COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
October 2021

I. VALUES OF THE UNION

Judgment of the Court (Grand Chamber) of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Rule of law – Effective legal protection in the fields covered by EU law – Second subparagraph of Article 19(1) TEU – Principles of the irremovability of judges and judicial independence – Transfer without consent of a judge of an ordinary court – Action – Order of inadmissibility made by a judge of the Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) (Supreme Court (Chamber of Extraordinary Control and Public Affairs), Poland) – Judge appointed by the President of the Republic of Poland on the basis of a resolution of the National Council of the Judiciary, despite a court decision ordering that the effects of that resolution be suspended pending a preliminary ruling of the Court – Judge not constituting an independent and impartial tribunal previously established by law – Primacy of EU law – Possibility of finding such an order of inadmissibility to be null and void

In August 2018, the judge W.Ż., who held office in a regional court in Poland, was transferred without his consent from the division of the court to which he was assigned to another division of that court. He brought an action against that transfer before the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS'), which resulted in a resolution that there was no need to adjudicate. In November 2018, W.Ż. challenged that resolution before the Sąd Najwyższy (Supreme Court, Poland), also seeking the recusal of all the judges making up the chamber that was to hear his appeal, namely the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs Poland) ('the Chamber of Extraordinary Control'). He considered that, in view of the manner in which they were appointed, the members of that chamber did not offer the necessary guarantees of independence and impartiality.

In that regard, the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Division), Poland), which is required to rule on that application for recusal, states, in its order for reference, that appeals were brought before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) against Resolution No 331/2018 of the KRS, proposing to the President of the Republic the list of new judges of the Chamber of Extraordinary Control. However, notwithstanding the suspension of the effects of that resolution ordered by that court, the President of the Republic appointed to the posts of judge of that chamber certain of the candidates put forward in that resolution.

In March 2019, although, first, those proceedings before the Supreme Administrative Court were still pending and, second, that court had made a reference to the Court of Justice for a preliminary ruling concerning another resolution of the KRS proposing to the President of the Republic a list of candidates for posts as judges of the Supreme Court, [1] a new judge was appointed to the Chamber of Extraordinary Control ('the judge of the Chamber of Extraordinary Control') on the basis of Resolution No 331/2018. Ruling as a single judge, without having access to the case file and without hearing W.Ż., that new judge made an order ('the order at issue') dismissing as inadmissible the latter's action against the resolution of the KRS declaring that there was no need to adjudicate.

[1] Namely the case giving rise to the judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153). In that case, brought in November 2018, the Supreme Administrative Court essentially asked whether EU law precludes certain amendments made to the provisions of the Law on the KRS concerning the remedies available in respect of KRS resolutions relating to the appointment of judges to the Supreme Court.

The referring court asked the Court whether a judge appointed in such circumstances constitutes an independent and impartial tribunal previously established by law, within the meaning, in particular, of the second subparagraph of Article 19(1) TEU, [2] and asked the Court to specify the possible implications for the order at issue if that judge were found not to have that status.

In its Grand Chamber judgment, the Court rules on the circumstances which must be taken into account by a national court in order to find that, in the procedure for the appointment of a judge, there are irregularities such as to prevent that court from being regarded as an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU, and on the consequences which, in such a case, the principle of the primacy of EU law entails for a decision such as the order at issue, made by such a judge.

Findings of the Court

The Court notes, first of all, that an ordinary court such as a Polish regional court forms part of the Polish system of legal remedies in the 'fields covered by EU law' within the meaning of the second subparagraph of Article 19(1) TEU. In order for such a court to be able to ensure the effective legal protection required by that provision, the preservation of its independence is essential. A transfer of a judge without consent is potentially capable of undermining the principles of irremovability of judges and judicial independence. It is capable of affecting the scope of the activities allocated to the judge concerned and the handling of cases entrusted to him and of having significant consequences for that judge's life and career; it may therefore constitute a way of controlling the content of judicial decisions and producing effects similar to those of a disciplinary sanction. Consequently, the requirement of judicial independence requires the system applicable to transfers not consented to by judges to provide the necessary guarantees to prevent that independence from being jeopardised by direct or indirect external intervention. Such transfer measures, which can be decided only on legitimate grounds relating in particular to the distribution of available resources, should therefore be open to challenge before the courts, in accordance with a procedure fully safeguarding the rights of the defence.

