COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

MONTHLY CASE-LAW DIGEST
September 2021

I. Fundamental rights **3**

Judgment of the Court (Fourth Chamber) of 9 September 2021, Adler Real Estate and Others, C-546/18 3

II. Citizenship of the Union: Derived right of residence of third-country nationals who are family members of a citizen of the Union **5**

Judgment of the Court (Grand Chamber) of 2 September 2021, Belgian State (Droit de séjour en cas de violence domestique) C-930/19 5

III. Institutional provisions **7**

Judgment of the Court (Full Court) of 30 September 2021, Court of Auditors v Pinxten, C-130/19 7

Judgment of the General Court (Eighth Chamber) of 1 September 2021, KN v EESC, T-377/20 9

IV. Litigation of the Union **11**

Order of the General Court (Fourth Chamber) of 7 September 2021, Isopix v Parliament, T-163/20 DEP 11

V. Agriculture **13**

Judgment of the General Court (Ninth Chamber) of 29 September 2021, Società agricola Vivai Maiorana and Others v Commission, T-116/20 13

VI. Competition **15**

1. Mergers **15**

Judgment of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe v Commission, T-425/18 15

2. State aid **17**

Judgment of the General Court (Ninth Chamber, Extended Composition) of 15 September 2021, INC and Consorzio Stabile Sis v Commission, T-24/19 17

Judgment of the General Court (Ninth Chamber, Extended Composition) of 15 September 2021, CAPA and Others v European Commission, T-777/19 19

Judgment of the General Court (Third Chamber, Extended Composition) of 22 September 2021, DEI v Commission, T-639/14 RENV, T-352/15 and T-740/17 21

VII. Approximation of laws **24**

1. Intellectual and industrial property **24**

Judgment of the General Court (Fifth Chamber, Extended Composition) of 1 September 2021, Gruppe Nymphenburg Consult v EUIPO (Limbic® Types), T-96/20 24

Order of the General Court (Second Chamber) of 13 September 2021, Katjes Fassin v EUIPO, T-616/19 REV 25

Judgment of the General Court (Third Chamber) of 22 September 2021, Collibra v EUIPO – Dietrich (COLLIBRA), T-128/20 and T-129/20 27

Judgment of the General Court (Ninth Chamber) of 22 September 2021, Marina Yachting Brand Management v EUIPO – Industries Sportswear (MARINA YACHTING), T-169/20 28

2. Public procurement **30**

Judgment of the Court (Grand Chamber) of 7 September 2021, Klaipėdos regiono atliekų tvarkymo centras, C-927/19 30

3. Money laundering **33**

Judgment of the Court (Second Chamber) of 2 September 2021, LG and MH (Autoblanchiment), C-790/19 33

4. Chemicals 35

Judgment of the General Court (Seventh Chamber) of 15 September 2021, Laboratoire Pareva and Biotech3D v Commission, T-337/18 and T-347/18 35

VIII. Social policy 37

1. Equal treatment in employment and social security 37

Judgment of the Court (Grand Chamber) of 2 September 2021, INPS (Allocations de naissance et de maternité pour les titulaires de permis unique), C-350/20 37

2. Agreement on the social policy 39

Judgment of the Court (Grand Chamber) of 2 September 2021, EPSU v Commission, C-928/19 P 39

IX. Environment 41

Judgment of the General Court (Second Chamber, Extended Composition) of 15 September 2021, Daimler v Commission, T-359/19 41

X. Energy 43

Judgment of the Court (Fourth Chamber) of 2 September 2021, Commission v Germany (Transposition des directives 2009/72 et 2009/73), C-718/18 43

XI. International agreements: interpretation of an international agreement 45

Judgment of the Court (Grand Chamber) of 2 September 2021, Commission v Council (Accord avec l'Arménie), C-180/20 45

Judgment of the Court (Grand Chamber) of 2 September 2021, République de Moldavie, C-741/19 47

XII. Judgments previously delivered 50

1. Institutional provisions: non-contractual liability of the Union 50

Judgment of the General Court (First Chamber) of 7 July 2021, HTTS v Council, T-692/15 RENV 50

Judgment of the General Court (First Chamber) of 7 July 2021, Bateni v Council, T-455/17, ... 50

2. Competition: State aid 53

Judgment of the General Court (Seventh Chamber) of 5 May 2021, ITD and Danske Fragtmænd v Commission, T-561/18 53

I. FUNDAMENTAL RIGHTS

Judgment of the Court (Fourth Chamber) of 9 September 2021, Adler Real Estate and Others, C-546/18

Reference for a preliminary ruling – Company law – Takeover bids – Directive 2004/25/EC – Article 5 – Mandatory bid – Article 4 – Supervisory authority – Final decision making a finding of infringement of the obligation to make a takeover bid – Binding effect of that decision in subsequent proceedings for an administrative sanction initiated by the same authority – EU law principle of effectiveness – General principles of EU law – Rights of the defence – Charter of Fundamental Rights of the European Union – Articles 47 and 48 – Right to silence – Presumption of innocence – Access to an independent and impartial tribunal

By decision of 22 November 2016, the Übernahmekommission (Takeover Commission, Austria; 'the Takeover Commission') determined that GM, a natural person, and four companies had acted in concert so as to incite another company to enter into a transaction that led to a significant increase in the holding of its principal shareholder. On the basis that the parties in question held a controlling interest, within the meaning of the Austrian legislation transposing Directive 2004/25, [1] in the company concerned, the Takeover Commission held that they should have made a takeover bid.

After that decision had become final, the Takeover Commission initiated proceedings for the imposition of administrative sanctions against GM and two other natural persons, HL and FN, the latter two in their respective capacities as board member and director of two of the companies to which the decision of 22 November 2016 related.

By decisions of 29 January 2018, the Takeover Commission imposed administrative sanctions on GM, HL and FN on the basis, amongst other things, of the findings of fact set out in the decision of 22 November 2016.

The Bundesverwaltungsgericht (Federal Administrative Court, Austria), before which actions against the decisions of 29 January 2018 have been brought, is in doubt as to the compatibility with EU law of the national administrative practice followed by the Takeover Commission. Under Austrian law, a decision making a finding of infringement, such as the decision of 22 November 2016, once final, is binding not only on the authority which made it, but also on other administrative and judicial authorities which may have cause to rule, in other proceedings, on the same factual and legal situation, provided that the parties concerned are the same.

As regards HL and FN, the Federal Administrative Court doubts that this condition is met, given that they were not 'parties' to the proceedings in which the finding of infringement was made, but simply acted as representatives of two of the companies which were parties to those proceedings. Nevertheless, it states, in the proceedings for an administrative sanction the Takeover Commission treated the decision of 22 November 2016 as having binding effect as regards HL and FN. As HL and FN were not 'parties' to the proceedings for a finding of infringement, they did not have the benefit of all the procedural rights of a 'party', including the right to silence.

By its questions, the Federal Administrative Court asks, essentially, whether Articles 4 and 17 of Directive 2004/25, read in the light of the rights of the defence guaranteed by EU law, in particular the right to be heard, and of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, preclude a national practice such as that followed in the present case by the Takeover Commission.

---

1 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12).

Findings of the Court

As Directive 2004/25 does not lay down rules governing the effect that final administrative decisions adopted pursuant to that directive are to have in subsequent proceedings, the rules at issue in the main proceedings are within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness. Thus, Directive 2004/25 does not, in principle, prevent the Member States from establishing an administrative procedure divided into two separate stages, as in the present case, or a practice under which binding effect is given, in subsequent proceedings, to administrative decisions which have become final. Indeed, such a practice may help to ensure the efficiency of administrative proceedings for a finding of failure to comply with the rules of Directive 2004/25, and for the imposition of a sanction in respect of such a failure, and thus to ensure the useful effect of that directive. However, the rights of the parties as guaranteed by EU law, and in particular by the Charter of Fundamental Rights, must be respected at both of those procedural stages.

As regards persons who, like GM, were parties to the proceedings which led to the adoption of a decision making a finding of infringement, it is permissible for the Member States to give binding effect to such a decision in subsequent proceedings for the imposition of an administrative sanction on those persons in respect of that infringement, provided that they were able to exercise their fundamental rights, such as the rights of the defence, the right to silence and the presumption of innocence, in the proceedings for a finding of infringement.

In contrast, having regard to the subjective nature of the rights of the defence, the same does not apply to persons who, like HL and FN, were not parties to the proceedings for a finding of infringement, even if those persons acted as members of a representative organ of a legal person which was a party to those proceedings. Accordingly, in proceedings for the imposition of an administrative sanction on a natural person, the administrative authority must disregard the binding effect which attaches to the assessments made in a decision the infringement of which that person is accused and which has become final, without the person concerned having had the opportunity to challenge those assessments, in his or her personal capacity, in the exercise of his or her own rights of the defence. Similarly, the right to silence precludes a situation in which such a person is deprived of that right in relation to factual matters which are subsequently to be used in support of the allegation and will therefore have an impact on the sentence or the sanction imposed. Furthermore, the presumption of innocence precludes a situation in which a natural person is held liable, in proceedings for an administrative sanction, for an infringement found to have been committed in a decision which has become final without that person having had the opportunity to challenge it, and which can no longer be challenged by that person, in the exercise of his or her right to an effective remedy, before an independent and impartial tribunal with jurisdiction to rule on issues of both law and fact. The benefit of the right to an effective judicial remedy must be available to all parties to the proceedings for an administrative sanction, whether or not they were parties to the earlier proceedings for a finding of infringement.

II. CITIZENSHIP OF THE UNION: DERIVED RIGHT OF RESIDENCE OF THIRD-COUNTRY NATIONALS WHO ARE FAMILY MEMBERS OF A CITIZEN OF THE UNION

Judgment of the Court (Grand Chamber) of 2 September 2021, Belgian State (Droit de séjour en cas de violence domestique) C-930/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 2004/38/EC – Article 13(2) – Right of residence of family members of a Union citizen – Marriage between a Union citizen and a third-country national – Retention, in the event of divorce, of the right of residence by a third-country national who is the victim of acts of domestic violence committed by his or her spouse – Requirement to demonstrate the existence of sufficient resources – No such requirement in Directive 2003/86/EC – Validity – Charter of Fundamental Rights of the European Union – Articles 20 and 21 – Equal treatment – Difference in treatment based on whether the sponsor is a Union citizen or a third-country national – Non-comparability of situations

In 2012, X, an Algerian national, joined his French wife in Belgium, where he was issued with a residence card of a family member of a Union citizen.

In 2015, he was forced to leave the matrimonial home because of acts of domestic violence which he suffered at the hands of his wife. A few months later, his wife left Belgium to move to France. Almost three years after that departure, X initiated divorce proceedings. The divorce was granted on 24 July 2018.

In the meantime, the Belgian State had terminated X's right of residence, on the ground that he had not adduced evidence that he had sufficient resources to support himself. According to the provision of Belgian legislation intended to transpose Article 13(2) of Directive 2004/38, [2] in the event of divorce or when the spouses no longer live together as a single household, the retention of the right of residence by a third-country national who has been the victim of acts of domestic violence committed by his or her spouse, who is a Union citizen, is subject to certain conditions, including, in particular, the requirement to have sufficient resources.

X brought an action against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), on the ground that there is an unjustified difference in treatment between the spouse of a Union citizen and the spouse of a third-country national residing lawfully in Belgium. In the event of divorce or separation, the provision of Belgian legislation transposing Article 15(3) of Directive 2003/86 [3] makes the retention of the right of residence by a third-country national who has benefited from the right to family reunification with another third-country national and has been the victim of acts of domestic violence committed by that other third-country national subject only to proof of the existence of those acts.

The Conseil du contentieux des étrangers considers that, as regards the conditions for the retention, in the event of divorce, of the right of residence by third-country nationals who have been the victims of acts of domestic violence committed by their spouses, the regime laid down in Directive 2004/38 is

---

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

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

less favourable than that laid down in Directive 2003/86. It has therefore asked the Court to rule on the validity of Article 13(2) of Directive 2004/38, in particular in the light of the principle of equal treatment laid down in Article 20 of the Charter of Fundamental Rights of the European Union.

In its judgment, delivered by the Grand Chamber, the Court, in the first place, restricts the scope of its case-law concerning the scope of point (c) of the first subparagraph of Article 13(2) of Directive 2004/38, in particular the judgment in *NA*. [4] In the second place, it does not find any factor of a kind such as to affect the validity of Article 13(2) of that directive in the light of Article 20 of the Charter of Fundamental Rights.

Findings of the Court

Before carrying out an assessment of validity, the Court clarifies the scope of point (c) of the first subparagraph of Article 13(2) of Directive 2004/38, pursuant to which the right of residence is retained in the event of divorce where this is warranted by particularly difficult circumstances, such as having been the victim of acts of domestic violence during the marriage. The issue arises, in particular, as to whether that provision is applicable where, as in the main proceedings, divorce proceedings were initiated after the departure of the spouse who is a Union citizen from the host Member State concerned.

Contrary to the judgment in *NA*, the Court considers that, in order to retain the right of residence on the basis of that provision, divorce proceedings may be initiated after such departure. However, in order to ensure legal certainty, a third-country national – who has been the victim of acts of domestic violence committed by his or her spouse who is a Union citizen and in relation to whom divorce proceedings have not been initiated before the departure of that spouse from the host Member State – can rely on the retention of his or her right of residence only in so far as those proceedings are initiated within a reasonable period following such departure. It is important to leave the third-country national concerned sufficient time to choose between the two options offered to him or her by Directive 2004/38 in order to retain a right of residence, which are either the commencement of divorce proceedings for the purpose of enjoying a personal right of residence under point (c) of the first subparagraph of Article 13(2) of that directive, or his or her establishment in the Member State in which the Union citizen resides in order to retain his or her derived right of residence.

Regarding the validity of Article 13(2) of Directive 2004/38, the Court concludes that that provision does not result in discrimination. Notwithstanding the fact that point (c) of the first subparagraph of Article 13(2) of Directive 2004/38 and Article 15(3) of Directive 2003/86 share the objective of ensuring protection for family members who are victims of domestic violence, the regimes introduced by those directives relate to different fields, the principles, subject matters and objectives of which are also different. In addition, the beneficiaries of Directive 2004/38 enjoy a different status and rights of a different kind to those upon which the beneficiaries of Directive 2003/86 may rely, and the discretion which the Member States are recognised as having to apply the conditions laid down in those directives is not the same. In the present case, it is thus, in particular, a choice made by the Belgian authorities in connection with the exercise of the broad discretion conferred on them by Article 15(4) of Directive 2003/86 which has led to the difference in treatment complained of by the applicant in the main proceedings.

Therefore, as regards the retention of their right of residence, third-country nationals who are spouses of Union citizens, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Directive 2004/38, on the one hand, and third-country nationals who are spouses of other third-country nationals, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Directive 2003/86, on the other, are not in a comparable situation for the purposes of the possible application of the principle of equal treatment guaranteed by Article 20 of the Charter of Fundamental Rights.

---

4 Judgment of 30 June 2016, *NA* (C-115/15, EU:C:2016:487).

III. INSTITUTIONAL PROVISIONS

Judgment of the Court (Full Court) of 30 September 2021, Court of Auditors v Pinxten, C-130/19

Article 286(6) TFEU – Breach of obligations arising from the office of Member of the European Court of Auditors – Deprivation of the right to a pension – Right to effective judicial protection – Regularity of the investigation by the European Anti-Fraud Office (OLAF) – Internal procedure at the Court of Auditors – Activity incompatible with the duties of a Member of the Court of Auditors – Mission expenses and daily allowances – Representation and hospitality expenses – Use of official car – Use of a driver – Conflict of interest – Proportionality of the penalty

Mr Pinxten was a Member of the European Court of Auditors from 1 March 2006 to 30 April 2018, completing two terms of office.

In that capacity Mr Pinxten received, among other things, reimbursement of various expenses and an official car. Furthermore, between 2006 and March 2014 the Court of Auditors provided Mr Pinxten with a driver.

The Court of Auditors stated that in the course of 2016 it received information concerning a number of serious irregularities attributed to Mr Pinxten. On 18 July 2016, Mr Pinxten was informed of the allegations made against him.

On 14 October 2016, the Secretary-General of the Court of Auditors, acting on instructions from the President of that institution, forwarded a file to the European Anti-Fraud Office (OLAF) relating to the activities of Mr Pinxten which had led to possible undue expenditure from the budget of the Union.

On 2 July 2018, the Court of Auditors received OLAF's final report following the completion of its investigation. That report found, in respect of Mr Pinxten, misuse of the resources of the Court of Auditors in the context of activities unrelated to his duties, misuse of fuel cards and the motor insurance contract for his official car, unjustified absences, failure to declare certain external activities, transmission of confidential information and the existence of conflicts of interest. Furthermore, considering that some of the facts revealed by the investigation could constitute criminal offences, OLAF forwarded information and its recommendations to the Luxembourg judicial authorities.

After sending written observations to the Court of Auditors, Mr Pinxten was heard by the Members of that institution in a closed session on 26 November 2018. On 29 November 2018, at a closed session, the Court of Auditors decided to refer the issue concerning Mr Pinxten to the Court pursuant to Article 286(6) TFEU. [5]

Alongside this, in the light of the information forwarded by OLAF, the State Prosecutor at the Tribunal d'arrondissement de Luxembourg (Luxembourg District Court, Luxembourg) requested, by letter of 1 October 2018, that the Court of Auditors waive Mr Pinxten's immunity from legal proceedings. On 15 November 2018, that institution granted that request.

By its action, which was brought on 15 February 2019, the Court of Auditors claimed that the Court should declare that Mr Pinxten no longer meets the obligations arising from his office and impose, consequently, the penalty laid down in Article 286(6) TFEU.

Sitting in full court, its most formal composition, the Court rules inter alia that Mr Pinxten breached the obligations arising from his office as a Member of the Court of Auditors in respect of:

---

5 Article 286(6) TFEU provides: 'A Member of the Court of Auditors may be deprived of his office or of his right to a pension or other benefits in its stead only if the Court of Justice, at the request of the Court of Auditors, finds that he no longer fulfils the requisite conditions or meets the obligations arising from his office.'

– the undeclared and unlawful exercise of an activity within the governing body of a political party;

– improper use of the resources of the Court of Auditors to finance activities unrelated to the duties of a Member of that institution to the extent specified in the judgment;

– the use of a fuel card to purchase fuel for vehicles belonging to third parties, and

– the creation of a conflict of interest through a relationship with the head of an audited entity.

On the other hand, the Court rejected the complaints raised by the Court of Auditors relating to:

– the purportedly undeclared and unlawful exercise of an activity as manager of a *société civile immobilière*;

– the holding and use of a fuel card by one of Mr Pinxten's children when he was no longer a member of Mr Pinxten's household;

– allegations of false insurance claims in connection with accidents involving the official vehicle and the driver assigned to Mr Pinxten's Cabinet.

In the light of these findings, the Court rules that Mr Pinxten is deprived of two thirds of his right to a pension from the date of delivery of the judgment in the present case, namely 30 September 2021.

Assessment by the Court

As regards the admissibility of the action, the Court rejects, in succession, all the arguments put forward by Mr Pinxten concerning, first, the incompatibility of the procedure with the right to effective judicial protection, second, the irregularity of the investigation by OLAF, third, the irregularity of the procedure followed within the Court of Auditors for authorising the bringing of the action before the Court of Justice and, fourth, the delay in bringing that action. The Court therefore declares the action to be admissible.

