support should be regarded as existing aid, the General Court recalled, first of all, that, under the fourth paragraph of Article 263 TFEU, natural or legal persons may bring an action against a decision constituting a regulatory act not entailing implementing measures and which is of direct concern to them.

As regards the condition relating to the existence of a regulatory act, the General Court examined, by reference to the judgment in *Scuola Elementare Maria Montessori* and the concept of 'aid scheme' laid down in Article 1(d) of the regulation laying down detailed rules for the application of Article 108 TFEU, whether the contested decision is of general application.

In that regard, first, the General Court took into account, inter alia, the fact that the Lower Saxony legislative measure provides that the financial support is to be granted to a category of persons envisaged in a general and abstract manner, namely umbrella associations operating in the independent charitable sector in that *Land*. Although it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which the measure at issue in the present case applies at any given time, the General Court took the view that that cannot mean that it loses its regulatory character, as long as there is no doubt that the measure is applicable as a result of an objective situation of law or of fact which it specifies and which is in harmony with its ultimate objective.

Secondly, the General Court observed that the umbrella associations, which are the direct beneficiaries of the financial support, could accept new charitable organisations as local or regional members, to which those associations may transfer the funds made available to them. Those indirect beneficiaries of that support thus also constitute a category of persons envisaged in a general and abstract manner.

Thirdly and lastly, the General Court recalled that the Commission, in the contested decision, concluded that, in so far as the financial support had to be classified as aid, it was existing aid. Even assuming that the beneficiaries, direct or indirect, of the financial support at issue form a restricted class, that decision thereby preserves the effects of the general and abstract measure which that support constitutes with respect to an indefinite number of competitors of those beneficiaries, namely an additional category of persons envisaged in a general and abstract manner.

Having thus reached the conclusion that the contested decision constitutes a regulatory act and, thereafter, also pursuant to the judgment in *Scuola Elementare Maria Montessori*, that that decision is of direct concern to the applicants and does not entail implementing measures with regard to them, the General Court concluded that the action was also admissible inasmuch as it sought to call into question the merits of the contested decision.

In that regard, in relation to the classification of the financial support as constituting existing aid, the General Court, first, found that the financial support at issue was implemented prior to the entry into force of the EEC Treaty in the Federal Republic of Germany. Secondly, the General Court took the view, contrary to what the applicants had argued, that the financial support had not been the subject of a substantial alteration since it was instituted in 1956. Consequently, it upheld the contested decision inasmuch as the Commission considered that that measure, in so far as it constituted aid, had to be classified as existing aid within the meaning of Article 1(b)(i) of the regulation laying down detailed rules for the application of Article 108 TFEU.

**Judgment of the General Court (Third Chamber) of 14 April 2021, The kaikai Company Jaeger Wichmann gbr v European Union Intellectual Property Office, T-579/19**

Community design – Multiple application for registration of Community designs representing gymnastic and sports apparatus and equipment – Right of priority – Article 41 of Regulation (EC) No 6/2002 – Application under the Patent Cooperation Treaty – Article 4 of the Paris Convention for the Protection of Industrial Property – Priority period

On 24 October 2018, the applicant, The kaikai Company Jaeger Wichmann gbr, applied to the European Union Intellectual Property Office (EUIPO) for the multiple registration of 12 Community designs representing gymnastic and sports apparatus and equipment. It claimed a right of priority based on an international patent application filed on 26 October 2017 under the Patent Cooperation Treaty [75] ('the PCT').

EUIPO refused that right of priority because the date of the earlier filing was more than six months prior to the date of the multiple application. Article 41(1) of Regulation No 6/2002 [76] provides, for the purpose of filing an application for a registered Community design, a right of priority of six months from the date of filing of an earlier design right or utility model. EUIPO found that the concept of a utility model should be interpreted to include international patent applications, but that that broad interpretation had no effect on the prescribed six-month priority period.

An action for annulment was brought before the Court, which annulled EUIPO's decision and, for the first time, interpreted Article 41(1) of Regulation No 6/2002 in relation to the right of priority.

*Findings of the Court*

In the first place, the Court points out that, according to the definition set out in the PCT, patent applications filed under the PCT cover utility models. That does not mean that the concepts of 'patent' and 'utility model' are the same, nor that the concept of 'utility model' includes that of 'patent'. The Court therefore finds that the PCT does not distinguish between the different rights through which the various States in question protect inventions. Accordingly, the Court holds that, although the wording of Article 41(1) of Regulation No 6/2002 does not expressly refer to a right of priority claimed on the basis of a patent, EUIPO was entitled to take international patent applications into consideration in the context of that article. That broad interpretation is in keeping with the overall scheme of the PCT, which seeks to ensure that equivalent protection is afforded to utility models and patents.

In the second place, the Court observes that Article 41(1) of Regulation No 6/2002 is silent on the matter of the priority period resulting from an international patent application. Accordingly, the Court finds that, in order to interpret that provision, it is necessary to look to the legislation underlying that right of priority, namely Article 4 of the Paris Convention. [77]

In that regard, the Court finds that Article 4(E)(1) of the Paris Convention provides that the priority period prescribed for the later right prevails where that later right is a design right and the earlier right is a utility model. The Court finds that this is a special rule constituting an exception to the general rule that stipulates that the length of the priority period is determined by the nature of the earlier right.

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75 Patent Cooperation Treaty, concluded in Washington on 19 June 1970 and last modified on 3 October 2001 (*United Nations Treaties Series*, vol. 1160, No 18336, p. 231).

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

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

The Court points out that the difference in the way in which patents and utility models are treated under that provision can be explained by the difference in the length of their respective application procedures, since utility models are registered and published following a brief formal examination, whereas patent applications are generally not published until the expiry of the 12-month priority period.

The Court therefore concludes that EUIPO erred in finding that the period applicable to the claim for priority of the international patent application in relation to the filing of the application for registered Community designs was six months.