The Court finds next that the appointment of the judge of the Chamber of Extraordinary Control in breach of the final decision of the Supreme Administrative Court ordering the suspension of the effects of Resolution No 331/2018 of the KRS, without awaiting the judgment of the Court of Justice in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18), undermined the effectiveness of the preliminary ruling system laid down by Article 267 TFEU. When that appointment was made, the reply awaited from the Court in that case was liable to lead the Supreme Administrative Court to have to, if necessary, annul Resolution No 331/2018 of the KRS in its entirety.

As regards the other circumstances surrounding the appointment of the judge of the Chamber of Extraordinary Control, the Court also notes that it recently held that certain circumstances mentioned by the referring court, relating to recent changes affecting the composition of the KRS, were liable to give rise to reasonable doubts concerning the independence of that body. [3] Furthermore, that appointment and the order at issue were made even though the referring court was seised of an application for recusal in respect of all the judges then sitting in the Chamber of Extraordinary Control.

Viewed together, the abovementioned circumstances are, subject to the referring court's final assessments, capable of leading to the conclusion that the appointment of the judge of the Chamber of Extraordinary Control was made in clear disregard of the fundamental rules governing the appointment of judges at the Supreme Court. The same circumstances may also lead the referring

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2 That provision states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

3 See, to that effect, judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraphs 104 to 108.

court to conclude that the conditions in which that appointment took place undermined the integrity of the outcome of the appointment process, by serving to create in the minds of individuals, reasonable doubts and a lack of appearance of independence or impartiality on the part of the judge of the Chamber of Extraordinary Control likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

Consequently, the Court holds that, by virtue of the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law, a national court hearing an application for recusal, such as that at issue in the main proceedings, must, where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law, declare an order such as the order at issue to be null and void, if it follows from all the conditions and circumstances in which the process of appointment of the judge who made that order took place that that judge does not constitute an independent and impartial tribunal previously established by law, within the meaning of that provision.

II. CITIZENSHIP OF THE EUROPEAN UNION: RIGHTS OF EU CITIZENS

Judgment of the Court (Fifth Chamber) of 6 October 2021, A (Border crossing by pleasure boat), C-35/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Right of Union citizens to move freely within the territory of the Member States – Article 21 TFEU – Directive 2004/38/EC – Articles 4 and 5 – Obligation to carry an identity card or a passport – Regulation (EC) No 562/2006 (Schengen Borders Code) – Annex VI – Crossing the maritime border of a Member State on board a pleasure boat – Rules on sanctions applicable when travelling between Member States without an identity card or a passport – Rules on daily fines in criminal cases – Calculation of the fine based on the offender's average monthly income – Proportionality – Severity of the sanction in relation to the offence

A, a Finnish national, made a round trip between Finland to Estonia on board a pleasure boat in August 2015. During that journey, he crossed international waters between Finland and Estonia. However, he was not in possession of his valid Finnish passport when he travelled. Consequently, in the course of a border check carried out in Helsinki on his return, A was unable to present that passport or any other travel document, although his identity could be established on the basis of his driving licence.

The Syyttäjä (Public Prosecutor, Finland) prosecuted A for a minor border offence. Under Finnish law, Finnish nationals must, on pain of criminal sanctions, carry a valid identity card or passport when, by whatever means of transport and route, they make a journey to another Member State or enter Finland by arriving from another Member State.

At first instance, it was held that A had committed an offence by crossing the Finnish border without being in possession of a travel document. However, no penalty was imposed on him, since the offence was minor and the amount of the fine that could be imposed on him under the Penal Code

provided for in Finnish law, based on his average monthly income, was excessive, the total amount of that fine being EUR 95 250.

Since the appeal brought by the Public Prosecutor against that decision was dismissed, the latter brought an appeal before the Korkein oikeus (Supreme Court, Finland). The referring court then decided to ask the Court about the compatibility with the right of Union citizens to freedom of movement laid down in Article 21 TFEU, [4] of the Finnish legislation at issue in the present case and, in particular, the rules on criminal sanctions in accordance with which the crossing of the national border without a valid identity card or passport punishable by a fine may amount to 20% of the offender's net monthly income.