On the substance of the action, after noting the nature of the obligations arising from the office of Member of the Court of Auditors, the Court states that the expression 'obligations arising from his office', within the meaning of Article 286(6) TFEU, falls to be broadly construed. Having regard to the importance of the responsibilities assigned to them, it is important that the Members of the Court of Auditors observe the highest standards of conduct and ensure that the general interest of the Union takes precedence at all times, not only over national interests, but also over personal interests. With this in mind, the obligations of the Members of the Court of Auditors set out in primary law are reproduced and given concrete expression in the internal rules adopted by that institution, which those Members are required to observe rigorously.

Against this background, the Court must examine all the evidence submitted to it, both by the Court of Auditors, which must establish the existence of the breach of obligations which it attributes to Mr Pinxten, and by Mr Pinxten. The Court must inter alia assess the material accuracy and reliability of that evidence in order to ascertain whether it is sufficient to find a breach of a certain degree of gravity for the purposes of Article 286(6) TFEU.

Thus, after examining all the evidence submitted by the Court of Auditors and by Mr Pinxten, the Court rules that, by exercising an undeclared activity within the governing body of a political party, which is incompatible with his duties as a Member of the Court of Auditors, by misusing the resources of that institution to finance activities unrelated to the duties of a Member of that institution [6] and by acting in a manner likely to create a conflict of interest with an audited entity, Mr Pinxten is liable for breaches of a significant degree of gravity and therefore acted in breach of the obligations arising from his office as a Member of that institution within the meaning of Article 286(6) TFEU.

---

6 A series of irregularities connected with mission expenses and daily allowances, representation and hospitality expenses and use of the official car and use of a driver.

According to the Court, the breach of those obligations calls, in principle, for the imposition of a penalty under that provision. Article 286(6) TFEU permits the Court to impose a penalty in the form of compulsory retirement or the deprivation of his right to a pension or other benefits in its stead.

As there is no provision in Article 286(6) TFEU as to the extent of the deprivation of the right to a pension under that provision, the Court may order deprivation in whole or in part thereof. That penalty must, however, be proportionate to the gravity of the breaches of obligations arising from the office of Member of the Court of Auditors established by the Court.

In this regard, the Court notes that a number of circumstances are such as to establish that the irregularities attributable to Mr Pinxten have a particularly high degree of gravity. Thus, in the course of his two terms of office as a Member of the Court of Auditors, Mr Pinxten, first, deliberately and repeatedly infringed the applicable rules within that institution, systematically breaching the most basic obligations arising from his office. Next, Mr Pinxten frequently attempted to conceal those infringements of the rules. In addition, the irregularities committed by Mr Pinxten served, to a large extent, to contribute to his personal enrichment. Furthermore, Mr Pinxten's conduct caused considerable damage to the Court of Auditors, not only financially but also to its image and its reputation. Lastly, the specific function for which the Court of Auditors is responsible in examining whether all expenditure has been incurred by the Union in a lawful and regular manner and whether the financial management has been sound [7] further increases the gravity of the irregularities committed by Mr Pinxten.

However, the Court observes that other factors are such as to mitigate the liability of Mr Pinxten. First, he acquired his right to a pension in respect of work which he carried out over 12 years of service at the Court of Auditors. The quality of that work has not been called into question and Mr Pinxten was even elected by his peers to the office of Dean of Chamber III of the Court of Auditors from 2011. Second, although the breaches committed by Mr Pinxten of the obligations arising from his office are determined, first and foremost, by personal choices which he must have known were incompatible with the most basic obligations arising from his office, the fact remains that the perpetuation of those irregularities was facilitated by a lack of precision in the internal rules of that institution and permitted by deficiencies in the controls established by it.

In the light of all the evidence examined, the Court considers that on a fair assessment of the circumstances of the case Mr Pinxten should be deprived of two thirds of his right to a pension from the date of delivery of the judgment in the present case.

Judgment of the General Court (Eighth Chamber) of 1 September 2021, KN v EESC, T-377/20

Institutional law – Member of the EESC – OLAF investigation into allegations of psychological harassment – Decision to discharge a member from his duties involving the management and administration of staff – Action for annulment – Challengeable act –Admissibility – Measure taken in the interest of the service – Legal basis – Rights of the defence – Refusal of access to the annexes to the OLAF report – Disclosure of the substance of the witness statements in the form of a summary – Liability

The applicant, KN, has been a member of the European Economic and Social Committee (EESC) since 1 May 2004 and was president of 'Group I', the Employers' Group within the EESC, between April 2013 and 27 October 2020.

After having been informed of allegations concerning the applicant's behaviour towards other members of the EESC and members of its staff, the European Anti-Fraud Office (OLAF) opened an investigation, in the course of which the applicant and also witnesses and whistle-blowers were

7 Article 287(2) TFEU.

interviewed. On 16 January 2020, OLAF sent out a report in which it recommended to the EESC that it take all necessary measures to prevent any further cases of harassment on the part of the applicant in the workplace. With a view to ensuring the protection of the witnesses and whistle-blowers, the transcripts of their hearings were not sent to the applicant, who received a non-confidential version which did not contain any of the annexes to the OLAF report.

On 13 May 2020, the European Parliament refused to grant the EESC discharge in respect of the budget for as long as measures were not taken to follow up OLAF's recommendations. [8]

By decision of 9 June 2020, the EESC Bureau asked the applicant to resign from his duties as president of Group I and withdraw his candidacy for presidency of the EESC, and discharged him from all activities involving the management and administration of staff ('the contested decision'). Following that decision, the applicant remained president of Group I until the expiry of his mandate but withdrew his application. He was nominated as a member of the EESC for the period from 21 September 2020 to 20 September 2025.

Ruling on an action for annulment of the contested decision and for damages, the General Court dismissed that action and clarified the extent of the access of a person accused of harassment to the statements of the witnesses interviewed in the course of an OLAF investigation.

Findings of the Court

First of all, the Court decided on the admissibility of the action. On the one hand, the action was inadmissible inasmuch as it was directed against the invitations made to the applicant to resign from his duties as president of Group I and withdraw his candidacy for presidency of the EESC, because those invitations did not have binding legal effects. On the other hand, the action was admissible inasmuch as it was directed against the decision to discharge the applicant from his duties involving the management and administration of staff. That decision, which prevented the applicant from exercising hierarchical authority, produced binding legal effects and adversely affected him.

Next, the Court noted that the non-confidential version of the OLAF report contained a summary of the statements of the witnesses and whistle-blowers interviewed. That version gave details of each of the alleged behaviours on the part of the applicant and described the effects which those behaviours had had on the health of the persons concerned.

Inasmuch as that summary reflected the substance of the witness statements gathered, the Court concluded that the failure to provide the annexes to the OLAF report did not affect the legality of the contested decision.

Finally, during the proceedings before the Court, the applicant's lawyers were asked to give a confidentiality undertaking before receiving a copy of the annexes to the OLAF report. [9] However, the applicant's lawyers argued that their observations could not act as a substitute for those which the applicant could have made if he himself had had access to those annexes. In that regard, the Court noted that the applicant's lawyers had failed to identify any element of the annexes to the OLAF report the substance of which was not already found in the non-confidential version of that report. Given that that step could be undertaken without communicating to the applicant the confidential version of the statements of the witnesses interviewed in the course of the investigation, the Court

---

8 Decision (EU) 2020/1984 of the European Parliament of 13 May 2020 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, Section VI – European Economic and Social Committee (OJ 2020 L 417, p. 469), and Resolution (EU) 2020/1985 of the European Parliament of 14 May 2020 with observations forming an integral part of the decision on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, Section VI – European Economic and Social Committee (OJ 2020 L 417, p. 470).

9 Article 103(3) of the Rules of Procedure of the General Court provides for the possibility, for the Court, to bring to the attention of a main party certain information or material which is relevant to the outcome of the dispute and of a confidential nature, making its disclosure subject to the giving of specific undertakings. It is apparent, in addition, from paragraph 191 of the Practice Rules for the Implementation of the Rules of Procedure that such an undertaking may involve a party's representatives' undertaking not to communicate that information or material to their client or a third party.

concluded that it was not necessary to examine the additional observations which the applicant could have submitted himself if he had been privy to that version.

IV. LITIGATION OF THE UNION

Order of the General Court (Fourth Chamber) of 7 September 2021, Isopix v Parliament, T-163/20 DEP

Procedure – Taxation of costs

The applicant, Isopix SA, brought an action seeking, primarily, annulment of two acts of the European Parliament rejecting the bid submitted by that company in the context of an invitation to tender and awarding the public contract relating thereto to another tenderer.

Following two applications for interim measures made by the applicant, the President of the General Court ordered, in essence, on 25 May 2020, [10] the suspension of the operation of one of the two acts pending the decision bringing the main proceedings to a close.

However, following the annulment by the Parliament of the public procurement procedure at issue, the Court held, on 29 October 2020, [11] that there was no longer any need to adjudicate on the applicant's action. Furthermore, it ordered the Parliament to bear its own costs and to pay those incurred by the applicant in connection with the main proceedings and the proceedings for interim measures which had been conducted.

Since the parties did not agree on the amount of costs to be recovered, the applicant lodged an application for taxation of costs with the Court. [12]

By the present order, the Court fixes the total amount of costs which the Parliament is to pay to the applicant. It rules, for the first time, on certain questions relating to the taxation of recoverable costs in proceedings before it. [13]

Findings of the Court

As a preliminary point, the Court recalls that, as regards recoverable costs, which are limited to the expenses necessarily incurred for the purpose of the proceedings, it must make an unfettered assessment of the facts of the case, taking into account the purpose and nature of the proceedings and their significance from the point of view of EU law, as well as the difficulties presented by the case, the amount of work generated by the proceedings for the agents or advisers involved and the financial interests which the parties had in the proceedings.

In the first place, the Court notes that, in the present case, the significance of the proceedings from the point of view of EU law was limited since no novel or particularly complex questions were raised by the main proceedings and the proceedings for interim measures. Nor did the examination of those proceedings reveal anything of significance with respect to the development of EU law. The fact that it

---

10 Order of 25 May 2020, *Isopix* v *Parliament* (T-163/20 R and T-163/20 RII, not published, EU:T:2020:215).

11 Order of 29 October 2020, *Isopix* v *Parliament* (T-163/20, not published, EU:T:2020:527).

12 Under Article 170(1) of the Rules of Procedure of the General Court.

13 Within the meaning of Article 140(b) of the Rules of Procedure of the General Court.

is unusual for the President of the General Court to decide on the suspension of the operation of a measure adopted by an EU institution cannot, in itself, constitute an indication that the case has particular significance from the point of view of EU law.

Furthermore, the allegedly unusual nature of those interim decisions means only that the chance of obtaining the suspension of the operation of a measure is lower than that of having an application for suspension rejected; nevertheless, this does not necessarily cause difficulties for the lawyers in terms of the amount of work or the complexity of the legal issues raised in the cases concerned.

Similarly, while the applicant's lawyers may have had to work within tight time limits, this cannot have an impact on the amount of their work or on the complexity of the legal issues raised.

In the second place, the Court holds that the courier fees incurred by the applicant in connection with sending the documents relating to the opening of an e-Curia account to the Registry of the General Court cannot be considered to have been necessarily incurred for the purpose of the main proceedings (T-163/20) or the proceedings for interim measures (T-163/20 R). It notes that the opening of such an account by a representative is subject to, inter alia, that representative having the professional status of an agent or lawyer authorised to practise before a national court. That account is to be opened in the name of the lawyer requesting it and is to be used for any case brought before the Court of Justice of the European Union.

In the present case, the applicant could have sent the documents necessary to complete the opening of its e-Curia account to the Registry of the General Court after filing its application initiating proceedings and its application for interim measures. The conditions of use of e-Curia [14] provide for a special procedure which enables an e-Curia account to be opened provisionally in order that procedural documents may be lodged with the Court. Thus, where a representative has not taken the requisite steps to open that account in good time before the expiry of the time limit for lodging a procedural document with the Court, it is possible for that representative to open an account on a provisional basis in order to lodge that document. In order for the creation of that account to be validated by the Registry of the General Court, the representative must send it the required documents within 10 days of the date on which the procedural document was lodged via e-Curia.

14 Adopted by the Registry of the General Court on the basis, in particular, of Article 8 of the Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia (OJ 2018 L 240, p. 72).

V. AGRICULTURE

Judgment of the General Court (Ninth Chamber) of 29 September 2021, Società agricola Vivai Maiorana and Others v Commission, T-116/20

Agriculture – Regulation (EU) 2016/2031 – Protective measures against pests of plants – List of Union regulated non-quarantine pests – Threshold above which the presence of a Union regulated non-quarantine pest on plants for planting has an unacceptable economic impact – Implementing Regulation (EU) 2019/2072 – Professional associations – Action for annulment – *Locus standi* – Admissibility – Proportionality – Obligation to state reasons

Union regulated non-quarantine pests ('RNQPs') are pests (in particular, insects, fungi and bacteria) which are mainly transmitted through specific plants and the presence of which on those plants has an adverse economic impact on the use of those plants. As provided for in particular in the Plant Health Regulation, [15] the introduction into and movement within the Union territory of such RNQPs on the plants for planting concerned are prohibited, where those pests are present at an incidence above a certain threshold. In Annex IV to Implementing Regulation 2019/2072, [16] the Commission drew up the list of RNQPs and also established the thresholds for the maximum presence of such pests.

A vineyard nursery company and two associations representing farmers working in various agricultural activities [17] (together, 'the applicants') consider inter alia that establishing 0% thresholds for the presence of RNQPs on the plants covered by Parts A, B, C, F, I and J [18] of Annex IV to that implementing regulation entails plant health sanitation obligations in respect of the varieties concerned, which has adverse consequences for biodiversity and gives rise to exorbitant sanitation costs for professional operators.

Whilst acknowledging that each of the applicants has standing to bring an action for annulment of various parts of Annex IV to the implementing regulation, cited above, the Court dismisses the applicants' action for annulment of that annex, and in so doing rules, for the first time, on the legal issues raised.

Assessment of the Court

In the first place, the applicants claimed that the fact that the Commission failed to take account of the negative impact of the thresholds established on biodiversity and the costs borne by the professional operators concerned entailed, primarily, infringement of the Plant Health Regulation. In rejecting that plea, the Court notes first of all the review of the pests and of the thresholds which led to the adoption of Annex IV to the contested implementing regulation. Next, finding that the

---

15 Regulation (EU) 2016/2031 of the European Parliament and of the Council of 26 October 2016 on protective measures against pests of plants, amending Regulations (EU) No 228/2013, (EU) No 652/2014 and (EU) No 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC (OJ 2016 L 317, p. 4).

16 Commission Implementing Regulation (EU) 2019/2072 of 28 November 2019 establishing uniform conditions for the implementation of Regulation (EU) 2016/2031 of the European Parliament and the Council, as regards protective measures against pests of plants, and repealing Commission Regulation (EC) No 690/2008 and amending Commission Implementing Regulation (EU) 2018/2019 (OJ 2019 L 319, p. 1).

17 More specifically, it appears that the first association has 584 842 members, eight of whom are professional operators active in the fodder plant seed, cereal seed, vine propagating material, vegetable seed, vegetable planting and fruit plant sectors. The second association has members who are professional operators active in the vine propagating material, vegetable planting and fruit plant sectors.

18 Those parts concern, respectively, fodder plant seed (Part A), cereal seed (Part B), vine propagating material (Part C), vegetable seed (Part F), vegetable propagating material and vegetable planting (Part I) and fruit propagating material and fruit plants intended for fruit production (Part J).

establishment of the contested thresholds led to a false perception of the obligations on the professional operators concerned, the Court holds, conversely, in particular, that Part C of Annex IV to the contested regulation does not require professional operators to implement methods of sanitation by way of genetic selection, as suggested by the applicants. Finally, the Court observes that several directives governing the marketing of plants for planting contain derogating provisions intended to promote genetic diversity.

In the second place, the applicants considered that establishing a 0% threshold for the presence of RNQPs on the native varieties of plants infringed the International Treaty on Plant Genetic Resources for Food and Agriculture. [19] In their view, the genetic selection required by the contested parts of Annex IV to the contested implementing regulation for the purpose of the sanitation required led to the rights of farmers, as provided for in that treaty, to save, use, exchange and sell farm-saved seed or propagating material being rendered meaningless. Finding inter alia that that plea is based on the same erroneous premiss as the first plea, and having concluded that there is no obligation of sanitation incumbent on the operators concerned, the Court rejects that second plea.

In the last place, the Court finds, with regard to the plea alleging infringement of Regulation 2018/848, [20] that, rather than casting doubt on the legality of the establishment of the contested thresholds, Article 13 of Regulation 2018/848 allows, by way of exception and within a strictly defined framework, plant reproductive material of organic heterogeneous material to be marketed without complying with the requirements set out in the directives governing marketing. Thus, that provision cannot be relied on to contest the legality of the abovementioned thresholds, and that third plea must therefore be rejected.

---

19 International Treaty on Plant Genetic Resources for Food and Agriculture, the conclusion of which was approved, on behalf of the European Community, by Council Decision 2004/869/EC of 24 February 2004 (OJ 2004 L 378, p. 1).

20 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ 2018 L 150, p. 1).

VI. COMPETITION

1. MERGERS

Judgment of the General Court (Sixth Chamber) of 22 September 2021, Altice Europe v Commission, T-425/18

Link to the complete text of the judgment

Competition – Concentrations – Telecommunications sector – Decision imposing fines for putting into effect a concentration before it has been notified and authorised – Article 4(1), Article 7(1) and Article 14 of Regulation (EC) No 139/2004 – Legal certainty – Legitimate expectations – Principle of legality – Presumption of innocence – Proportionality – Gravity of the infringements – Implementation of the infringements – Exchange of information – Amount of fines – Unlimited jurisdiction

Altice Europe NV ('Altice') is a multinational cable and telecommunications company. PT Portugal SGPS SA ('PT Portugal') is a telecommunications and multimedia operator with activities extending across the entire telecommunications sector in Portugal.

On 9 December 2014 Altice concluded a share purchase agreement ('SPA') with a view to obtaining sole control of PT Portugal through its subsidiary Altice Portugal SA. Since that acquisition required authorisation by the Commission under the regulation on the control of concentrations [21], the SPA laid down a set of rules concerning how PT Portugal's business was to be managed in the period between the signing of that agreement and the closing of the transaction following authorisation by the Commission ('the preparatory clauses').

By decision of 20 April 2015, the Commission declared the acquisition compatible with the internal market subject to compliance with certain commitments.

In March 2016, after becoming aware of information in the press, la Commission launched an investigation to determine whether Altice had infringed the provisions of the Merger Regulation which require that concentrations be notified to the Commission before they are implemented [22] and prohibit their implementation before they are notified and declared compatible with the internal market [23].

Based on the results of its investigation, the Commission concluded that Altice had had the possibility of exercising decisive influence or had exercised control over PT Portugal prior to the adoption of its clearance decision and, in some instances, even prior to notification of the concentration. In that regard, the Commission observed, in the first place, that some of the preparatory clauses gave Altice a right to veto the appointment of senior management of PT Portugal, its pricing policy, commercial terms agreed with clients and a veto over it entering into, terminating or amending a wide range of contracts. In the second place, the Commission found that those clauses had been implemented on a number of occasions, which involved Altice intervening in the day-to-day running of PT Portugal. In the third place, the Commission noted that sensitive information concerning PT Portugal had been exchanged as from the date of signing the SPA.

Accordingly, by decision of 24 April 2018, the Commission imposed on Altice a fine of €62 250 000 for having infringed the obligation to notify the concentration and a fine of €62 250 000 for failing to

---

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

22 Article 4(1) of the Merger Regulation.

23 Article 7(1) of the Merger Regulation.

comply with the prohibition on implementing the concentration prior to its notification to and its clearance by the Commission [24].

Altice brought an action seeking annulment of that decision, which the General Court has dismissed in part. In its judgment, the General Court provides clarifications regarding the interpretation and the application of the notification obligation and the standstill obligation for concentrations with a European dimension laid down in the Merger Regulation.

The General Court's findings

First of all, the General Court dismisses the plea of illegality raised by Altice, according to which the obligation to notify the concentration (laid down in Article 4(1) of the Merger Regulation) and the fine applicable in cases of non-compliance with that obligation (laid down in Article 14(2)(a) of the regulation) are redundant in the light of the obligation not to implement the concentration before it has been notified and cleared (laid down in Article 7(1) of the regulation) and the fine applicable in cases of infringement of that obligation (laid down in Article 14(2)(b) of the regulation). In that context, Altice also alleged an infringement of the principles of proportionality and the prohibition of double punishment, in so far as the provisions mentioned above permitted the Commission to impose a second fine on the same person in respect of the same facts.

In that regard, the General Court observes, in the first place, that Article 4(1) and Article 7(1) of the Merger Regulation pursue autonomous objectives. Article 4(1) seeks to require undertakings to notify a concentration before it is implemented whilst the aim of Article 7(1) is to prevent those undertakings from implementing a concentration before the Commission has declared it compatible with the internal market. In addition, Article 4(1) lays down a positive obligation to act, whereas Article 7(1) lays down a negative obligation not to act. Furthermore, while an infringement of Article 4(1) is an instantaneous infringement, an infringement of Article 7(1) is a continuous infringement.

In the light of those considerations, the General Court concludes that Article 4(1) and Article 14(2)(a) of the Merger Regulation are not redundant in the light of Article 7(1) and Article 14(2)(b) and do not infringe the principle of proportionality or the prohibition of double punishment. Furthermore, to declare such provisions unlawful would conflict not only with the objective of the regulation, which is to ensure effective control of concentrations, but would also deprive the Commission of the possibility of establishing a distinction, by means of the fines which it imposes, between a situation in which the undertaking complies with the notification obligation but infringes the standstill obligation, and a situation in which the undertaking infringes both obligations.

Next as regards Altice's argument that the preparatory clauses of the SPA did not confer upon it the power to block the adoption of strategic decisions and cannot therefore be considered to be veto rights granting it control of PT Portugal, the General Court first of all addresses the preparatory clause enabling Altice to appoint and to terminate the employment of the senior management of PT Portugal, or to amend their contracts. The General Court observes, in that regard, that the power to co-determine the structure of the senior management usually confers on the holder the power to exercise decisive influence on the commercial policy of an undertaking.

In addition, the preparatory clause enabling Altice to intervene in PT Portugal's pricing policy required PT Portugal to obtain written consent from Altice to any change in prices and to any amendments to its standard terms and conditions.

In so far as the preparatory clauses also enabled Altice to enter into, terminate or amend a wide range of PT Portugal's contracts, the General Court observes that those clauses, which carried a right to compensation in the event they were infringed, obliged PT Portugal to request Altice's prior

[24] Decision C(2018) 2418 final imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) on the Merger Regulation (Case M.7993 – Altice/PT Portugal).

consent to all material contracts, whether or not they were in the ordinary course of business and irrespective of their economic value.

In that regard, Altice had not proved that the preparatory clauses concerned were necessary to ensure the value of the undertaking transferred was preserved or to avoid its commercial integrity being compromised.

In the light of the foregoing, the General Court concludes that those preparatory clauses gave Altice the possibility of exercising control over PT Portugal, by conferring on it the possibility of exercising decisive influence over the business of PT Portugal. According to the General Court, it is apparent, in addition, from various items in the file that, on a number of occasions, Altice did in fact intervene in the day-to-today running of PT Portugal and that sensitive information was exchanged between Altice and PT Portugal.

Finally, given that the entry into force of the preparatory clauses of the SPA, certain interventions and certain exchanges of sensitive information had occurred before the transaction was notified, the General Court confirms that Altice exercised decisive influence over PT Portugal, contrary to both the notification obligation under Article 4(1) of the Merger Regulation and the standstill obligation under Article 7(1) of that regulation.

However, in the exercise of its unlimited jurisdiction, the General Court considers that it is appropriate to reduce by 10% the amount of the fine applied in relation to the infringement of the notification obligation laid down in Article 4(1) of the Merger Regulation, in order to take account of the fact that, before the SPA was signed, Altice had informed the Commission of the transaction it was to undertake and that, immediately after that signing, it sent to the Commission a case team allocation request relating to its file.

2. STATE AID

Judgment of the General Court (Ninth Chamber, Extended Composition) of 15 September 2021, INC and Consorzio Stabile Sis v Commission, T-24/19

Link to the complete text of the judgment

State aid – Italian motorways – Prolongation of concessions for the execution of works – Services of general economic interest – Cap on toll charges – Decision not to raise any objections – Article 106(2) TFEU – Actions brought by competitors of the beneficiary – Abandonment by the Member State of the plan to grant aid – Plan not capable of being implemented as approved – Annulment not procuring any advantage to the applicants – No longer any legal interest in bringing proceedings – No need to adjudicate

In October 2017, the Italian authorities notified the European Commission of a series of measures relating to an Italian motorways investment plan managed by private operators under concession. That plan comprised, in essence, the prolongation of certain concessions awarded to the private operators Autostrade per l'Italia SpA and Società Iniziative Autostradali e Servizi SpA in order to finance additional investments to be made by those operators.

By decision of 27 April 2018, [25] the Commission found that certain measures taken in the context of the notified investment plan constituted State aid within the meaning of Article 107 TFEU, which was

[25] Commission Decision C(2018) 2435 of 27 April 2018 on State aid granted for the purposes of the Italian motorways investment plan (Cases SA.49335 (2017/N) and SA.49336 (2017/N)) ('the contested decision').

nevertheless compatible with the internal market pursuant to Article 106(2) TFEU ('the measures at issue'). Accordingly, the Commission decided, without initiating the formal investigation procedure under Article 108(2) TFEU not to raise objections to those measures.

INC SpA and Consorzio Stabile Sis SCpA ('the applicants'), two companies active in the motorway construction and concession sectors brought an action before the General Court for annulment of that decision. In support of their action, they argued, inter alia, that the Commission ought to have had serious doubts as to the compatibility of the measures at issue with the internal market, and therefore, ought to have initiated the formal investigation procedure. By declaring the measures at issue compatible with the internal market without initiating the formal investigation procedure, the Commission therefore infringed their procedural rights.

In the course of the oral procedure, however, the Commission informed the Court of the Italian authorities' decision not to implement the measures at issue. In the light of the written confirmation from the ministero delle Infrastructure e dei Trasporti (Ministry of Infrastructure and Transport, Italy), the Commission observed that the measures at issue could not and would not be implemented by the Italian authorities, so that the applicants no longer had any legal interest in bringing proceedings.

In confirming that the annulment of the contested decision was no longer capable of procuring an advantage to the applicants, the ninth chamber, sitting in extended composition, stated that, given the applicants no longer had a legal interest in bringing proceedings, there was, in reality, no longer any need to adjudicate on the action.

The Court's findings

The Court recalled first of all that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest, which must be vested and current, requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it.

As regards, in particular, the rules on State aid, that interest must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible and continue until the final decision, failing which there will be no need to adjudicate.

In that context, the competitors of the aid beneficiary have an interest in seeking the annulment of a decision under which, without initiating the formal investigation procedure, the Commission declares that aid compatible with the internal market in accordance with Article 4(3) of Regulation 2015/1589. [26] That interest exists inasmuch as the annulment in question would require the Commission to initiate the formal investigation procedure and to invite competitors of the beneficiary of the measure to submit comments pursuant to Article 6(1) of the regulation as 'interested parties'.

However, in order for that interest to be considered ongoing until the delivery of the court decision, it is necessary that, at the time of any decision to annul the decision not to raise objections, there is still a plan to grant aid capable of being implemented by the notifying Member State and, thus, of being the subject of a formal investigation procedure.

In the present case, it follows from the various documents submitted by the Commission that the Italian Republic had definitively and irreversibly abandoned the proposed prolongation of the concessions at issue, a prolongation which constituted the element on the basis of which the Commission classified the measures which were the subject of the contested decision as State aid within the meaning of Article 107(1) TFEU.

---

[26] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the functioning of the European Union (OJ 2015 L 248, p. 9).

Given that the Italian government had definitively and irreversibly abandoned the plan to grant the aid in question, any annulment by the court would oblige the Commission only to initiate a formal investigation procedure which would be devoid of purpose from the outset, which renders devoid of purpose also the applicants' submission of comments on a plan which is no longer capable of being implemented.

Since the annulment of the contested decision is not, therefore, capable of procuring the applicants the advantage that they seek, namely the opportunity to submit comments in the context of a formal investigation procedure, the Court confirms that that annulment cannot, as a result, procure any advantage to the applicants. Accordingly, it observes that there is no longer any need to adjudicate on their action for annulment.

Judgment of the General Court (Ninth Chamber, Extended Composition) of 15 September 2021, CAPA and Others v European Commission, T-777/19

State aid – Individual aid measures for the operation of offshore wind farms – Obligation to purchase electricity at a price higher than the market price – Preliminary investigation procedure – Decision not to raise any objections – Action for annulment – Article 1(h) of Regulation (EU) 2015/1589 – Status of interested party – Fisheries undertakings – Construction of wind farms in fishing grounds – No competitive relationship – No likelihood that granting the aid at issue will have an effect on the interests of fisheries undertakings – No direct individual effect – Inadmissibility

In 2011 and 2013, France issued tendering procedures for construction of the first offshore wind farms operated in France. Those six projects, which are expected to operate for 25 years, are located inside marine areas exploited as fisheries.

The projects to construct and operate the wind farms are subsidised by means of an obligation to purchase electricity at a price higher than the market price, in respect of which the State offsets the entirety of the additional cost.

By a decision of 26 July 2019 [27] ('the contested decision'), the European Commission found those subsidies to be State aid compatible with the internal market [28] ('the aid at issue'). It decided for that reason not to raise any objections.

Coopérative des artisans pêcheurs associés (CAPA), a company whose customers are fishermen, and 10 fisheries undertakings or skippers of fishing vessels ('the applicant fishermen') brought proceedings before the General Court seeking annulment of the contested decision, However, the Ninth Chamber (Extended Composition) of the Court dismisses that action as inadmissible, finding that the applicants do not have *locus standi* in respect of the contested decision.

Findings of the Court

As a preliminary point, the Court recalls that the contested decision is a decision not to raise objections to the aid at issue, by which the Commission necessarily, albeit implicitly, declined to open the formal investigation procedure provided for in Article 108(2) TFEU. Since that decision prevents the 'interested parties' [29] from submitting their observations in a formal investigation procedure

---

27 Commission Decision C(2019) 5498 final of 26 July 2019 concerning the State aid SA.45274 (2016/NN), SA.45275 (2016/NN), SA.45276 (2016/NN), SA.47246 (2017/NN), SA.47247 (2017/NN) and SA.48007 (2017/NN) implemented by the French Republic in favour of six offshore wind farms (Courseulles-sur-Mer, Fécamp, Saint-Nazaire, Île d'Yeu and Île de Noirmoutier, Dieppe and Le Tréport, Saint Brieuc).

28 Under Article 107(3)(c) TFEU.

29 Within the meaning of Article 1(h) 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).

relating to the aid at issue, an action by those parties challenging that decision before the EU judicature is admissible since the decision infringes their procedural rights. In order to be categorised as an 'interested party', a person, undertaking or association of undertakings must establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation.

In respect of whether the applicant fishermen are 'interested parties' entitled to bring an action against the contested decision, the Court notes that, as grounds for their *locus standi*, they submit, first, that there is an indirect competitive relationship between their activities and those of the beneficiaries of the aid at issue and, second, and in any event, that the aid is likely to have a specific effect on their situation.

As regards the indirect competitive relationship claimed by the applicant fishermen, the Court notes that the applicants cannot argue that their production process involves using the same 'raw material' as that of wind farm operators. In common parlance, 'raw material' denotes a natural resource or an unprocessed product used as an input in a process to manufacture goods. In the present case, the 'raw material' of their respective economic activities is not access to the area of maritime public space used by both the fishermen and the operators of offshore wind farms but the natural resources found therein, that is to say, the fish stocks, on the one hand, and kinetic wind energy, on the other. Since those resources are different, the applicant fishermen are thus not in competition with the wind farm operators to exploit those resources.

The Court accordingly finds that the applicant fishermen cannot be regarded as 'interested parties' entitled to bring an action against the contested decision on the basis of an alleged indirect competitive relationship with the beneficiaries of the aid at issue.

As regards the claim that the aid at issue is likely to have a specific effect on the situation of the applicant fishermen, the Court then examines whether the alleged adverse effects of the operation of the wind farms on their environment – in particular on coexisting fishing activities, the marine environment and fish stocks – can be regarded as a specific effect of the grant of that aid on the situation of the fisheries undertakings concerned.

The Court states in that regard that, although in principle it is not inconceivable that aid may specifically affect the interests of third parties as a result of the effects the subsidised development has on their environment and, in particular, on other activities carried on in the vicinity, in order for those third parties to be categorised as interested parties they must demonstrate to the requisite legal standard that such a specific effect is likely. It is furthermore not sufficient for that purpose to demonstrate that those effects exist; it is also necessary to establish that they result from the aid itself. The applicant fishermen have not provided that evidence.

The alleged effects of the projects at issue on the activities of the applicant fishermen are in fact inherent, first, in the decisions by the French authorities to locate those projects in the areas concerned as part of their policy to exploit energy resources and, second, in the rules governing maritime public space and in the technical measures applicable to those projects. Although the decision by those authorities to grant aid to the operators of those projects in the form of a purchase obligation funded by the State does give them an advantage over producers of non-subsidised electricity, it does not, on its own, affect the applicant fishermen's economic performance.

In the light of the foregoing, the Court concludes that the aid at issue cannot, on its own, be considered likely to have a specific effect on the situation of the applicant fishermen, and therefore does not give them *locus standi* to challenge the contested decision.

Lastly, as regards whether Coopérative des artisans pêcheurs associés (CAPA) can be categorised as an 'interested party', the Court notes that the activity of that company, whose customers are fishermen, is determined by the economic decisions of its customers, not by the payment of the aid at issue. It follows that it has not in any event been demonstrated that the aid is likely to have a specific effect on its situation, and that that company cannot be categorised as an interested party either.

Judgment of the General Court (Third Chamber, Extended Composition) of 22 September 2021, DEI v Commission, T-639/14 RENV, T-352/15 and T-740/17

State aid - Tariff for electricity supply - Fixing of the tariff invoiced to Alouminion by decision of an arbitration tribunal - Decision to take no further action on the complaint - Decision finding that there is no aid - Challengeable act - Interested party status - Interest in bringing proceedings - Locus standi - Admissibility - Imputability to the State - Advantage - Private operator principle - Serious difficulties

Dimosia Epicheirisi Ilektrisimou AE ('DEI'), an electricity producer and supplier established in Athens (Greece) and controlled by the Greek State, and its largest customer, Mytilinaios AE – Omilos Epicheiriseon, formerly Alouminion tis Ellados VEAE, established in Marousi (Greece) ('Mytilinaios'), have been involved in a long-running dispute regarding the electricity supply tariff intended to replace the preferential tariff enjoyed by Mytilinaios stemming from an agreement which was signed in 1960 but which expired in 2006.

As part of an arbitration agreement signed on 16 November 2011, the two parties agreed to entrust the resolution of their dispute to the Rythmistiki Archi Energeias (Greek Energy Regulator, Greece; 'the RAE'), under which a permanent arbitration body ('the Arbitration Tribunal') is established under Greek law.

By decision of 31 October 2013 ('the arbitration award'), the Arbitration Tribunal fixed the energy tariff applicable to Mytilinaios ('the tariff in question'). The action filed by DEI against that arbitration award was dismissed by the Efeteio Athinon (Court of Appeal, Athens, Greece).

In that context, DEI filed two complaints with the Commission, arguing that, first, the RAE and, secondly, the Arbitration Tribunal had granted Mytilinaios unlawful State aid, in so far as the tariff in question required it to supply Mytilinaios with electricity at a price below its costs and thus below the market price. By letter of 12 June 2014, signed by a Head of Unit of the Directorate-General (DG) for Competition ('the contested letter'), the Commission informed DEI that no further action would be taken on its complaints. According to the Commission, the tariff in question did not constitute State aid, as the criteria of imputability and advantage were not met; there was consequently no need to open the formal investigation procedure referred to in Article 108(2) TFEU.

Following that letter, DEI brought an action before the General Court, registered under number T-639/14, seeking annulment of the decision, contained in that letter, not to take further action on its complaints.

In the course of those proceedings, the Commission, by decision of 25 March 2015 [30] ('the first contested decision'), withdrew and replaced the contested letter. In that decision, it took the view that the arbitration award did not involve the granting of State aid to Mytilinaios, essentially on the ground that DEI's voluntary submission of their dispute to arbitration was consistent with the conduct of a prudent investor operating in a market economy and therefore did not involve an advantage.

DEI subsequently brought an action before the Court, registered under number T-352/15, seeking to have the first contested decision annulled.

By order of 9 February 2016, the Court held that there was no longer any need to adjudicate on the action in Case T-639/14. On appeal, however, the Court of Justice [31] set that order aside and referred the case back to the Court, where it was registered under number T-639/14 RENV.

On 14 August 2017, the Commission adopted a second decision ('the second contested decision'), [32] repealing and replacing both the contested letter and the first contested decision. Relying on the

---

[30] Decision C(2015) 1942 final of 25 March 2015 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid to Alouminion SA in the form of below-cost electricity tariffs following an arbitration award).

[31] Judgment of 31 May 2017, DEI v Commission (C-228/16 P).

same grounds as those set out in the first contested decision, the second decision confirms that the arbitration award does not involve the granting of State aid within the meaning of Article 107(1) TFEU.

DEI once again brought an action for annulment of that second decision before the Court, registered under number T-740/17.

After joining the three pending cases, the Third Chamber (Extended Composition) of the General Court upheld the three actions brought by DEI and annulled both the contested letter and the first and second contested decisions (together, 'the contested acts'). In its judgment, the Court clarifies the classification of a complainant as an 'interested party' with standing to bring an action against a Commission decision not to raise objections under State aid law to a State measure. As to the substance, the judgment also defines the scope of the Commission's obligation to determine whether an arbitration tribunal with rights and powers comparable to those of an ordinary State court has granted an advantage within the meaning of State aid law by setting an electricity supply tariff which, as the case may be, does not correspond to the market price.

Findings of the General Court

As regards the admissibility of the action in Case T-740/17, which is examined first, the Court notes that the second contested decision has legally binding effects on DEI. According to settled case-law of the Court of Justice, a decision finding that there is no aid, by which the Commission closes the preliminary investigation phase, also has binding legal effects on an interested party. In that regard, the Court adds that, in so far as DEI claims that the tariff in question constituted aid prohibited by Article 107(1) TFEU and affecting its economic interests, DEI has the status, 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, [33] of an 'interested party' which is prevented, by virtue of the contested acts deciding that no further action is to be taken on its complaints, from submitting its observations in a formal investigation procedure.