Findings of the Court

In its judgment, the Court sets out, first of all, the conditions under which an obligation to carry an identity card or passport may be imposed, on pain of sanctions, including criminal sanction, for travel to a Member State other than that of which the person concerned is a national.

In the first place, the Court observes that the words 'with a valid identity card or passport' used in Directive 2004/38, [5] clarifying Article 21 TFEU, mean that the exercise by nationals of a Member State of their right to travel to another Member State is subject to the condition that they carry one of those two valid documents. That formality related to free movement [6] is intended to facilitate the exercise of the right to freedom of movement by ensuring that all persons who enjoy that right are identified as such in the context of a possible check. Consequently, a Member State which requires its nationals to carry one of the documents referred to, when crossing the national border in order to travel to another Member State, contributes to compliance with that formality.

In the second place, as regards the sanctions that may be imposed on a Union citizen who does not comply with that formality, the Court states, referring to the autonomy of the Member States in that regard, that the Member States may provide for sanctions, where necessary of a criminal nature, provided that those principles comply, inter alia, with the principles of proportionality and non-discrimination.

The Court therefore concludes that the right of Union citizens to freedom of movement does not preclude national legislation by which a Member State requires its nationals, on pain of criminal sanctions, to carry a valid identity card or passport when they travel to another Member State, irrespective of the means of transport used and the route. However, the detailed rules for those sanctions must comply with the general principles of EU law, including those of proportionality and non-discrimination.

Moreover, the Court reaches the same conclusion as regards the requirement to carry an identity card or passport when a national of one Member State enters the territory of that Member State arriving from another Member State. It states, however, that although the presentation of an identity card or passport may be requested when the national of a Member State returns to its territory, the requirement to carry such a document cannot affect the right of entry.

Finally, the Court examines the question whether Article 21(1) TFEU and Directive 2004/38, read in the light of the principle of proportionality of the sanction, laid down by the Charter of Fundamental

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4 Having regard to the provisions on border crossing set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

5 Article 4(1) of 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).

6 Recital 7 of Directive 2004/38.

Rights of the European Union, [7] preclude rules on criminal sanctions such as those laid down in Finnish law in connection with the crossing of the national border without a valid identity card or passport.

In that regard, it observes that, while it is open to the Member States to impose a fine in order to penalise a failure to comply with a formal requirement relating to the exercise of a right conferred by EU law, that sanction must be proportionate to the gravity of the infringement. Where, as in the present case, the obligation to be in possession of a valid identity card or passport is disregarded by a beneficiary of the right to freedom of movement who possesses such a document but has merely failed to carry it when travelling, it is a minor offence. Therefore, a heavy financial penalty, such as a fine of 20% of the offender's average net monthly income, is not proportionate to the seriousness of that offence.

III. INSTITUTIONAL PROVISIONS: ACCESS TO DOCUMENTS

Judgment of the General Court (Third Chamber, Extended Composition) of 6 October 2021, Aeris Invest v ECB, T-827/17

Access to documents – Decision 2004/258/EC – Documents concerning the adoption of a resolution scheme for Banco Popular Español – Partial refusal of access – Exception relating to the protection of the confidentiality of the proceedings of the ECB's decision-making bodies – Documents reflecting the outcome of the proceedings of the ECB's decision-making bodies –Obligation to state reasons – Exception relating to the protection of the financial, monetary or economic policy of the European Union or of a Member State – Exception relating to the protection of the stability of the financial system in the European Union or in a Member State – Exception relating to the protection of the confidentiality of information that is protected as such under EU law – Concept of 'confidential information' – General presumption of confidentiality – Exemptions from the obligation of professional secrecy – Article 47 of the Charter of Fundamental Rights

The applicant, Aeris Invest Sàrl, held shares in Banco Popular Español, SA ('Banco Popular'), a credit institution established in Spain which was subject to direct prudential supervision by the European Central Bank (ECB). [8] On 6 June 2017, the ECB, after consulting the Single Resolution Board (SRB), carried out an assessment regarding whether Banco Popular was failing or was likely to fail. [9] That same day, Banco Popular's board of directors informed the ECB that it had reached the conclusion that the bank was likely to fail. On 7 June 2017, the SRB adopted a decision concerning a resolution

7 Article 49(3) of the Charter of Fundamental Rights of the European Union.

8 Pursuant to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

9 In accordance with the second subparagraph of Article 18(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

scheme for Banco Popular. [10] That same day, the European Commission adopted Decision 2017/1246 [11] endorsing the resolution scheme.