Thus, in so far as DEI's action seeks to safeguard the procedural guarantees which it would enjoy, as an interested party, if a formal investigation procedure were to be opened under Article 108(2) TFEU, it is admissible. In that regard, the Court states that the pleas for annulment relied on by DEI seek to establish the existence of doubts [34] or serious difficulties which should have led the Commission to open the formal investigation procedure.

As regards the substantive question of whether the Commission should have encountered doubts or serious difficulties in its assessment of the complaints lodged by DEI, the Court rejects the Commission's argument that a prudent private investor in DEI's situation would have opted for arbitration and accepted the fixing of the applicable tariff by an Arbitration Tribunal comprising experts whose discretion was limited by parameters comparable to those contained in the arbitration

---

[32] Decision C(2017) 5622 final of 14 August 2017 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid to Alouminion SA in the form of below-cost electricity tariffs following an arbitration award).

[33] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

[34] Within the meaning of Article 4(3) and (4) of the Regulation laying down detailed rules for the application of Article 108 TFEU.

agreement; the fixing of the tariff in question by the Arbitration Tribunal could therefore not have had the effect of granting an advantage to Mytilinaios.

In that regard, the Court confirms that the Arbitration Tribunal, ruling under an arbitration procedure provided for by law and fixing an electricity tariff by means of a legally binding decision, must be classified as a body exercising a power coming within the scope of public authority rights and powers, having regard to its nature, the context in which its activity takes place, its objective and the rules to which it is subject, according to which its decisions may be challenged before the State courts, have the force of *res judicata* and are enforceable. The Arbitration Tribunal can therefore be treated in the same way as an ordinary State court.

That being the case, in view of the division of powers between national courts and the Commission in the monitoring of State aid, national courts are themselves liable to disregard their obligations under Articles 107(1) and 108(3) TFEU and, in so doing, to make possible or perpetuate the granting of unlawful aid, or even to become the instrument of such aid, this being a matter which comes within the scope of the Commission's supervisory power.

Thus, in order to be able to remove any doubts or serious difficulties as to whether the tariff in question, set by the arbitration award, involved an advantage as contemplated in Article 107(1) TFEU, the Commission was required to carry out a review as to whether a State measure which was not notified but which was challenged by a complainant, such as that tariff, came within the definition of State aid, within the meaning of Article 107(1) TFEU, including the criterion of an advantage. That review requires complex economic assessments, relating, in particular, to how consistent the tariff is with normal market conditions.

However, by limiting its analysis to the question of whether a private operator would have submitted to the arbitration accepted by DEI, the Commission delegated those complex assessments to the Greek courts, while disregarding its own supervisory duty. Moreover, having regard to the information submitted by DEI in the course of the administrative procedure, the Commission ought to have carried out its own analysis as to whether DEI's method for determining costs, as applied by the Arbitration Tribunal, was both appropriate and sufficiently plausible to establish that the tariff in question was consistent with normal market conditions.

Since the Commission did not, in the second contested decision, comply with its supervisory obligations, the Court finds that it ought to have experienced serious difficulties or had doubts requiring the opening of the formal investigation procedure. Accordingly, the Court upholds the action in Case T-740/17 and annuls the second contested decision.

Since the second contested decision is thus declared null and void, it cannot repeal and replace either the first contested decision or the contested letter. Consequently, the action for annulment of the first contested decision retains its purpose.

In view of the almost identical content of the first and second contested decisions, the Court, for the same reasons, upholds the action in Case T-352/15 and annuls the first contested decision. In so far as the latter is no longer capable of repealing and replacing the contested letter, Case T-639/14 RENV also retains its purpose.

After having declared the action in the latter case admissible, the Court finds that the contested letter, which amounts to a definitive statement of the Commission's position on DEI's complaints by deciding to take no further action in their regard, is vitiated by a procedural error in that it should have been adopted by the Commission as a collegiate body and not by a Head of Unit of the Competition DG, which is why the Commission itself repealed and replaced that letter. The Court further confirms that the Commission ought to have had serious difficulties or doubts as to whether there was State aid or, at the very least, that it was not entitled to dismiss such doubts on the ground that the arbitration award was not attributable to the Greek State. In recalling that, by its nature and legal effects, the arbitration award is comparable to judgments delivered by an ordinary Greek court, and can therefore be classified as an act of public authority, the Court emphasises that DEI has demonstrated that imputability to the requisite legal standard.

The Court, having upheld the third application, therefore also annuls the contested letter.

VII. APPROXIMATION OF LAWS

1. INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Fifth Chamber, Extended Composition) of 1 September 2021, Gruppe Nymphenburg Consult v EUIPO (Limbic® Types), T-96/20

EU trade mark – Application for the EU word mark Limbic® Types – Absolute grounds for refusal – Decision taken following the annulment by the General Court of an earlier decision – Referral to the Grand Board of Appeal – Article 7(1)(b) of Regulation No 207/2009 (now Article 7(1)(b) of Regulation 2017/1001) – Error of law – Examination of the facts of the Office's own motion – Article 95(1) of Regulation 2017/1001 – *Res judicata* – Article 72(6) of Regulation 2017/1001 – Composition of the Grand Board of Appeal

Gruppe Nymphenburg Consult AG filed an application with the European Union Intellectual Property Office (EUIPO) for registration of the EU word mark Limbic® Types in respect of goods and services falling within, inter alia, the business consultancy sector and the human resource management consultancy sector. On 23 June 2015, the First Board of Appeal of EUIPO found that the sign was descriptive and refused the application on the basis of Article 7(1)(c) of Regulation No 207/2009. [35]

By its judgment of 16 February 2017, *Gruppe Nymphenburg Consult* v *EUIPO (Limbic® Types)* ('the judgment in T-516/15'), [36] the General Court annulled the Board of Appeal's decision on the ground that it had incorrectly assessed the descriptive character of the mark applied for.

By decision of the Presidium of the Boards of Appeal of EUIPO, the case was referred to the Grand Board of Appeal for a new decision. On 2 December 2019, the Grand Board of Appeal dismissed Gruppe Nymphenburg Consult's appeal and found that the mark was descriptive of the goods and services at issue and that it was devoid of any distinctive character.

The General Court, sitting in extended composition, annuls the decision of the Grand Board of Appeal on the grounds that, first, it disregarded the force of *res judicata* attaching to the judgment in Case T-516/15 and, secondly, it infringed Article 7(1)(b) of Regulation No 207/2009. In addition, it states that the complaints directed against the decision of the Presidium of the Boards of Appeal are inadmissible. Furthermore, it rules that it was permissible for the Grand Board of Appeal to include the single member of the Board of Appeal who adopted the decision annulled by the judgment in T-516/15.

Findings of the General Court

First of all, the General Court recalls that actions may be brought before the EU judicature only against decisions of the Boards of Appeal. [37] Thus, the complaints alleging failure to communicate and failure to state adequate reasons for the decision to refer the action to the Grand Board of Appeal concern irregularities which may affect the decision of the Presidium of the Boards of Appeal, but not the decision of the Grand Board of Appeal. Accordingly, those complaints are inadmissible.

Next, as regards the complaint alleging irregularity in the composition of the Grand Board of Appeal, in that the single member of the Board of Appeal who adopted the decision annulled by the General

---

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

36 Judgment of 16 February 2017, *Gruppe Nymphenburg Consult* v *EUIPO (Limbic ® Types)* (T-516/15, not published, EU:T:2017:83).

37 In accordance with Article 72(1) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

Court in T-516/15 also sat on the Grand Board of Appeal, [38] the General Court points out that a judgment annulling a measure has the effect of retroactively eliminating the annulled measure from the legal system. Given that the decision of the Board of Appeal was annulled by the judgment in T-516/15, which has become final, the decision under appeal before the Grand Board of Appeal is not the annulled decision of the Board of Appeal but the decision of the EUIPO examiner. Accordingly, in so far as the case was referred to the Grand Board of Appeal, it was permissible for the Grand Board of Appeal to include the single member of the Board of Appeal who adopted the annulled decision.

Lastly, the General Court points out that, while it is true that the Board of Appeal is entitled to re-open the examination of absolute grounds for refusal on its own initiative at any time before registration, where appropriate, [39] it is required to have regard not only to the operative part of the judgment annulling a measure, but also to the grounds constituting its essential basis. In the present case, the General Court finds that the question of the descriptive character of the mark applied for was settled by the judgment in T-516/15 and, therefore, that the grounds of the judgment relating to the lack of such character are covered by the force of *res judicata*. In that regard, the General Court explains that the fact that the Grand Board of Appeal based its examination of the descriptive character on matters of fact which the First Board of Appeal had not taken into account has no effect on the force of *res judicata* attaching to the judgment in T-516/15. Consequently, the Grand Board of Appeal disregarded the force of *res judicata* attaching to that judgment.

Furthermore, the General Court holds that the Grand Board of Appeal also erred in law in its assessment of the distinctive character of the mark applied for and therefore annuls the decision in its entirety.

Order of the General Court (Second Chamber) of 13 September 2021, Katjes Fassin v EUIPO, T-616/19 REV

Link to the complete text of the order

Procedure – Application for revision – EU trade mark – Opposition proceedings – Action against a decision of EUIPO partially refusing to register a mark – Withdrawal of the opposition before service of the order dismissing the action – Fact unknown to the applicant and to the General Court – Revision of the order – No need to adjudicate

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

The action brought by Katjes Fassin against that decision was dismissed by the General Court by order of 10 July 2020. [40] After learning that the opponent had withdrawn its opposition to the

38 It relied on Article 169(1) of Regulation 2017/1001, according to which members of the Boards of Appeal may not take part in appeal proceedings if they participated in the decision under appeal.

39 See Article 45(3) of Regulation 2017/1001 and Article 27(1) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

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

registration of the mark WONDERLAND before the Court made its order, Katjes Fassin made an application for revision by which it requested the Court to resume the proceedings in the case in question and to amend its order.

By an initial decision, [41] the Court declares the application for revision admissible. By a second decision, [42] it grants that application and holds that there is no longer any need to adjudicate on the action for annulment, which has become devoid of purpose.

Findings of the Court

In its initial decision, the Court rules on the admissibility of the application for revision. First of all, it observes that an application for revision of its decision may be made only on discovery of a fact which is of such a nature as to be a decisive factor and which, when the judgment was delivered or the order served, was unknown to the Court and to the party claiming revision. [43] Furthermore, it states that revision is an exceptional review procedure that allows the force of *res judicata* attaching to a final judicial decision to be called in question on the basis of the findings of fact relied upon by the court.

Having made those clarifications, the Court examines, in the first place, whether the application for revision satisfies the conditions governing admissibility. In that regard, it notes that, although the opponent informed EUIPO of the withdrawal of the opposition, EUIPO did not make that information available to Katjes Fassin. Consequently, as it had not been informed of the actual withdrawal of the opposition before service of the order of 10 July 2020, the applicant was not in a position to know that fact on the date of service of that order. In addition, the Court points out that, when it made that order, it also did not have any information on the withdrawal of the opposition, of which it had not been notified by either EUIPO or the opponent.

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

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

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

In its second decision, the Court rules on the question of substance. It finds that, at the time of service of the order of 10 July 2020, the basis of the opposition proceedings had ceased to exist and the decision which was the subject of the action for annulment in the main proceedings had to be

---

41 Order of 22 April 2021, *Katjes Fassin* v *EUIPO – Haribo The Netherlands & Belgium (WONDERLAND)* (T-616/19, not published, EU:T:2021:213).

42 Order of 13 September 2021, *Katjes Fassin* v *EUIPO – Haribo The Netherlands & Belgium (WONDERLAND)* (T-616/19, not published, EU:T:2021:597).

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

deemed never to have existed. Consequently, had it been informed in good time of the withdrawal of the opposition, it would not have adopted that order.

Accordingly, the Court grants the application for revision, holds that, following the withdrawal of the opposition, the action for annulment has become devoid of purpose and that there is therefore no longer any need to adjudicate, and declares that each party is to bear its own costs relating to the annulment proceedings.

Judgment of the General Court (Third Chamber) of 22 September 2021, Collibra v EUIPO – Dietrich (COLLIBRA), T-128/20 and T-129/20

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Applications for the EU word mark COLLIBRA and figurative mark collibra – Earlier national word mark Kolibri – Relative ground for refusal – Likelihood of confusion – Article 8(1)(b) of Regulation (EU) 2017/1001 – Right to be heard – Second sentence of Article 94(1) of Regulation 2017/1001

The company Collibra filed two applications for registration of EU trade marks with the European Union Intellectual Property Office (EUIPO): for the word mark COLLIBRA and the figurative mark collibra. Registration was sought for data governance software products for the purpose of organisation and management of internal data and for related services. [44] Mr Dietrich filed two notices of opposition to those marks, on the basis of his earlier German word mark, registered, in particular, for programs for data and word processing regarding real estate information systems. [45]

EUIPO rejected the applications for registration on the ground that there was a likelihood of confusion between the marks at issue, which were similar and covered similar goods and services.

In its judgment, the General Court dismisses the actions brought by Collibra. It provides clarifications on the assessment of the conceptual similarity of the marks and the similarity of the software products in the context of the examination of the likelihood of confusion. [46]

Findings of the Court

In the first place, as regards the comparison of the signs at issue, in particular from a conceptual point of view, the Court, first, upholds EUIPO's finding that the earlier mark Kolibri may, in German, refer to a hummingbird. Second, it notes that a significant part of the relevant German public may also perceive in the marks applied for, COLLIBRA and collibra, an allusion to the concept of a hummingbird, given the proximity in the pronunciation of the words 'collibra' and 'kolibri'. The average consumer normally perceives a mark as a whole and does not engage in an analysis of its various details, but, when perceiving a word sign, he or she will recognise word elements which, for him or her, suggest a specific meaning or which resemble words known to him or her. According to the Court, the fact that the concept of a hummingbird bears no relation to the goods and services covered by the marks applied for is irrelevant in view of the fact that those marks resemble the German word 'kolibri', which is known by a non-negligible part of the German public. Consequently, the Court considers that there is a high degree of conceptual similarity between the signs at issue.

---

44 More specifically, the word mark COLLIBRA concerned goods and services in Classes 9 and 42, while the figurative mark collibra designated goods in Class 9 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

45 The mark was used, inter alia, for goods and services in Classes 9 and 42 of the Nice Agreement.

46 Within the meaning of Article 8(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended.

In the second place, as regards the comparison of the goods and services at issue, the Court first examines the similarity of the goods, namely the software products at issue. It upholds EUIPO's reasoning to the effect that the 'data processing' concerning real estate covered by the earlier mark requires the features of organisation and management of internal data, which are also present in the data governance software products covered by the marks applied for. The 'facilities management' or 'house and/or real estate administration' software products covered by the earlier mark generate a large volume of data and incorporate certain functionalities for the organisation and management of those data, functionalities which they share with the 'data governance' software products. Thus, the Court finds that there is an overlap between the intended purposes of the software products at issue and concludes that they are similar to an average degree.

Next, the Court compares the software products covered by the earlier mark with the services covered by the word mark applied for. It upholds EUIPO's finding that those services, which concern data governance software products, are similar to the real estate management and facilities management software products covered by the earlier mark. All those software products may be designed and developed by the same companies and, in the field of information technology, software manufacturers will also commonly provide software services. In addition, the end users and the manufacturers of the goods and services at issue coincide.

Accordingly, the Court upholds EUIPO's findings concerning a likelihood of confusion between the signs at issue.

Judgment of the General Court (Ninth Chamber) of 22 September 2021, Marina Yachting Brand Management v EUIPO – Industries Sportswear (MARINA YACHTING), T-169/20

Link to the complete text of the judgment

EU trade mark – Proceedings for the revocation of decisions or for the cancellation of entries – Cancellation of an entry in the register which contains an obvious error attributable to EUIPO – Trade mark involved in insolvency proceedings – Registration of the transfer of the mark – Effects vis-à-vis third parties of bankruptcy or similar proceedings – Competence of EUIPO – Duty of diligence – Articles 20, 24, 27 and 103 of Regulation (EU) 2017/1001 – Articles 3, 7 and 19 of Regulation (EU) 2015/848

On 28 September 2014, the EU word mark MARINA YACHTING was registered in the name of Industries Sportswear Co. Srl. That company was declared insolvent on 13 October 2017 by a judgment of the Tribunale di Venezia (District Court, Venice, Italy).

On 18 October 2017, the transfer of that mark to Spring Holdings SARL was entered in the register of the European Union Intellectual Property Office (EUIPO). On 25 October 2017, the appointed liquidator of Industries Sportswear informed EUIPO that that company had been declared insolvent and requested that the recordal of the transfer of the mark at issue to Spring Holdings be cancelled, on the ground that a company in liquidation is deprived of the right to administer its assets as from the date on which it is declared insolvent. EUIPO informed the liquidator that that request had been accepted, but did not record it in its database.

On 16 April 2018, Marina Yachting Brand Management Co. Ltd, which is managed by members of the same family as that which managed Industries Sportswear, filed a recordal application for the transfer of the mark at issue to itself. It claimed that that mark had been assigned to Spring Holdings on 26 June 2014 and had subsequently been assigned to it on 15 December 2017. The transfers of ownership were entered in EUIPO's register on the same day.

The liquidator requested the cancellation of the recordals of those transfers, which led the department in charge of EUIPO's register to adopt, on 30 January 2019, two decisions retroactively cancelling the recordals of those transfers. The Board of Appeal confirmed those decisions and found that EUIPO had made an obvious error in entering the successive transfers of the mark at issue in the register although it had been informed that Industries Sportswear had been declared insolvent since 13 October 2017.

The Court dismissed the action brought by Marina Yachting Brand Management and ruled on the cancellation of entries recording transfers of a trade mark in the register which were made after a failure to record an insolvency judgment.

Findings of the Court

In the first place, the Court specifies EUIPO's competence in the context of the registration of the transfer of a mark.

The Court points out that EUIPO must confine itself to examining the formal requirements for the validity of an application for registration of a transfer of a mark, [47] which does not imply an assessment of substantive issues arising under national law. However, EUIPO must diligently take into account facts that are capable of having legal implications for the application for registration of such a transfer, including the existence of insolvency proceedings.

That duty of diligence is all the more imperative where, before receiving an application for registration of the transfer of a trade mark, EUIPO was informed, by an earlier request for recordal [48] that that mark was involved in insolvency proceedings. In such a case, EUIPO must take into consideration the objective of 'guarantee[ing] the effectiveness' of the insolvency proceedings, [49] in particular if the existence, validity or certain date of that transfer is disputed by the liquidator.

Transfers of a trade mark are to have effects vis-à-vis third parties only after entry in the register, [50] from which it is apparent that such an entry does not have retroactive effect. Furthermore, the effects vis-à-vis third parties of insolvency proceedings are governed by national law. [51] Under the applicable Italian law, the insolvency proceedings at issue had the effect of making ineffective the formalities required to ensure that an act by the debtor was enforceable against third parties, since those formalities had been carried out after the declaration of insolvency. Consequently, EUIPO should have suspended the registration of the transfers at issue.

In the second place, the Court holds that that the necessary conditions for the cancellation of an entry in the register which contained an obvious error [52] had been satisfied. In that regard, it points out that, in entering the contested transfers in the register at the request of the applicant on 16 April 2018, after having failed to enter the insolvency proceedings concerning the proprietor of the mark at issue in the register, EUIPO had made an obvious error. EUIPO was therefore required to cancel the entries of 16 April 2018 as soon as possible.

Furthermore, the Court holds that the period of one year from the date on which the entry was made in the register [53] was duly complied with when, on 30 January 2019, the two decisions cancelling the register entries recording the transfers, entries which had been made on 16 April 2018, were adopted.

---

47 Those formal requirements are set out in Article 20 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1) and in Article 13 of Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation 2017/1001, and repealing Implementing Regulation (EU) 2017/1431 (OJ 2018 L 104, p. 37).

48 Which had been submitted in accordance with Article 24(3) of Regulation 2017/1001.

49 Which is referred to in recital 36 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19, corrigendum OJ 2016 L 349, p. 9).

50 Under Article 27(1) of Regulation 2017/1001.

51 Under Article 27(4) of Regulation 2017/1001.

52 Under Article 103 of Regulation 2017/1001.

53 Article 103(2) of Regulation 2017/1001 provides that the cancellation of the entry in the register is to be effected within one year of the date on which the entry was made in the register.

2. PUBLIC PROCUREMENT

Judgment of the Court (Grand Chamber) of 7 September 2021, Klaipėdos regiono atliekų tvarkymo centras, C-927/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Article 58(3) and (4) – Article 60(3) and (4) – Annex XII – Conduct of procurement procedures – Selection of participants – Selection criteria – Methods of proof – Economic and financial standing of economic operators – Whether the leader of a temporary association of undertakings may rely on income received in relation to a previous public contract in the same area as the public contract at issue including where it did not itself exercise the activity which is the subject matter of the public contract at issue – Technical and professional ability of economic operators – Exhaustive nature of means of proof permitted by the directive – Article 57(4)(h), (6) and (7) – Award of public service contracts – Non-compulsory grounds for exclusion from participation in a procurement procedure – Inclusion on a list of economic operators excluded from procurement procedures – Joint liability of members of a temporary association of undertakings – Personal nature of the penalty – Article 21 – Protection of the confidentiality of information submitted to the contracting authority by an economic operator – Directive (EU) 2016/943 – Article 9 – Confidentiality – Protection of trade secrets – Applicability to procurement procedures – Directive 89/665/EEC – Article 1 – Right to an effective remedy

By a notice of a public call for competition, Klaipėdos regiono atliekų tvarkymo centras UAB (Regional Waste Management Centre for the Region of Klaipėda, Lithuania) ('the contracting authority') launched an open international procurement procedure for the award of a contract for the provision of services relating to the collection and transport of municipal waste. It set out technical specifications in that notice. The notice also contained a description of the professional and technical capacities necessary for the performance of the contract and a description of the required financial and economic capacities.

At the end of that procedure, one of the tenderers to whom the contract was not awarded made, first, an application for access to the information used to establish the classification, then an administrative appeal to challenge the outcome of the tendering procedure before the contracting authority and, lastly, following the dismissal of its administrative appeal, an action for judicial review before the Klaipėdos apygardos teismas (Regional Court, Klaipėda, Lithuania). That court dismissed the action on the ground that the entity to which the contract had been awarded had the requisite qualifications. Ruling on an appeal brought by that tenderer, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) set aside both the judgment of the court of first instance and the decision of the contracting authority establishing the ranking of the tenders. The appeal court also ordered the contracting authority to carry out a fresh evaluation of the tenders.

The contracting authority brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania). That court wishes to know how it should determine the nature of certain qualification requirements for tenderers set out in the tender notice that could be understood as conditions relating to the financial and economic standing of the economic operator, as conditions relating to its technical and professional abilities, as technical specifications or as conditions relating to the performance of the public contract. According to the referring court, the question also arises as to the appropriate balance between the protection of the confidential information provided by a tenderer and the effectiveness of the rights of defence of other tenderers.

In its Grand Chamber judgment, the Court of Justice provides clarifications as regards the selection criteria relating, inter alia, to the economic and financial standing of economic operators, the technical requirements set out in a call for tenders, the absence of joint liability between the members of a temporary association of undertakings and, in particular, the protection of the confidentiality of information submitted to a contracting authority by an economic operator.

Findings of the Court

As regards the selection criteria for economic operators, the Court notes that the obligation on economic operators to demonstrate that they have a certain average annual turnover in the area covered by the public contract at issue constitutes a selection criterion relating to the economic and financial standing of economic operators, within the meaning of Directive 2014/24 on public procurement. [54] In addition, where the contracting authority, when setting the requirements in relation to the economic and financial standing necessary in order to perform the contract, has required that economic operators have achieved a certain minimum turnover in the area covered by the public contract in question, an economic operator may, in order to prove its economic and financial standing, rely on income received by a temporary group of undertakings to which it belonged only if it actually contributed, in the context of a specific public contract, to the performance of an activity of that group analogous to the activity which is the subject matter of the public contract in question. [55]

As regards the technical requirements set out in a call for tenders, the Court considers that the directive on public procurement does not preclude the consideration of technical requirements simultaneously as selection criteria relating to technical and professional ability, as technical specifications and/or as conditions for the performance of the contract. [56] In that respect, the Court holds that a requirement, such as the technical characteristics of vehicles which must be used for the purpose of providing the services covered by a public contract, may be classified as a selection criterion relating to 'technical and professional ability', as 'technical specifications' or as a 'condition for performance' of the contract. [57] The Court notes that, if that latter classification should be adopted, compliance with the conditions for the performance of a contract is to be assessed during the performance of the contract, not when it is awarded. Furthermore, those requirements may be imposed in the context of a call for tenders, subject to compliance with the fundamental principles of public procurement. [58] The Court notes, lastly, that the classification of those requirements as selection criteria relating to the technical and professional ability of economic operators, as technical specifications, or as conditions for performance of the contract does not alter the scope of the contracting authority's power to allow the successful tenderer subsequently to supplement or clarify its initial tender. The extent of that right is limited by the need to comply with the principles of equal treatment and transparency and, where appropriate, any specific provisions of national law. [59]

As regards the protection of the confidentiality of information submitted to a contracting authority by an economic operator, the Court holds that a decision of a contracting authority refusing to disclose to an economic operator the information deemed confidential in the application file or in the tender of another economic operator is a measure amenable to review. Where the Member State in which the public procurement procedure takes place has provided, while respecting the principles of equivalence and effectiveness, that any person wishing to challenge decisions taken by the contracting authority is required to seek administrative review before bringing an action before the

---

54 Article 58(3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

55 Article 58(3) and Article 60(3) of Directive 2014/24.

56 Within the meaning of Article 58(4), Article 42 and Article 70 of Directive 2014/24 respectively.

57 Article 58(4), Articles 42 and 70 of Directive 2014/24.

58 Article 18(1) of Directive 2014/24.

59 Article 56(3) of Directive 2014/24.

courts, that Member State may also provide that judicial proceedings against that decision refusing access have to be preceded by such a prior administrative review procedure. [60]

A contracting authority, when requested by an economic operator to disclose information deemed confidential contained in the tender of a competitor to which the contract has been awarded, is not required to communicate that information where its disclosure would infringe the rules of EU law relating to the protection of confidential information, even if that request is made in the context of an action for administrative review brought by that operator challenging the lawfulness of the contracting authority's assessment of the competitor's tender. However, the contracting authority cannot be bound by an economic operator's mere claim that the information submitted is confidential; that operator must demonstrate the genuinely confidential nature of the information which it claims should not be disclosed. Where the contracting authority refuses to disclose such information or where, while refusing such disclosure, it dismisses the application for administrative review lodged by an economic operator concerning the lawfulness of the assessment of the tender of the competitor concerned, the contracting authority is required to balance the applicant's right to good administration with its competitor's right to protection of its confidential information in order that the refusal or dismissal decision is supported by a statement of reasons and the unsuccessful tenderer's right to an effective remedy is not rendered ineffective.

In addition, the contracting authority must communicate in a neutral form, to the extent possible and preserving the confidentiality of the information, the essential content of that information. To that end, the contracting authority may, inter alia, communicate in summary form certain aspects of an application or tender and their technical characteristics, in such a way that the confidential information cannot be identified. To the same end, it may also request the successful tenderer to provide it with a non-confidential version of the documents containing confidential information.

As regards the scope of the competent national court's obligations in the context of proceedings brought against a decision of the contracting authority rejecting a request for access to information submitted by the successful tenderer or in the context of an action brought against the decision of a contracting authority dismissing an application for administrative review lodged against such a refusal decision, the Court holds that that national court is required to weigh the applicant's right to an effective remedy against the competitor's right to protection of its confidential information and trade secrets. To that end, that court – which must necessarily have at its disposal the confidential information and trade secrets necessary in order to be able to determine, with full knowledge of the facts, whether that information can be disclosed – must examine all the relevant matters of fact and of law and review the adequacy of the statement of reasons for the decision by which the contracting authority refused to disclose the confidential information or for the decision dismissing the application for administrative review of the prior refusal decision. It must also be able to annul the refusal decision or the decision dismissing the application for administrative review if they are unlawful and, where appropriate, refer the case back to the contracting authority, or itself adopt a new decision if it is permitted to do so under national law. [61]

As regards the scope of the powers of the national court hearing a dispute between an economic operator excluded from the award of a contract and a contracting authority, the Court holds that that national court may depart from the latter's assessment of the lawfulness of the conduct of the economic operator to which the contract was awarded and, accordingly, draw all the necessary inferences in its decision. Accordingly, depending on the case, that court may rule to that effect on the merits or remit the case to the contracting authority or the competent national court for that

---

60 The fourth subparagraph of Article 1(1), Article 1(3) and (5) and Article 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

61 The fourth subparagraph of Article 1(1) and Article 1(3) and (5) of Directive 89/665 and Article 21 of Directive 2014/24, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union.

purpose. However, in accordance with the principle of equivalence, such a court may raise of its own motion the issue of an error of assessment made by the contracting authority only if permitted to do so under national law. [62]

Finally, as regards the non-compulsory grounds for exclusion from participation in any procurement procedure, the Court holds that all of the members of a group of economic operators may not be excluded from participation in any public procurement procedure where an economic operator which is a member of that group has been found guilty of serious misrepresentation in supplying the information required for the verification, as regards that group, of the absence of grounds for exclusion or the fulfilment of the selection criteria, without the other members of that group having been aware of that misrepresentation. [63]

3. MONEY LAUNDERING

Judgment of the Court (Second Chamber) of 2 September 2021, LG and MH (Autoblanchiment), C-790/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Prevention of the use of the financial system for the purposes of money laundering and terrorist financing – Directive (EU) 2015/849 – Directive 2005/60/EC – Offence of money laundering – Laundering by the perpetrator of the predicate offence ('self-laundering')

LG, the manager of a company, was sentenced by the Tribunalul Brașov (Regional Court, Brașov, Romania) to imprisonment, with a conditional suspension of execution of the sentence, for the offence of money laundering in respect of 80 acts committed between 2009 and 2013. The funds in question were derived from the offence of tax evasion committed by the same person ('the predicate offence').

Hearing the appeals brought against that judgment, the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), the referring court, harboured doubts as to whether the perpetrator of the predicate offence and the perpetrator of the offence of money laundering can be the same person.

In its judgment, the Court finds that Directive 2005/60 [64] does not preclude national legislation which provides that the offence of money laundering may be committed by the perpetrator of the predicate offence.

Findings of the Court

The Court points out, first, that the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his or her action is an act which, when committed intentionally, is to be regarded as constituting the offence of money laundering. [65]

---

62 Article 57(4) of Directive 2014/24.

63 Second subparagraph of Article 63(1) and Article 57(4) and (6) of Directive 2014/24.

64 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (OJ 2005 L 309, p. 15), Article 1(2)(a).

65 Article 1(2)(a) of Directive 2005/60.

Consequently, for a person to be regarded as the perpetrator of that offence, that person must be aware that the property is derived from criminal activity or from an act of participation in such activity. Since that condition is necessarily satisfied as regards the perpetrator of the predicate offence, Directive 2005/60 does not preclude that person from also being the perpetrator of the offence of money laundering. Furthermore, in so far as such conduct constitutes a contingent act which does not automatically result from the predicate offence, it may be committed both by the perpetrator of the predicate offence and by a third party.

Next, the Court analyses the legislative context of Directive 2005/60, and, in particular, the international commitments of the Member States [66] and the EU measures [67] in force on the date of its adoption. In that regard, the Court states that, on that date, it was open to the Member States not to criminalise, under their penal law, as regards the perpetrator of the predicate offence, acts which constitute money laundering. The obligation on the Member States to prohibit certain acts of money laundering, without prescribing the means for implementing such a prohibition, and the definition of money laundering in a manner which permits, but does not require, the criminalisation of those acts as regards the perpetrator of the predicate offence, leave that decision to the Member States, [68] in accordance with their international commitments and the fundamental principles of their domestic law. Furthermore, it was only Directive 2018/1673 [69] which imposed an obligation on the Member States to criminalise such conduct.

Lastly, the Court states that that criminalisation is in line with the objectives of Directive 2005/60, in so far as it is liable to make the introduction of criminal funds into the financial system more difficult and thereby contributes to the proper functioning of the internal market. Consequently, a Member State may criminalise, as regards the perpetrator of the predicate offence, the offence of money laundering.

Furthermore, as regards the principle *non bis in idem*, [70] and, in particular, the prohibition on prosecuting or punishing under criminal law a person for the same offence, the Court points out that the relevant criterion is the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned. Accordingly, the imposition, with respect to identical facts, of several criminal penalties at the conclusion of different proceedings brought for those purposes is prohibited. In the present case, the principle *non bis in idem* does not preclude the perpetrator of the predicate offence from being prosecuted for the offence of money laundering where the facts in respect of which the prosecution is brought are not identical to those constituting the predicate offence. In that regard, the Court states that money laundering constitutes an act distinguishable from the predicate offence, even if that money laundering is carried out by the perpetrator of the predicate offence.

The Court clarifies the scope of the national court's obligations of verification. Thus, the national court must determine whether the predicate offence was the subject of criminal proceedings in which the perpetrator was finally acquitted or convicted and satisfy itself that the material facts constituting the predicate offence are not identical to those in respect of which the perpetrator is prosecuted for money laundering.

---

66 The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990 (*European Treaty Series* No 141).

67 Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L 182, p. 1).

68 Article 1(1) and Article 1(2)(a) of Directive 2005/60.

69 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ 2018 L 284, p. 22).

70 Article 50 of the Charter of Fundamental Rights of the European Union.

4. CHEMICALS

Judgment of the General Court (Seventh Chamber) of 15 September 2021, Laboratoire Pareva and Biotech3D v Commission, T-337/18 and T-347/18

Link to the complete text of the judgment

Biocidal products – Active substance PHMB (1415; 4.7) – Refusal of approval for product-types 1, 5 and 6 – Conditional approval for product-types 2 and 4 – Risks to human health and the environment – Regulation (EU) No 528/2012 – Article 6(7)(a) and (b) of Delegated Regulation (EU) No 1062/2014 – Harmonised classification of the active substance under Regulation (EC) No 1272/2008 – Prior consultation of the ECHA – Manifest error of assessment – Read-across – Right to be heard

Laboratoire Pareva is a manufacturer of the active substance polyhexamethylene biguanide hydrochloride ('PHMB'), which is produced for biocidal purposes as a disinfectant and a preservative. In the context of the programme for the evaluation of existing active substances established by Directive 98/8, [71] Laboratoire Pareva notified the European Commission of PHMB (1415; 4.7) in combination with various products in order to obtain their approval.

The assessment report submitted by the evaluating competent authority was examined by the Biocidal Products Committee of the European Chemicals Agency (ECHA). In accordance with the opinion of the Committee, the Commission refused to approve PHMB as an existing active substance intended for use in product-types 1, 5 and 6 [72] on account of unacceptable risks to human health and the environment. By contrast, it approved it for product-types 2 and 4, subject to compliance with certain specifications and conditions. [73] Pareva brought two actions for annulment before the General Court against those Commission acts.

The Court dismisses the action and applies for the first time Regulation No 528/2012 in the context of an application for approval of an active substance. [74] It provides important information, inter alia, on the possibility of submitting new studies during the evaluation procedure of such a substance.

Findings of the Court

In the first place, the Court recalls that, pursuant to Article 6(7)(a) of Delegated Regulation No 1062/2014, [75] the evaluating competent authority is required to submit a proposal for harmonised classification only after having carried out the examination of the existing active substance at issue and determined, on the basis of the complete dossier submitted by the applicant, what the effects of that substance were, on the one hand, and, on the other hand, the risks that it represented, inter alia,

---

71 Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, p. 1).

72 Commission Implementing Decision (EU) 2018/619 of 20 April 2018 not to approve PHMB (1415; 4.7) as an existing active substance for use in biocidal products for product-types 1, 5 and 6 (OJ 2018 L 102, p. 21).

73 Commission Implementing Regulation (EU) 2018/613 of 20 April 2018 approving PHMB (1415; 4.7) as an existing active substance for use in biocidal products of product-types 2 and 4 (OJ 2018 L 102, p. 1).

74 Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).

75 Commission Delegated Regulation (EU) No 1062/2014 of 4 August 2014 on the work programme for the systematic examination of all existing active substances contained in biocidal products referred to in Regulation (EU) No 528/2012 of the European Parliament and of the Council (OJ 2014 L 294, p. 1).

for human health and the environment, taking into account the product-types in which its use was envisaged and the proposed use scenarios. In that regard, the Court notes that the evaluation procedure for the purposes of approval of an active substance with a view to its use in biocidal products concerns a different area and is governed by a procedure different to that which relates to the harmonisation of the classification criteria and rules on labelling and packaging of such a substance. [76] Furthermore, the approval procedure for an existing active substance is not subject to the procedure for harmonisation of classification and labelling of such a substance. On the contrary, the obligation on the evaluating competent authority to submit a proposal for harmonised classification for an active substance for biocidal use constitutes a preliminary step in the classification and labelling procedure.

In the second place, as regards Article 6(7)(b) of Delegated Regulation No 1062/2014, the Court states that the evaluating competent authority is not required to consult the ECHA prior to the submission of its assessment report. Such a consultation must indeed take place no later than on the date on which the report is submitted to the ECHA. Furthermore, the Court acknowledges that the ECHA has a certain discretion as to whether it is necessary to refer the matter to its expert group on the persistent, bioaccumulative and toxic ('PBT') character of an active substance, which is an informal body, in the context of such a consultation. [77] While such referral to the expert group is highly preferable and strongly recommended, [78] it falls within the remit of the internal organisation of the ECHA. Moreover, in order not to delay unnecessarily the work relating to the evaluation of an active substance, referral to that group of experts occurs only where there is no consensus on its PBT properties.

In the third and final place, the Court points out that, in the context of the evaluation of an active substance, neither the evaluating competent authority nor the ECHA are required to accept any further study or additional data which an applicant wishes to submit to them on his or her own initiative after the dossier submitted by that applicant has been considered to be complete and has thus been validated by the evaluating competent authority.