Between 19 June and 2 August 2017, the applicant, inter alia, sent three requests to the ECB for access to documents under Decision 2004/258. [12] On 7 November 2017, the ECB adopted three decisions refusing access to the requested documents. The ECB argued, in particular, that some of those documents were covered by a presumption of confidentiality based on various exceptions to the right of access laid down in Decision 2004/258.

The Court, sitting in extended composition, partially upholds the action brought by the applicant; it annuls the second contested decision in so far as it refused access to the outcome of the vote in the Governing Council of the ECB and dismisses the action as to the remainder. This case affords the Court its first opportunity to rule on the recognition of a presumption of confidentiality on the basis of the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law. [13] It also allows the Court to clarify the case-law of the Court of Justice concerning the scope of the ECB's obligation to state reasons when applying the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies. [14]

Findings of the Court

In the first place, the Court holds that the ECB failed to provide sufficient reasons for the second contested decision inasmuch as it refused access to information relating to the ceiling for emergency liquidity assistance ('ELA'), the amount of ELA actually granted and the guarantees provided, on the basis of the exception relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies, since the information at issue was contained in a letter of 5 June 2017 from the Governor of the Bank of Spain to the President of the ECB entitled 'Emergency liquidity assistance', a follow-up letter of 5 June 2017 from the Governor of the Bank of Spain to the President of the ECB entitled 'Emergency liquidity assistance' and a proposal of 5 June 2017 from the Executive Board to the Governing Council of the ECB entitled 'Emergency liquidity assistance request from Banco de España'. The Court also considers that the second contested decision was vitiated by a failure to state reasons inasmuch as it refused access to the outcome of the vote in the Governing Council.

First, the Court finds that Decision 2004/258 lays down a right of access to ECB documents, subject to certain restrictions based on reasons of public or private interest, and establishes a system of exceptions to the right of access [15] which must be interpreted and applied strictly.

Secondly, the Court points out that in the judgment in *ECB* v *Espírito Santo Financial (Portugal)*, [16] the Court of Justice held that a refusal to grant access to the outcome of the Governing Council's deliberations is sufficiently reasoned solely by reference to the exception to the right of access, laid down in Decision 2004/528, relating to the protection of the public interest in the confidentiality of the

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10 Under Regulation No 806/2014.

11 Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p. 15).

12 Article 6(1) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42), as amended by Decision 2011/342/EU of the ECB of 9 May 2011 (OJ 2011 L 158, p. 37) and Decision (EU) 2015/529 of the ECB of 21 January 2015 (OJ 2015 L 84, p. 64).

13 Under Article 4(1)(c) of Decision 2004/258.

14 Under the first indent of Article 4(1)(a) of Decision 2004/258.

15 Article 4(1) and (2) of Decision 2004/258.

16 Judgment of 19 December 2019, *ECB* v *Espírito Santo Financial (Portugal)* (C-442/18 P, EU:C:2019:1117, paragraphs 43, 44 and 46).

proceedings of the ECB's decision-making bodies, as regards documents reflecting the outcome of those deliberations. However, the Court finds that, in the present case, the ECB merely referred generally to the fact that the three categories of information were included in the documents to which it had granted partial access. The only document recording the outcome of the deliberations of the ECB's Governing Council is the minutes of its 447th meeting held by teleconference on 5 June 2017, which contain the ELA ceiling. The ECB therefore provided sufficient reasons for access to that ceiling, in so far as that information is found in the minutes of the 447th meeting of the Governing Council, since that document reflects the outcome of the deliberations of the Governing Council. By contrast, the other documents predate the Governing Council's meeting and thus do not reflect the outcome of its deliberations. Accordingly, the Court considers that the ECB was fully entitled to refuse access to that information and those documents on the basis of the other exceptions to the right of access on which it relied.