Moreover, the mere claim that scientific and technical knowledge has evolved does not enable applicants who have notified an active substance to benefit from the opportunity to submit new studies and data for as long as doubts remain as to the safety of that active substance. Such a possibility would run counter to the objective of a high level of protection of human and animal health and of the environment in that it would be tantamount to granting to those applicants a right of veto over the possible adoption of a non-approval decision of that substance. Admittedly, in specific circumstances, it may be necessary to take account of new documents or new data submitted by the applicant, which were not available at the time of validation of the dossier lodged by the applicant. However, if that applicant considers that new data or studies, submitted after the validation of his or her dossier, should have been taken into account for the evaluation of the substance at issue, he or she must, by virtue of the burden of proof relating to the conditions of approval of an active substance, demonstrate that they could not be submitted before his or her dossier was validated, that they were necessary and that they manifestly called into question the outcome of the assessment procedure.

---

76 Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

77 Article 6(7)(b) of Delegated Regulation No 1062/2014.

78 In accordance with the Commission document entitled 'Review Programme of active substances: establishment of a work programme to meet the 2024 deadline').

VIII. SOCIAL POLICY

1. EQUAL TREATMENT IN EMPLOYMENT AND SOCIAL SECURITY

Judgment of the Court (Grand Chamber) of 2 September 2021, INPS (Allocations de naissance et de maternité pour les titulaires de permis unique), C-350/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 2011/98/EU – Rights for third-country workers who hold single permits – Article 12 – Right to equal treatment – Social security – Regulation (EC) No 883/2004 – Coordination of social security systems – Article 3 – Maternity and paternity benefits – Family benefits – Legislation of a Member State excluding third-country nationals holding a single permit from entitlement to a childbirth allowance and a maternity

The Italian authorities refused to grant childbirth and maternity allowances to a number of third-country nationals residing legally in Italy who hold a single work permit obtained pursuant to the Italian legislation transposing Directive 2011/98. [79] That refusal was based on the fact that, contrary to the requirements laid down by Law No 190/2014 and Legislative Decree No 151/2001, those persons do not have long-term resident status.

Under the Law No 190/2014, which introduces a childbirth allowance in respect of each child born or adopted, the allowance is paid monthly to Italian nationals, to nationals of other Member States, and to third-country nationals who hold a long-term residence permit, in order to encourage the birth rate and to contribute to the costs of supporting it. Legislative Decree No 151/2001 grants entitlement to the maternity allowance, in respect of every child born since 1 January 2001 or in respect of any minor in pre-adoption foster care or adopted without foster care to women residing in Italy who are nationals of that Member State or of another EU Member State or who are holders of a long-term residence permit.

The third-country nationals concerned challenged that refusal before the Italian courts. In the context of those proceedings, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), holding that the childbirth allowance regime infringes, inter alia, several provisions of the Italian Constitution, referred questions on constitutionality concerning Law No 190/2014 to the Corte costituzionale (Constitutional Court, Italy), in so far as that provision makes the grant of the allowance to third-country nationals subject to the condition that they have long-term resident status. For the same reasons, that court was also called upon to answer a question as to constitutionality concerning Legislative Decree No 151/2001 on the maternity allowance.

Considering that the prohibition of arbitrary discrimination and the protection of motherhood and children, guaranteed by the Italian Constitution, must be interpreted in the light of the binding indications given by EU law, the Constitutional Court asked the Court of Justice to clarify the scope of the right to social benefits recognised by Article 34 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the right to equal treatment in the field of social security granted to third-country workers by Article 12(1)(e) of Directive 2011/98. [80]

---

79 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343, p. 1).

80 Those workers are those referred to in Article 3(1)(b) and (c) of that directive, namely, first, third-country nationals admitted to a Member State for purposes other than work, who are allowed to work and who hold a residence permit in accordance with Council Regulation (EC)

In its Grand Chamber judgment, the Court confirms the right of third-country nationals who hold single permits to receive, in accordance with Article 12(1)(e) of Directive 2011/98, a childbirth allowance and a maternity allowance as provided for by the Italian legislation.

Findings of the Court

First, the Court states that, given that Article 12(1)(e) of Directive 2011/98 gives specific expression to the entitlement to social security benefits provided for in Article 34(1) and (2) of the Charter, it is necessary to examine the question concerning the compatibility of the Italian legislation with EU law in the light of that directive alone.

Second, since the scope of that provision of the directive, which refers to Regulation No 883/2004, [81] is determined by the latter, the Court ascertains whether the childbirth allowance and the maternity allowance at issue constitute benefits falling within the branches of social security listed in Article 3(1) of that regulation.

As regards the childbirth allowance, the Court notes that that allowance is granted automatically to households satisfying certain legally defined, objective criteria, without any individual and discretionary assessment of the applicant's personal needs. It is a cash benefit intended in particular, by means of a public contribution to the family's budget, to alleviate the financial burdens involved in the maintenance of a newly born or adopted child. The Court concludes from this that that allowance is a family benefit within the meaning of Article 3(1)(j) of Regulation No 883/2004.

As to the maternity allowance, the Court observes that it is granted or refused taking into account, in addition to the absence of maternity benefit in connection with employment, self-employment or professional practice, the resources of the household of which the mother is a member on the basis of an objective and legally defined criterion, namely the economic situation indicator, without the competent authority being able to take account of other personal circumstances. Furthermore, that allowance relates to the branch of social security referred to in Article 3(1)(b) of Regulation No 883/2004.

The Court finds that the childbirth allowance and the maternity allowance fall within the branches of social security in respect of which the third-country nationals referred to in Article 3(1)(b) and (c) of Directive 2011/98 enjoy the right to equal treatment provided for by that directive.

In view of the fact that Italy has not availed itself of the option of restricting equal treatment offered by the directive to the Member States, [82] the Court considers that the national legislation which excludes those third-country nationals from entitlement to those allowances does not comply with Article 12(1)(e) of that directive.

No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ 2002 L 157, p. 1), and, second, third-country nationals admitted to a Member State for the purpose of work.

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

82 That option is provided for by Article 12(2)(b) of Directive 2011/98.

2. AGREEMENT ON THE SOCIAL POLICY

Judgment of the Court (Grand Chamber) of 2 September 2021, EPSU v Commission, C-928/19 P

Link to the complete text of the judgment

Appeal – Law governing the institutions – Social policy – Articles 154 and 155 TFEU – Social dialogue between management and labour at EU level – Informing and consulting civil servants and employees of central government administrations of the Member States – Agreement concluded between the social partners – Joint request of the signatories to that agreement seeking its implementation at EU level – Refusal of the European Commission to submit a proposal for a decision to the Council of the European Union – Standard of judicial review – Obligation to state reasons for the decision refusing to submit the proposal

In April 2015, the European Commission launched a consultation concerning the possible extension of the scope of application of several directives on information and consultation of workers [83] to cover civil servants and employees of central administrations of the Member States. A few months later, in the context of that consultation, two social partners, the Trade Unions' National and European Administration Delegation (TUNED) and European Public Administration Employers (EUPAE), concluded an agreement establishing a general framework for informing and consulting civil servants and employees of those national administrations. The parties to the agreement then requested the Commission to submit to the Council of the European Union a proposal for a decision implementing the agreement at EU level, on the basis of Article 155(2) TFEU. [84] By decision of 5 March 2018, the Commission refused their request ('the contested decision').

In May 2018, EPSU, an association which brings together European trade unions representing public service workers and which contributed to the creation of TUNED, challenged that decision before the General Court, seeking its annulment. The General Court dismissed the action, [85] holding that Article 155(2) TFEU does not require the EU institutions to give effect to a joint request submitted by the signatories to an agreement seeking its implementation at EU level. After holding that the contested decision had to be the subject of a limited review, the General Court found that that decision satisfied the obligation to state reasons laid down in Article 296 TFEU and that the three contested reasons in the decision were well founded.

Hearing an appeal brought by EPSU, the Court of Justice, sitting as the Grand Chamber, upholds the judgment of the General Court, while noting the discretion enjoyed by the Commission in that area and the limited judicial review of such decisions.

Findings of the Court

---

83 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16), Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation (OJ 2002 L 80, p. 29).

84 Essentially, under that provision, agreements concluded between management and labour at EU level are to be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153 TFEU (that is to say, in fields falling within social policy), at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

85 Judgment of 24 October 2019, *EPSU and Goudriaan* v *Commission* (T-310/18, EU:T:2019:757).

As regards, first of all, the literal interpretation of Article 155(2) TFEU, the Court observes that that provision does not contain an indication that the Commission may be obliged to submit a proposal for a decision to the Council. The imperative formulations used in a number of language versions are thus intended solely to express the exclusivity of the two alternative procedures laid down in that provision, one of which is a specific procedure resulting in the adoption of an EU act.

Next, so far as concerns the contextual and teleological interpretation of Article 155(2) TFEU, the Court analyses that provision within the framework of the powers conferred on the Commission by the Treaties, in particular by Article 17 TEU, paragraph 1 of which assigns it the task of promoting the general interest of the European Union and paragraph 2 of which accords it a general power of legislative initiative. The Court concludes therefrom that Article 155(2) TFEU confers upon the Commission a specific power, which falls within the scope of the role that is assigned to it in Article 17(1) TEU and consists in determining whether it is appropriate to submit a proposal to the Council on the basis of an agreement between management and labour (the social partners), for the purpose of its implementation at EU level. A different interpretation would have the effect that the interests of the management and labour signatories to an agreement alone would prevail over the task, entrusted to the Commission, of promoting the general interest of the European Union. That conclusion is not called into question by the autonomy of the social partners, which is enshrined in the first paragraph of Article 152 TFEU and must be taken into account in the context of the dialogue between management and labour promoted as an objective of the European Union by the first paragraph of Article 151 TFEU. The existence of that autonomy, which characterises the stage of negotiation of a possible agreement between social partners, does not mean that the Commission must automatically submit to the Council at their request a proposal for a decision implementing such an agreement at EU level, because that would be tantamount to according those social partners a power of initiative of their own that they do not have.

The Court points out, moreover, that the question, raised by EPSU, as to whether legal acts adopted on the basis of Article 155(2) TFEU are legislative in nature is separate from the question of the power that the Commission holds to decide whether it is appropriate to submit a proposal to the Council pursuant to that provision and that the scope of that power of the Commission is the same whether or not the act is legislative in nature.

Furthermore, regarding the issue of the standard of judicial review of the contested decision, the Court points out that the Commission has a discretion when deciding whether it is appropriate to submit a proposal to the Council pursuant to Article 155(2) TFEU. Given the complex assessments that must be carried out by the Commission for that purpose, judicial review of that type of decision is limited. It must be limited in particular when the EU institutions, as in the present instance, have to take account of potentially divergent interests and to take decisions involving policy choices that have regard to political, economic and social considerations.

Finally, the appellant pleaded an alleged infringement of its legitimate expectations, submitting that the Commission departed from the communications previously published by it concerning social policy. In that regard, the Court acknowledges that, in adopting rules of conduct and announcing by publishing them that it will henceforth apply them to the cases to which they relate, an institution imposes a limit on the exercise of its discretion. However, the view cannot be taken in the absence of an explicit and unequivocal commitment on the part of the Commission that in the present instance it has imposed a limit on the exercise of its power laid down in a provision of primary law, by undertaking to examine solely certain specific considerations before submitting its proposal, thereby transforming that discretion into a circumscribed power where certain conditions are met.

Thus, the Court confirms that the General Court did not commit any error of law and dismisses EPSU's appeal in its entirety.

IX. ENVIRONMENT

Judgment of the General Court (Second Chamber, Extended Composition) of 15 September 2021, Daimler v Commission, T-359/19

Environment – Regulation (EC) No 443/2009 – Implementing Regulation (EU) No 725/2011 – Implementing Decision (EU) 2015/158 – Implementing Decision (EU) 2019/583 – Carbon dioxide emissions – Testing methodology – Passenger cars

In the context of the application of Regulation No 443/2009, [86] which aims to reduce emissions of carbon dioxide (CO_2) from light-duty vehicles, all manufacturers of passenger cars must ensure that their average specific emissions of CO_2 do not exceed the specific emissions target assigned to them. [87] The regulation, which also aims to encourage investment in new technologies, provides, in particular, that CO_2 savings achieved through the use of innovative technologies are to be deducted from the specific CO_2 emissions of the vehicles in which those technologies are used. [88] To that end, the European Commission adopted an implementing regulation [89] establishing a procedure for the approval and certification of those innovative technologies.

In 2015, by Implementing Decision 2015/158, [90] the Commission approved two high efficient alternator models as eco-innovations for reducing CO_2 emissions from passenger cars. For approval purposes, some of the alternators in question had undergone various preparation methods, falling under the generic description 'preconditioning'.

Daimler AG, a German car manufacturer which fits certain passenger cars with high efficient alternators, applied for and obtained certification from the competent German authorities of the CO_2 savings achieved by the use of those alternators.

However, in 2017, following an ad hoc review of those certifications, the Commission found that the savings thus certified using a testing methodology that involved preconditioning were much higher than those that could be shown using the methodology prescribed by Implementing Decision 2015/158, [91] which did not, in the Commission's view, allow for preconditioning. Consequently, in its Implementing Decision 2019/583 [92] ('the contested decision'), the Commission held that the savings attributed to Daimler AG's eco-innovations should not be taken into account in calculating its average specific emissions of CO_2 for 2017. [93]

---

86 Regulation (EC) No 443/2009 of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO_2 emissions from light-duty vehicles (OJ 2009 L 140, p. 1).

87 Article 4 of Regulation No 443/2009.

88 Article 12 of Regulation No 443/2009.

89 Commission Implementing Regulation (EU) No 725/2011 of 25 July 2011 establishing a procedure for the approval and certification of innovative technologies for reducing CO_2 emissions from passenger cars pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council (OJ 2011 L 194, p. 19).

90 Commission Implementing Decision (EU) 2015/158 of 30 January 2015 on the approval of two Robert Bosch GmbH high efficient alternators as the innovative technologies for reducing CO_2 emissions from passenger cars pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council (OJ 2015 L 26, p. 31).

91 Article 1(3) of Implementing Decision 2015/158.

92 Commission Implementing Decision (EU) 2019/583 of 3 April 2019 confirming or amending the provisional calculation of the average specific emission of CO_2 and specific emissions targets for manufacturers of passenger cars for the calendar year 2017 and for certain manufacturers belonging to the Volkswagen pool for the calendar years 2014, 2015 and 2016 pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council (OJ 2019 L 100, p. 66).

93 The Commission's right to carry out that review, and the procedure for carrying it out, are set out in Article 12 of Implementing Regulation No 725/2011.

Daimler AG therefore brought an action for annulment of the contested decision in so far as it excluded, for Daimler AG, the average specific emissions of CO_2 and the CO_2 savings attributed to eco-innovations. In its judgment, the Second Chamber, Extended Composition, of the General Court upholds the action, finding that the Commission infringed the implementing regulation when it carried out the ad hoc review of the certifications of CO_2 savings.

Findings of the Court

In the first place, the Court finds that the Commission erred in law when, in the ad hoc review of the certifications of CO_2 savings, it excluded the use of a testing methodology that involved preconditioning, such as that used in the approval procedure for the alternators in question. Such an approach does not comply with Article 12 of the implementing regulation, which sets out, in particular, the procedure for that review.

By using a testing methodology that differed from the one used in the approval procedure for the alternators in question, the Commission made it impossible to compare the certified reductions in emissions with the savings set out in Implementing Decision 2015/158.

As regards the Commission's argument that its approach was justified in the light of the principles of equal treatment and legal certainty, the Court recalls, first, that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. The Court notes, in that regard, that the testing methodology used by the Commission, which did not take into account the specific technical features of each alternator or the way in which it had been preconditioned, was liable to favour some car manufacturers and to disadvantage others.

The Court finds, secondly, that that methodology was not defined clearly and precisely in any legislation and did not constitute standard industry practice. Accordingly, it could not be regarded as an appropriate means of safeguarding the principle of legal certainty.

As for the Commission's objections to the use of preconditioning, which is standard industry practice, the Court holds that the Commission had the ability to raise objections or ask for further clarifications regarding the testing methodology at the time of the approval procedure for the alternators and not at the time of the ad hoc review.

In the second place, regarding the interpretation of Article 12(2) of the implementing regulation, which gives the Commission the right, in certain circumstances, not to take into account 'the certified CO_2 savings … for the calculation of the average specific emissions of that manufacturer for the following calendar year', the Court clarifies that this right relates only to the calendar year following the year of the ad hoc review. In that regard, the Court observes that the expression 'following calendar year' could not be interpreted as actually referring to the calendar year preceding the year of the ad hoc review, as the Commission suggested. Such an interpretation was contrary to the clear and unambiguous wording of that provision and raised questions in view of the principle of legal certainty, given that the contested decision had serious retroactive consequences for Daimler AG, whereas it should have affected only 'the following calendar year'.

Lastly, the Court finds that the provision of the implementing regulation in question is clear and unambiguous, meaning that, contrary to the arguments put forward by the Commission, an interpretation consistent with the basic regulation, namely Regulation No 443/2009, was unnecessary.

X. ENERGY

Judgment of the Court (Fourth Chamber) of 2 September 2021, Commission v Germany (Transposition des directives 2009/72 et 2009/73), C-718/18

Link to the complete text of the judgment

Failure of a Member State to fulfil obligations – Internal markets for electricity and natural gas – Directive 2009/72/EC – Article 2(21) – Article 19(3), (5) and (8) – Article 37(1)(a) and (6)(a) and (b) – Directive 2009/73/EC – Article 2(20) – Article 19(3), (5) and (8) – Article 41(1)(a) and (6)(a) and (b) – Concept of a 'vertically integrated undertaking' – Effective unbundling of networks from the activities of production and supply of electricity and natural gas – Independent transmission operator – Independence of the staff and the management of the transmission system operator – Transitional periods – Shares held in the capital of the vertically integrated undertaking – National regulatory authorities – Independence – Exclusive powers – Article 45 TFEU – Freedom of movement for workers – Charter of Fundamental Rights of the European Union – Article 15 – Right to engage in work and to pursue an occupation – Article 17 – Right to property – Article 52(1) – Restrictions – Principle of democracy

The purpose of Directives 2009/72 [94] and 2009/73 [95] is to provide all EU consumers with a real choice in domestic electricity and natural gas markets. In order to avoid discrimination, the directives provide for the effective separation of transmission networks from activities of generation and supply ('effective unbundling'). Compliance with the provisions of the directives is ensured through the creation of independent, impartial and transparent national regulatory authorities ('NRAs'). [96]

By its judgment, the Court of Justice upholds, in its entirety, the action for failure to fulfil obligations brought by the European Commission against the Federal Republic of Germany. The four complaints put forward by the Commission in support of its action all relate to the incorrect transposition by the Federal Republic of Germany of several provisions of Directives 2009/72 and 2009/73 into the Energy Industry Act. [97]

Findings of the Court

The Court upholds the first complaint, by which the Commission claims that the Federal Republic of Germany failed to transpose correctly into national law the concept of a 'vertically integrated undertaking' ('VIU'), by restricting its definition to activities carried on within the European Union. [98] The Court points out that the concept of a 'VIU' is an autonomous concept of EU law which does not impose any territorial restriction and must be interpreted in the light of the concept of 'effective unbundling' in order to avoid a risk of discrimination as regards network access. There may be conflicts of interest between a transmission system operator located in the European Union and electricity or natural gas producers or suppliers carrying on activities in those fields outside the

94 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55). That directive was repealed with effect from 1 January 2021 by Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125). However, it remains applicable to the case at issue *ratione temporis*.

95 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

96 Article 35(4) of Directive 2009/72 and Article 39(4) of Directive 2009/73.

97 Energiewirtschaftsgesetz (Energy Industry Act) of 7 July 2005 (BGBl. I, pp. 1970 and 3621), as amended by Paragraph 2(6) of the Law of 20 July 2017 (BGBl. I, p. 2808, 2018 I p. 472).

98 Infringement of Article 2(21) of Directive 2009/72 and of Article 2(20) of Directive 2009/73.

European Union. A broad interpretation of the concept of a 'VIU' may encompass, where appropriate, activities carried on outside the European Union. That does not imply an extension of the European Union's regulatory power. Consequently, the Federal Republic of Germany's restrictive interpretation of the concept of a 'VIU' is not in line with the objectives pursued by those provisions.

In the context of the independence of the staff and the management of the transmission system operator, the Court upholds the second complaint, by which the Commission submits that the German legislation limits the application of the provisions of the directives concerning transitional periods – which relate to persons changing posts within the VIU – to those parts of the VIU which carry on their activities in the energy sector. [99] The Court points out that those provisions of the directives do not contain any such restriction. Such a restriction would be contrary to the objective of 'effective unbundling', which is necessary to ensure the functioning of the internal energy market and the security of energy supply. Under the provisions of the directives, transitional periods apply to persons responsible for the management and/or members of the administrative bodies of the transmission system operator who, before their appointment, held a position in the VIU or in one of the VIU's controlling shareholders, even if that position was not held in the VIU's energy sector or in an undertaking which is the controlling shareholder of one of VIU's energy sector undertakings.

In response to an argument by the Federal Republic of Germany relating to the freedom of movement for workers and the fundamental right to pursue a freely chosen occupation, the Court observes that freedoms are not absolute rights and may be restricted under certain conditions, as is the case here. The Court concludes that the scope *ratione personae* of the German law is contrary to the provisions of the directives at issue.

The Court upholds the third complaint, by which the Commission submits that the provisions of the directives prohibiting the holding of certain interests in or receipt of financial benefits from any part of the VIU have been transposed only in part into the German legislation, and do not apply to shareholdings of the transmission system operator's employees, [100] even though it is clear from the wording of the provisions that those prohibitions also apply to employees. That interpretation is supported by the objective of 'effective unbundling' and by the risk that employees who do not participate in the day-to-day management of the transmission system operator may nevertheless be able to influence the activities of their employer, with the result that situations of conflicts of interests could arise if those employees hold shares in the VIU or in parts thereof. In response to an argument by the Federal Republic of Germany relating to the right to property of employees, guaranteed by Article 17(1) of the Charter of Fundamental Rights of the European Union, the Court observes that the prohibitions in the relevant provisions do not constitute such a disproportionate and intolerable interference with that right as to impair its very substance.

The Court upholds the fourth complaint, by which the Commission claims that the Federal Republic of Germany disregarded the powers exclusively reserved to NRAs under the directives, by attributing to the Federal Government, under the German legislation, the power to determine the methodologies used to calculate or establish the conditions for access to national networks, including the applicable tariffs. [101] The Court points out that NRAs must be completely independent in order to ensure impartiality and non-discrimination towards economic actors and public entities. It observes that the procedural autonomy of Member States must be exercised in accordance with the objectives and obligations laid down in the directives. In particular, tariffs and calculation methodologies for both national and cross-border exchanges must be determined on the basis of uniform criteria, such as those laid down by the directives and other EU legislative acts.

---

99 Infringement of Article 19(3) and (8) of Directives 2009/72 and 2009/73.

100 Infringement of Article 19(5) of Directives 2009/72 and 2009/73.

101 Infringement of Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

In response to the Federal Republic of Germany's argument that Article 24 of the Energy Industry Act is legislative in nature, the Court emphasises that the functioning of the European Union is founded on the principle of representative democracy and, in particular, that directives are adopted under the legislative procedure. Moreover, the Court stresses that the principle of democracy does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The independent status of NRAs does not in itself deprive those authorities of their democratic legitimacy, since they are not shielded from all parliamentary influence. [102]

The Court points out that the powers reserved to the NRAs are executive powers that are based on technical and specialist assessment, and do not confer upon those authorities a margin of discretion which might entail decision-making of a political nature. The Court notes that, in the present case, the NRAs are subject to principles and rules established by a detailed legislative framework at EU level.

XI. INTERNATIONAL AGREEMENTS: INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court (Grand Chamber) of 2 September 2021, Commission v Council (Accord avec l'Arménie), C-180/20

Link to the complete text of the judgment

Action for annulment – Decisions (EU) 2020/245 and 2020/246 – Position to be taken on behalf of the European Union within the Partnership Council established by the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part – Agreement, certain provisions of which may be linked with the common foreign and security policy (CFSP) – Adoption of the Rules of Procedure of the Partnership Council, of the Partnership Committee, subcommittees and other bodies – Adoption of two separate decisions – Choice of legal basis – Article 37 TEU – Article 218(9) TFEU – Voting rules

The Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part ('the Partnership Agreement with Armenia'), was signed on 24 November 2017. [103] That agreement provides for the establishment of a Partnership Committee and the possibility of establishing subcommittees and other bodies. It also provides that the Partnership Council is to adopt its own Rules of Procedure and to determine therein the duties and functioning of the Partnership Committee.

---

102 To that effect, judgment of 9 March 2010, *Commission* v *Germany* (C-518/07, EU:C:2010:125, paragraphs 42, 43 and 46); to that effect, judgment of 11 June 2020, *Prezident Slovenskej republiky* (C-378/19, EU:C:2020:462, paragraphs 36 to 39).

103 Council Decision (EU) 2018/104 on the signing, on behalf of the Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part (OJ 2018 L 23, p. 1).

The European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy jointly adopted, on 29 November 2018, a proposal for a Council Decision on the position to be taken on behalf of the European Union within the Partnership Council established by the Partnership Agreement with Armenia, as regards the adoption of decisions on the rules of procedure of the Partnership Council, the Partnership Committee and those of specialised subcommittees or any other body. In its amended proposal of 19 July 2019, the Commission deleted the reference to Article 37 TEU, which covers the conclusion of agreements in the field of the common foreign and security policy (CFSP), as a substantive legal basis. The Council split that proposal for a decision into two separate decisions. It thus adopted, first, Decision 2020/245, intended to ensure the application of the Partnership Agreement with Armenia with the exception of Title II thereof, based on a substantive legal basis constituted by Articles 91, 207 and 209 TFEU, in the fields of transport, trade and development. Second, it adopted Decision 2020/246, intended to ensure the application of Title II of that agreement, covering cooperation in the field of the CFSP, based on a substantive legal basis constituted solely by Article 37 TEU. Whereas Decision 2020/245 was adopted by qualified majority, Decision 2020/246 was adopted by unanimity. The Commission contested, before the Court, the splitting of the Council act into two decisions, the choice of Article 37 TEU as the legal basis of Decision 2020/246, and the voting rules that resulted from that choice, and consequently sought the annulment of those two Council decisions.

The Court of Justice, sitting as the Grand Chamber, annuls Council Decisions 2020/245 and 2020/246. It holds that, although the partnership agreement has some links with the CFSP, the components or declarations of intention it includes which may be linked to the CFSP are insufficient to constitute an autonomous component of that agreement capable of justifying the choice of Article 37 TEU as the substantive legal basis and the second subparagraph of Article 218(8) TFEU as the procedural legal basis of Decision 2020/246. It also holds that, in those circumstances, there is nothing to justify splitting into two decisions the act on the position to be taken by the European Union within the Partnership Council established by the Partnership Agreement with Armenia.

Findings of the Court

At the outset, the Court recalls that, pursuant to Article 218(8) TFEU the Council is to act, in principle, by way of qualified majority and that it is only in the situations set out in the second subparagraph of that provision that it is to act by unanimity. In those circumstances, the voting rules applicable must, in each individual case, be determined according to whether or not it falls within one of the situations set out in the second subparagraph of Article 218(8) TFEU, as the choice of substantive legal basis of the decision concerned must be based on objective factors amenable to judicial review, which include the aim and the content of that measure.

The Court recalls in that regard that, if examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. In the present case, although the contested decisions formally concern different titles of the partnership agreement, the Court observes that the field that they cover and, thus, the legal basis of the external action of the European Union at issue, must be assessed with regard to the agreement as a whole, as those decisions concern, overall, the functioning of the international bodies created on the basis of the Partnership Agreement with Armenia. Moreover, the adoption of two separate decisions of the Council, based on different legal bases, but which seek to establish the single position to be adopted on behalf of the European Union on the functioning of the bodies established by that agreement, can be justified only if the agreement, considered as a whole, contains distinct components corresponding to the different legal bases used for the adoption of those decisions.

In that regard, the Court emphasises that the characterisation of an agreement as a development cooperation agreement must be determined having regard to its essential object and not in terms of its individual clauses. While it is true that the provisions of Title II of the Partnership Agreement with Armenia cover subjects capable of falling within the CFSP and reaffirm the will of the parties to collaborate in that area, those provisions are nevertheless few in number in the agreement and are, for the main part, limited to declarations of a programmatic nature which merely describe the relationship between the contracting parties and their common future intentions.

The Court next observes, as regards the aims of the agreement, that it seeks principally to establish the framework for cooperation in matters of transport, trade and development with Armenia. In that context, the Court finds that to require a development cooperation agreement also to be based on a provision other than the provision relating to that policy whenever the agreement touches on a specific area would in practice be liable to render devoid of substance the competence and the procedure laid down in Article 208 TFEU. In the present case, while some of the specific aims seeking to strengthen political dialogue may be linked to the CFSP, the Court observes that the enumeration of those specific aims is not accompanied by any programme of action or concrete terms governing cooperation in that field that may be capable of establishing that the CFSP constitutes one of the distinct components of that same agreement, outside the scope of those aspects connected with trade and development cooperation.

Finally, while a contextual element of a measure, such as, in the present case, the Nagorno-Karabakh conflict, may also be taken into account in order to determine the legal basis of that measure, the Court finds that the Partnership Agreement with Armenia does not envisage any concrete or specific measure with a view to addressing that situation which puts international security in issue.

In the light of the foregoing, the Court annuls Decision 2020/246 since it was wrongly based on the substantive legal basis of Article 37 TEU. The Court also annuls Decision 2020/245. As is apparent from recital 10 and from Article 1 thereof, that decision does not relate to the position to be adopted on behalf of the European Union within the Partnership Council established by the Partnership Agreement with Armenia in so far as that position is covered by the application of Title II of that agreement. However, the provisions comprising that title do not constitute a distinct component of that agreement that obliged the Council to use, inter alia, Article 37 TEU and the second subparagraph of Article 218(8) TFEU as a basis for establishing that same position. Therefore, there was nothing to justify the Council excluding the position in question from the object of Decision 2020/245, in so far as it covers the application of Title II of that same agreement and adopting a separate decision pursuant to Article 218(9) TFEU, which has as its object the establishment of that position in so far as it covers that same application.

The Court decides however, on grounds of legal certainty, to maintain the effects of the annulled decisions pending a new decision to be taken by the Council which complies with the judgment.

Judgment of the Court (Grand Chamber) of 2 September 2021, République de Moldavie, C-741/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Energy Charter Treaty – Article 26 – Inapplicability between Member States – Arbitration Award – Judicial review – Jurisdiction of a court of a Member State – Dispute between a third-State operator and a third State – Jurisdiction of the Court – Article 1(6) of the Energy Charter Treaty – Concept of 'investment'

In performance of a series of contracts concluded in 1999, Ukrenergo, a Ukrainian producer, sold electricity to Energoalians, a Ukrainian distributor, which resold that electricity to Derimen, a company registered in the British Virgin Islands, which in turn resold that electricity to Moldtranselectro, a Moldovan public undertaking with a view to exporting it to Moldova. The volumes of electricity to be supplied were agreed each month directly between Moldtranselectro and Ukrenergo.

Derimen paid Energoalians the full amounts due for the electricity purchased, whilst Moldtranselectro only partially settled the amounts due to Derimen for that electricity. On 30 May 2000, Derimen assigned to Energoalians the claim that it had against Moldtranselectro. The latter settled its debt to Energoalians in part by assigning to it claims that it held. Energoalians attempted unsuccessfully to obtain payment of the remainder of that debt, a sum of 16 287 185.94 United States dollars (USD) (approximately EUR 13 735 000), by bringing proceedings before the Moldovan courts and subsequently the Ukrainian courts.

Energoalians considered that certain conduct by the Republic of Moldova in that context constituted serious breaches of the undertakings made under the Energy Charter Treaty [104] ('the ECT'), the essential concept of which is to catalyse economic growth by means of measures to liberalise investment and trade in energy.

Energoalians, whose rights were subsequently assigned to Komstroy LLC, initiated the arbitration procedure provided for by the ECT. [105] The ad hoc arbitral tribunal constituted in order to resolve that dispute, sitting in Paris (France), held that it had jurisdiction and ordered the Republic of Moldova to pay a sum of money to Energoalians on the basis of the ECT. Following an action to set aside the arbitral award and a judgment of the Cour de cassation (Court of Cassation, France), the jurisdiction of that arbitral tribunal is disputed by the Republic of Moldova before the Cour d'appel de Paris (Court of Appeal, Paris, France), the referring court, on the ground that the claim arising from a contract for the sale of electricity does not constitute an 'investment' within the meaning of the ECT. [106] To that end, the referring court has asked three questions relating to the concept of 'investment'.

By its judgment, the Court, sitting as the Grand Chamber, holds that the acquisition, by an undertaking of a Contracting Party to the ECT, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State to that treaty against a public undertaking of another Contracting Party to the same treaty, does not constitute an 'investment' within the meaning of the ECT. [107]

Findings of the Court

As a preliminary matter, the Court ascertains its own jurisdiction to answer the questions referred for a preliminary ruling since several parties, including Komstroy, submitted that EU law does not apply to the dispute in issue, the parties to the dispute being outsiders to the European Union.

The Court confirms that it has jurisdiction to give a preliminary ruling on the interpretation of the ECT, which is a mixed agreement, that is to say concluded by the European Union and a large number of Member States. More specifically, it has jurisdiction to answer the questions referred since they concern the concept of 'investment' within the meaning of the ECT and, since the entry into force of the Treaty of Lisbon, the European Union has exclusive competence as regards foreign direct investment and, as regards investments that are not direct, it has shared competence. [108]

That conclusion is not called into question by the fact that the dispute at the origin of the main proceedings is between an investor of a third State and another third State. It is true that, in principle, the Court does not have jurisdiction to interpret an international agreement as regards its application in the context of a dispute not covered by EU law. That is the case in particular where such a dispute is between an investor of a non-member State and another non-member State. However, it is in the interest of the European Union that, in order to forestall future differences of interpretation, the concept of 'investment' should be interpreted uniformly, whatever the circumstances in which it is to apply. That is the case for the provisions whose interpretation is sought by the referring court. In particular, in a case covered by EU law, that court could be required to rule on the interpretation of those same provisions of the ECT whether in the context of an application to set aside an arbitral award or in ordinary court proceedings.

---

104 Energy Charter Treaty, signed at Lisbon on 17 December 1994 (OJ 1994 L 380, p. 24; 'the ECT') approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 (OJ 1998 L 69, p. 1).

105 Article 26(1) ECT.

106 Article 1(6) and Article 26(1) ECT.

107 Article 1(6) and Article 26(1) ECT

108 Article 207 TFEU; Opinion 1/17 (EU-Canada CET Agreement), of 30 April 2019 (EU:C:2019:341)

In any event, the parties to the dispute chose to submit that dispute to an ad hoc arbitral tribunal established on the basis of the Arbitration Rules of the United Nations Commission on International Trade Law (Uncitral) [109] and agreed, in accordance with those arbitration rules, that the seat of the arbitration should be established in Paris, that is to say on the territory of a Member State, in this case France, in which the ECT is applicable as an act of EU law. For the purposes of the proceedings brought in that Member State, that fixing of the seat of arbitration thus entails the application of EU law, compliance with which the court hearing the case is obliged to ensure in accordance with Article 19 TEU.

In order to answer the referring court's first question relating to the concept of 'investment' within the meaning of the ECT, that interpretation being necessary in order to ascertain whether the ad hoc arbitral tribunal has jurisdiction, the Court first of all examines which disputes may be brought before an arbitral tribunal pursuant to Article 26 ECT. Several Member States that participated in the written and oral stages of the proceedings invited the Court to specify whether such a tribunal may, in compliance with the principle of the autonomy of the EU judicial system, rule on a dispute between an operator of one Member State and another Member State. [110]

The Court states in that regard, in the first place, that the arbitral tribunal rules in accordance with the ECT, which is an act of EU law, and also of international law, with the result that that tribunal may be required to interpret and apply EU law.

In the second place, that arbitral tribunal does not constitute an element of the judicial system of a Member State, in this case France. It follows that that tribunal cannot be regarded as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling. [111]

In the third place, in order to ensure compliance with the principle of the autonomy of the EU judicial system, the arbitral award must be subject to review by a court of a Member State, capable of ensuring full compliance with EU law, guaranteeing that questions of EU law may, if necessary, be submitted to the Court by means of a reference for a preliminary ruling. In the present case, the parties to the dispute chose an arbitral tribunal on the basis of the Uncitral arbitration rules and accepted that the seat of arbitration be established in Paris, with the result that that renders French law applicable to proceedings for judicial review of the arbitration award made by that tribunal. However, such judicial review can be exercised by that national court only to the extent that national law so permits. French law provides only for limited review concerning, in particular, the jurisdiction of the arbitral tribunal. Moreover, the arbitration procedure in question is different from commercial arbitration proceedings, which originate in the freely expressed wishes of the parties concerned. That procedure derives from a treaty whereby Member States consent to remove from the system of judicial remedies that they are required to establish disputes that could involve the application and interpretation of EU law.

Having regard to all of the characteristics of the arbitral tribunal, if the dispute was between Member States, the mechanism for settling that dispute would not be capable of ensuring that the dispute would be determined by a court within the EU judicial system, it being understood that only such a court is capable of guaranteeing the full effectiveness of EU law. [112] Consequently, the provision of the ECT at issue [113] does not apply to disputes between a Member State and an investor in another Member State on the subject of an investment made by the latter in the first Member State.

---

109 Article 26(4)(b) ECT.

110 Article 26 ECT.

111 Judgment of 6 March 2018, *Achmea*, (C-284/16, EU:C:2018:158, paragraphs 43 to 49).

112 Judgment of 6 March 2018, *Achmea*, (C-284/16, EU:C:2018:158, paragraph 56).

113 Article 26(2)(c) ECT.

Next, the Court clarifies the concept of 'investment' within the meaning of the ECT. In that regard, the Court holds that a claim arising from a contract for the supply of electricity constitutes an asset held directly by an investor, it being specified that the term 'investor', defined by the ECT and used in particular in Article 26(1) ECT, designates, inter alia, as regards a Contracting Party such as Ukraine, any undertaking organised in accordance with the legislation applicable in the territory of that Contracting Party. However, a claim arising from a mere contract for the sale of electricity cannot be regarded as having been granted in order to undertake an economic activity in the energy sector. It follows that a mere contract for the supply of electricity, in this case produced by other operators, is a commercial transaction which cannot, in itself, constitute an 'investment'. That interpretation is consistent with the clear distinction made by the ECT between trade and investments.