Moreover, as regards the refusal to grant access to the outcome of the vote in the Governing Council, the Court takes the view that the ECB must provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception is genuine. Thus, the failure to state any reasons at all explaining why the refusal to grant access to those documents, in so far as they contained the information at issue, was covered by the exception prevented the applicant from understanding the reasons for the refusal to grant access to that information and from raising a plea seeking to challenge the justification for applying the exception to those documents. The statement of reasons must in principle be notified to the person concerned at the same time as the act adversely affecting him or her. A failure to state reasons cannot be remedied by the fact that the person concerned learns of the reasons for the decision during the proceedings before the EU Courts, as was the case here.

In the second place, the Court rules on whether there exists a general presumption of confidentiality on the basis of the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law.

In that regard, the Court points out that general presumptions are an exception to the rule that the EU institution concerned is obliged to make a specific and individual examination of every document which is the subject of an application for access and, more generally, to the principle that the public should have the widest possible access to the documents held by the EU institutions. Consequently, such presumptions must be interpreted and applied strictly.

First, the Court states that, in the light of the wording of the provision of Decision 2004/258 requiring the ECB to refuse access to a document where its disclosure would undermine the protection of the confidentiality of information that is protected as such 'under Union law', [17] a general presumption of confidentiality based on that provision would not be clearly and precisely circumscribed and would be at variance with the case-law according to which, since presumptions are an exception to the principle of the widest possible access, they must be interpreted strictly.

Secondly, the Court observes that the recognition of a general presumption of confidentiality based on that provision of Decision 2004/258 cannot be reconciled with the approach endorsed by the Court of Justice in *Baumeister*. [18] The ECB must check that the two conditions established in that judgment [19] are satisfied in respect of each item of information to which access is requested. If they are, the ECB must refuse access to the information at issue, and it has no discretion whatsoever in that regard. That process necessarily requires a specific and individual examination of each item of information

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17 Article 4(1)(c) of Directive 2004/258.

18 Judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464).

19 That the information held by the competent authorities is not public and its disclosure is likely to affect adversely the interests of the natural or legal person who provided it or of third parties, or the proper functioning of the system for monitoring the activities of investment firms.

concerned, which cannot be circumvented by the application of a general presumption of confidentiality.

Thirdly, the Court points out that the exception to the right of access referred to in that provision of Decision 2004/258 is an 'absolute' exception, the application of which is mandatory, since disclosure of the document concerned to the public is liable to undermine the interests which that exception protects.

That said, the ECB's decisions relying on that general presumption of confidentiality are not annulled by the Court on the ground that the information and documents concerned constitute confidential information to which access was rightly refused on the basis of the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law.

In the third place, the Court holds that the exemptions from the obligation of professional secrecy provided for in Directives 2013/36 [20] and 2014/59 [21] do not apply to the requested documents.

The application of the exemption provided for in Directive 2013/36 allowing the disclosure, in civil or commercial proceedings, of confidential information which does not concern third parties involved in attempts to rescue the credit institution concerned is subject to the requirement that that institution has been declared bankrupt or is being compulsory wound up, which is not the case here. The exemption provided for in Directive 2014/59 relates to the disclosure of confidential information only in the course of national proceedings. The applicant conceded that its requests for access were motivated by its intention to bring an action before the Court.

In the fourth and last place, the General Court examines the scope of the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in the context of applications for access made pursuant to Decision 2004/258. The Court concludes that that right does not require the ECB to grant access to certain documents for the purpose of preparing an action for annulment of a decision adopted by another institution.

First, the purpose of Decision 2004/258 is not to settle questions relating to the evidence to be adduced by the parties in court proceedings. Secondly, it is not intended to lay down rules designed to protect the specific interest that a person might have in gaining access to a document. Thirdly, the fact that a document becomes accessible to any person once it has been disclosed following a request for access manifestly exceeds the boundaries of the legitimate interests of a party seeking to rely on his or her right to an effective remedy for the purpose of making enquires in connection with another case before the Court. The Court finds that the ECB did not infringe Article 47 of the Charter.