XII. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS: NON-CONTRACTUAL LIABILITY OF THE UNION

Judgment of the General Court (First Chamber) of 7 July 2021, HTTS v Council, T-692/15 RENV

Non-contractual liability – Common foreign and security policy – Restrictive measures against Iran – List of persons and entities subject to the freezing of funds and economic resources – Sufficiently serious breach of a rule of law intended to confer rights on individuals

and

Judgment of the General Court (First Chamber) of 7 July 2021, Bateni v Council, T-455/17,

Non-contractual liability – Common foreign and security policy – Restrictive measures against Iran – List of persons and entities subject to the freezing of funds and economic resources – Jurisdiction of the General Court – Limitation – Sufficiently serious breach of a rule of law intended to confer rights on individuals

Pursuant to adoption by the United Nations Security Council of a number of resolutions concerning the nuclear proliferation programme of the Islamic Republic of Iran [114] and calling on the Member States, inter alia, to freeze the assets of Islamic Republic of Iran Shipping Lines ('IRISL') and any legal or natural persons that might be linked to it, on account of its shipping activities, the Council of the European Union adopted restrictive measures against IRISL, HTTS Hanseatic Trade Trust & Shipping ('HTTS'), [115] a company incorporated under German law carrying on activities of shipping agents and of

[114] United Nations Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1929 (2010).

[115] Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39) and Council implementing Regulation (EU) No 668/2010 of 26 July 2010 implementing Article 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran (OJ 2010 L 195, p. 25).

technical managers of vessels, and Mr Naser Bateni. [116] The Council subsequently extended those measures several times.

HTTS was relisted as a person or entity subject to those measures, on 25 October 2010, on the grounds that it was under the control or acting on behalf of IRISL, [117] and again on 23 January 2012, on the grounds that it was registered in Germany at the same address as IRISL Europe GmbH and that Mr Naser Bateni, its director, had previously been employed by IRISL. [118] Mr Bateni, for his part, was included in the list in question on 1 December 2011 on the grounds that he was the former legal director of IRISL and the director of HTTS, which was subject to EU sanctions. After the Council modified the listing criteria by directly targeting 'persons and entities providing insurance or other essential services to … IRISL, or to entities owned or controlled by [it] or acting on [its] behalf', [119] Mr Naser Bateni was kept on the list on the grounds that he had acted on behalf of IRISL, had been the director of that company until 2008, and subsequently managing director of IRISL Europe, and that he was the director of HTTS which, as their general agent, provided essential services to two other shipping entities, SAPID and HSDL, which were also designated as entities acting on behalf of IRISL. [120]

Before the Court, HTTS and Mr Naser Bateni ('the applicants') and IRISL challenged the majority of the successive measures adopted against them by the Council and were granted annulment of those measures. [121] In those proceedings, under Articles 268 and 340 TFEU which apply to the non-contractual liability of the European Union, the applicants sought compensation for the damage they each allegedly suffered as a result of their inclusion in the lists at issue. They argued, inter alia, that their inclusion in those lists constituted sufficiently serious breaches of rules of law intended to confer rights on individuals. [122]

In both these cases, the Court dismissed the applicants' actions for damages and recalled, in particular, that a finding that a legal act of the European Union is unlawful is not, as such, a sufficient basis for holding that the non-contractual liability of the European Union, stemming from unlawful conduct on the part of one of its institutions, has automatically arisen.

---

116 Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2011 L 319, p. 71) and Council Implementing Regulation (EU) No 1245/2011 of 1 December 2011 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran (OJ 2011 L 319, p. 11).

117 Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 (OJ 2010 L 281, p. 1).

118 Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2012 L 19, p. 22) and Council Implementing Regulation (EU) No 54/2012 of 23 January 2012 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran (OJ 2012 L 19, p. 1).

119 Article 20(1)(b) of Council Decision 2010/413/CFSP of 26 July 2010 concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 195, p. 39), as amended by Decision 2013/497/CFSP, and Article 23(2)(e) of Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1), as amended by Regulation (EU) No 971/2013.

120 Council Decision 2013/661/CFSP of 15 November 2013 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2013 L 306, p. 18) and Council Implementing Regulation (EU) No 1154/2013 of 15 November 2013 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran (OJ 2013 L 306, p. 3).

121 See judgment of 7 December 2011, *HTTS* v *Council* (T-562/10, EU:T:2011:716); judgment of 12 June 2013, *HTTS* v *Council* (T-128/12 and T-182/12, EU:T:2013:312); judgment of 6 September 2013, *Bateni* v *Council* (T-42/12 and T-181/12, EU:T:2013:409); judgment of 16 September 2013, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (T-489/10, EU:T:2013:453); and judgment of 18 September 2015, *HTTS and Bateni* v *Council* (T-45/14, EU:T:2015:650).

122 In *HTTS* v *Council* (T-692/15, EU:T:2017:890), the General Court first of all, by its judgment of 13 December 2017, rejected HTTS's claim for compensation. That judgment was then set aside by the Court of Justice on 10 September 2019 in *HTTS* v *Council* (C-123/18 P, EU:C:2018:694) and the case referred back to the General Court.

Findings of the Court

In both cases, the Court examined whether the evidence adduced by the applicants demonstrates that the listings at issue constituted sufficiently serious breaches of a rule of law intended to confer rights on individuals, as the case-law on the non-contractual liability of the European Union requires.

The Court noted in these cases that the parameters that are required to be taken into account when assessing whether there is a sufficiently serious breach of a rule of EU law intended to confer rights on individuals must all relate to the date on which the decision or the conduct was adopted by the institution concerned. It also observed that a manifest error of assessment adduced as a plea in support of an action for annulment must be distinguished from the manifest and grave disregard for the limits set on an institution's discretion, relied upon when alleging such a breach in an action for damages.

The Court noted that the Council had access to a large amount of information constituting a likewise large amount of evidence of links between IRISL, HTTS and Mr Naser Bateni.

The Court highlighted in particular that the concept of a company 'owned or controlled by another entity' afforded the Council a degree of discretion and that the Council itself had provided information which it considered capable of establishing the nature of the links between HTTS, IRISL and Mr Naser Bateni. In Case T-455/17, the Court likewise found that the applicant's listings were based both on a personal link between the applicant and IRISL and on the fact that he had a management role within a company allegedly controlled or owned by IRISL, in particular HTTS, which provided essential services to other companies allegedly controlled or owned by IRISL. The Court found in that respect that, even if, at the time of the listings at issue, the Council had erred in its assessment on that point, the error could not have been flagrant and inexcusable and it was not possible to find that an administrative authority exercising ordinary care and diligence would not have made that error in similar circumstances.

Lastly, the Court rejected the applicants' complaints that their listings, based also on the fact that companies belonging to IRISL, including SAPID and HDSL, participated in nuclear proliferation, were erroneous because the restrictive measures adopted against IRISL had been annulled on 16 September 2013. [123] The Court noted in particular that the lawfulness of the contested measures must be assessed on the basis of the facts and the law as they stood at the time when the act was adopted and emphasised that it had not been disputed that IRISL had in fact violated the arms embargo imposed by the UN and that IRISL's involvement in three incidents concerning the transportation of military material increased the risk that it was also involved in incidents relating to the transportation of material linked to nuclear proliferation, and that the Council therefore did not breach the substantive listing conditions in a manner giving rise to non-contractual liability on the part of the European Union.

The Court therefore dismissed both actions for damages in their entirety.

[123] Judgment of 16 September 2013, *Islamic Republic of Iran Shipping Lines and Others* v *Council* (T-489/10, EU:T:2013:453).

2. COMPETITION: STATE AID

Judgment of the General Court (Seventh Chamber) of 5 May 2021, ITD and Danske Fragtmænd v Commission, T-561/18

Link to the complete text of the judgment

State aid – Postal sector – Compensation for the discharge of the universal service obligation – Decision not to raise any objections – Calculation of the compensation – Net avoided cost methodology – Taking into account the intangible benefits of the universal service – Use of funds granted as compensation – State guarantee of redundancy payments in the event of bankruptcy – VAT exemption for certain transactions carried out by the universal service provider – Accounting allocation of common costs between universal service activities and non-universal service activities – Capital contribution from a public undertaking in order to avoid the bankruptcy of its subsidiary – Complaint from a competitor – Decision finding no State aid after the preliminary examination stage – Existing aid – Advantages granted on a periodic basis – Whether imputable to the State – Private investor test

Post Danmark is a universal postal service provider in Denmark that is wholly owned by PostNord, which is, in turn, owned by the public authorities (Kingdom of Denmark and Kingdom of Sweden). It benefited from a series of measures granted by the public authorities which formed the subject of a complaint from a competing undertaking concerning, inter alia, compensation for the provision of the universal postal service in Denmark, which had been notified to the Commission.

By its decision of 28 May 2018 ('the contested decision'), the Commission found that the compensation for the provision of the universal postal service over the period from 2016 to 2019, notified by the Danish authorities, constituted State aid compatible with the internal market. The Commission also took a view on the measures challenged in the complaint of one of the applicants. First, it found that the guarantee provided by the public authorities under which, in the event of the undertaking's bankruptcy, they undertook to pay, without any consideration in return, the costs relating to the redundancy payments for former civil servants, constituted existing aid. Secondly, the Commission considered that a Danish administrative practice that allowed exemption from VAT for customers of mail-order companies when those companies chose to purchase a transport service from Post Danmark and a capital increase made in February 2017 by PostNord to its subsidiary Post Danmark, did not constitute State aid. The Court annuls that decision in so far as it found, at the end of the preliminary examination stage, that, first, the exemption from VAT and, secondly, PostNord's capital increase in favour of Post Danmark did not constitute State aid.

In its judgment, by which the Court partially annuls the contested decision, clarification is given concerning the criteria for assessing the compatibility of compensation for the cost of the universal service obligation, the starting point for the limitation period for recovery of the aid, the classification of a guarantee as State aid, the imputability to the State of national measures taken pursuant to a directive and measures taken by a public undertaking, and on the private investor in a market economy test in assessing a measure taken in favour of a company on the verge of bankruptcy.

Findings of the Court

In the first place, the Court holds that the applicants have not provided evidence of serious difficulties as regards the compatibility of the compensation received by Post Danmark for the provision of the universal postal service. In its examination of the arguments relating to that compensation, it recalls that Article 106(2) TFEU seeks to prevent, through the assessment of the proportionality of the aid, that the operator responsible for the public service benefits from funding which exceeds the net costs of the public service. Thus, as part of the review of proportionality, it is for the Commission to compare the amount of the planned State aid with the net costs of the public service missions performed by the beneficiary of that aid.

From that perspective, in order to identify the cost inherent in the provision of a universal service, the net avoided cost methodology, provided for by the framework on services of general economic interest, [124] involves developing a counterfactual scenario, that is to say, a hypothetical situation in which the provider of the universal service is no longer responsible for it, and to compare that scenario with the factual scenario in which that provider is entrusted with the universal service obligation. In that regard, first, the Court notes that, in order to develop a counterfactual scenario, that scenario must describe a stable situation that does not take account of the costs inherent in the transition, for the universal service provider, to the situation in which it is no longer entrusted with the universal service obligation. Thus, according to the Court, the calculation of the net avoided cost may include, in the counterfactual scenario, activities that are not profitable in the short term but are profitable in the long term.

Secondly, the Court points out that any calculation of the net avoided cost must deduct the intangible benefits attributable to the universal service obligation. In that regard, it notes that the enhancement of the reputation of the universal service provider may be regarded as an intangible benefit attributable to the universal service obligation in the postal sector. It points out, however, that the circumstances of the present case, characterised in particular by a fall in Post Danmark's activity and revenue in connection with the universal service owing to the generalised use of electronic communications, are such as to exclude the existence of serious difficulties as regards the failure to deduct profits linked to the enhancement of Post Danmark's reputation in the net avoided cost calculation. In addition, the Court states that, for the purposes of deducting intangible benefits in the context of the net avoided cost calculation, it is necessary not to assess the value of the corporate brand of the universal service provider but rather to determine whether the reputation of a universal service provider is enhanced by the fact that it provides such a service. As regards the ubiquity of the universal service provider, where ubiquity attracts customers and increases the loyalty of customers, who are more inclined to choose the universal service provider than its competitors, the Court notes that, even in the absence of a universal service obligation, Post Danmark's ubiquity would not have been fundamentally altered. Thus, the Commission was entitled to conclude that there was no need to deduct an intangible benefit linked to ubiquity when calculating the net avoided cost presented by the Danish authorities.

Thirdly, as regards the use of the compensation granted to Post Danmark, the Court holds that the Commission was entitled to declare that that compensation was compatible with the internal market while authorising that such compensation be used not for the discharge of the universal service obligation but to pay the costs arising from the dismissal of former civil servants. According to the Court, an assessment as to whether public service compensation is compatible with the internal market consists in verifying, irrespective of whether the corresponding amount is actually allocated to it, whether such a public service exists and imposes a net cost on the undertaking responsible for providing it. In particular, as regards the postal sector, the interpretation of the provisions relating to the recovery of the net costs of the universal service obligations in Directive 97/67 [125] excludes any requirement that the transfer of funds corresponding to compensation for the universal service actually be used for the performance of such a service.

In the second place, as regards the guarantee at issue, the Court finds it is an individual measure that is not part of a multiannual aid scheme and, therefore, the limitation period began to run from the date on which it was granted, in 2002. In addition, the Court notes that, irrespective of the classification of the guarantee at issue, the applicants have not put forward any evidence capable of establishing that the amount of the premium that Post Danmark should have paid each year, in

---

124 Points 25 to 27 of the European Union framework for State aid in the form of public service compensation (OJ 2012 C 8, p. 15).

125 The first paragraph of Part C of Annex I to Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14), as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67 with regard to the full accomplishment of the internal market of Community postal services (OJ 2008 L 52, p. 3).

return for the guarantee at issue, should be determined periodically on the basis of circumstances specific to each period, or even that that would be the case, in general, as regards the amount of a guarantee premium. Consequently, the guarantee at issue does not entail advantages granted on a periodic basis and the limitation period is not to recommence periodically. The Court concludes that the Commission was entitled to find that that measure constituted existing aid under the provisions regarding limitation periods. [126] In any event, the Court points out that, for the purposes of classifying a guarantee as State aid, it is necessary to assess the actual impact of the guarantee at issue on the situation of the beneficiary compared with that of its competitors. In the present case, it is not apparent that the guarantee given to Post Danmark improves its situation, since, in particular, it could be implemented only in the event that that undertaking ceases to exist, meaning that, as long as the undertaking is solvent, it is required to pay the special redundancy payments relating to the dismissal of former civil servants.

In the third place, the Court finds that the Commission did not carry out a complete and sufficient examination when it concluded that the administrative practice of exempting from VAT the supply of goods carried out by Post Denmark in transactions between mail-order companies and end customers was attributable to the European Union and not to the Danish State, in so far as that practice followed from Article 132(1)(a) of the VAT Directive. [127] In that regard, the Court points out that a national administrative practice establishing a tax exemption must be imputed to the European Union where it merely fulfils a clear and precise obligation laid down in a directive, whereas it must be regarded as imputable to the State where that State adopted it by making use of its discretion in the transposition of a directive. In the present case, the Court observes that it is clear and precise from Article 132(1)(a) of the VAT Directive that the transactions carried out by a universal service provider and which fall within the scope of the universal service obligation are exempt from that tax. The exemption from VAT permitted by the Danish administrative practice covers services invoiced by mail-order companies to their end customers, which do not therefore fall within the scope of the universal service obligation, or, therefore, of the exemption provided for in Article 132(1)(a) of the VAT Directive. Furthermore, the Court states that, when assessing whether the effects of the administrative practice at issue were attributable to the European Union or to the Danish State, the Commission failed to examine the links between that practice and the rule laid down in point (c) of the first paragraph of Article 79 of the VAT Directive relating to the taxable amount, on which it was based.

In the fourth place, the Court finds that the Commission did not carry out a complete and sufficient examination when concluding that the capital increase made in February 2017 by PostNord to its subsidiary Post Danmark did not constitute State aid since it was not imputable to the public authorities and did not entail an advantage. In that regard, first, as regards the imputability of that transaction to the public authorities, the Court recalls that, in the case of an undertaking over which a Member State might exercise a dominant influence, the Commission must establish, on the basis of a set of sufficiently precise and convergent indicators, that the involvement of the State in the decision made by that undertaking was specific or that the absence of such involvement was unlikely having regard to the circumstances and the context of the case. In the present case, the Commission merely considered that, even if the Danish and Swedish States were in a position to exercise a dominant influence over PostNord, that did not enable it to assume that the capital increase was imputable to them. Such a conclusion, reached without any concrete examination of the likely extent of involvement of the State shareholders in the adoption of the measure, was tantamount to excluding the imputability to the State of the increase in capital on the sole ground that PostNord was incorporated as a commercial company, in breach of the Court's case-law. [128] Secondly, as regards the application of the private investor in a market economy test, the Court notes that, in the context of a

---

126 Article 17(3) of Regulation 2015/1589.

127 Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (OJ 2006 L 347, p. 1; 'the VAT Directive').

128 Judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraph 57).

public investment seeking to ensure the survival of a subsidiary company, the Commission must carry out a meticulous examination, on the basis of reliable evidence available to it, of the advantages and disadvantages (i) of the option of filing for the bankruptcy of the subsidiary and (ii) of the option of making a public investment in order to ensure the survival of the undertaking, examining, in particular, in the latter case, the prospects of profitability for the public investor. In the present case, the Commission relied exclusively on the negative consequences for the PostNord group of potential bankruptcy proceedings concerning Post Danmark, without excluding the possibility that such proceedings could, in spite of everything, be more advantageous than a capital increase which, for example, offered no prospects of profitability, even in the long term.

Nota:

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

- Judgment of 15 July 2021, FBF, Case C-911/19, ECLI: EU:C:2021:599
- Judgment of 8 September 2021, Brunswick Bowling Products v Commission, Case T-152/19, ECLI:EU:T:2021:539
- Judgment of 15 September 2021, Residencial Palladium v EUIPO – Palladium Gestión (PALLADIUM HOTELS & RESORTS), Case T-207/20, ECLI:EU:T:2021:587
- Judgment of 22 September 2021, Sociedade da Água de Monchique v EUIPO – Ventura Vendrell (chic ÁGUA ALCALINA 9,5 PH), Case T-195/20, ECLI:EU:T:2021:601
- Judgment of 22 September 2021, Al-Imam v Council, Case T-203/20, ECLI:EU:T:2021:605
- Judgment of 29 September 2021, Front Polisario v Council, Case T-279/19, ECLI:EU:T:2021:639
- Judgment of 29 September 2021, NEC Corporation v Commission, Case T-341/18, ECLI:EU:T:2021:634
- Judgment of 29 September 2021, Nichicon Corporation v Commission, Case T-342/18, ECLI:EU:T:2021:635
- Judgment of 29 September 2021, Tokin Corporation v Commission, Case T-343/18, ECLI:EU:T:2021:636
- Judgment of 29 September 2021, Rubycon and Rubycon Holdings v Commission, Case T-344/18, ECLI:EU:T:2021:637
- Judgment of 29 September 2021, Front Polisario v Council, joined Cases T-344/19 and T-356/19, ECLI:EU:T:2021:640
- Judgment of 29 September 2021, Nippon Chemi-Con Corporation v Commission, Case T-363/18, ECLI:EU:T:2021:638
- Judgment of 29 September 2021, AlzChem Group v Commission, Case T-569/19, ECLI:EU:T:2021:628