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20 The third subparagraph of Article 53(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

21 Article 84(6) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

IV. LITIGATION OF THE UNION: REFERENCE FOR A PRELIMINARY RULING

Judgment of the Court (Grand Chamber) of 6 October 2021, Consorzio Italian Management and Catania Multiservizi, C-561/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 267 TFEU – Scope of the obligation on national courts or tribunals of last instance to make a reference for a preliminary ruling – Exceptions to that obligation – Criteria – Question on the interpretation of EU law raised by the parties to the national proceedings after the Court has given a preliminary ruling in those proceedings – Failure to state the reasons justifying the need for an answer to the questions referred for a preliminary ruling – Partial inadmissibility of the request for a preliminary ruling

In 2017, the Consiglio di Stato (Council of State, Italy), a national court of last instance ('the referring court'), made a reference to the Court of Justice for a preliminary ruling in proceedings concerning a public contract for the supply of services relating to the cleaning, inter alia, of Italian railway stations. The Court delivered its judgment in 2018. [22] The parties to those proceedings then asked the referring court to refer other questions for a preliminary ruling.

It is against that background that, in 2019, the referring court made a new reference to the Court for a preliminary ruling. It was seeking, inter alia, to ascertain whether a national court or tribunal of last instance must bring before the Court a question concerning the interpretation of EU law where that question is put to it by a party at an advanced stage of the proceedings, after the case has been set down for judgment for the first time or where a reference for a preliminary ruling has already been made in that case.

Findings of the Court

In its judgment, the Court, sitting as the Grand Chamber, reasserts the criteria identified in the judgment in *Cilfit*, [23] which provides for three situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling: [24]

(i) the question is irrelevant for the resolution of the dispute;

(ii) the provision of EU law in question has already been interpreted by the Court;

(iii) the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.

Accordingly, the Court holds that a court or tribunal of last instance cannot be relieved of its obligation to make a reference for a preliminary ruling merely because it has already made a reference to the Court for a preliminary ruling in the same national proceedings.

With regard to the third situation referred to above, the Court clarifies that the absence of reasonable doubt must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union. Before concluding that there is no reasonable doubt as to the correct interpretation of EU law, the national court or tribunal of last instance must be convinced that the

22 Judgment of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi* (C-152/17, EU:C:2018:264).

23 Judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335).

24 That obligation is laid down in the third paragraph of Article 267 TFEU.

matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice.

In that regard, the mere fact that a provision of EU law may be interpreted in several ways is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision. Nonetheless, where the national court or tribunal of last instance is made aware of the existence of diverging lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of that provision.

National courts or tribunals of last instance must take upon themselves, independently and with all the requisite attention, the responsibility for determining whether the case before them involves one of the situations in which they may refrain from submitting to the Court a question concerning the interpretation of EU law which has been raised before them. If such a court or tribunal takes the view that it is relieved of its obligation to make a reference to the Court, the statement of reasons for its decision must show that the matter involves one of those three situations.

Moreover, where the case before the court or tribunal of last instance involves one of those situations, it is not required to bring the matter before the Court, even when the question concerning the interpretation of EU law is raised by a party to the proceedings before it.

By contrast, if the question concerning the interpretation of EU law does not involve any of those situations, the court or tribunal of last instance must bring the matter before the Court. The fact that that court or tribunal has already made a reference to the Court for a preliminary ruling in the same national proceedings does not affect the obligation to make a reference for a preliminary ruling when a question concerning the interpretation of EU law the answer to which is necessary for the resolution of the dispute remains after the Court's decision.

Moreover, it is for the national court or tribunal alone to decide at what stage in the proceedings it is appropriate to refer a question to the Court for a preliminary ruling. However, a court or tribunal of last instance may refrain from referring a question to the Court for a preliminary ruling on grounds of inadmissibility specific to the procedure before that court or tribunal. Where the pleas in law raised before such a court or tribunal must be declared inadmissible, a request for a preliminary ruling cannot be regarded as necessary and relevant for that court or tribunal to be able to give judgment. The applicable national procedural rules must however observe the principles of equivalence [25] and effectiveness. [26]

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25 The principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law.

26 According to the principle of effectiveness, national procedural rules must not be such as to render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order.

V. JUDICIAL COOPERATION IN CRIMINAL MATTERS: FREEZING AND CONFISCATION OF INSTRUMENTALITIES AND PROCEEDS OF CRIME IN THE EUROPEAN UNION

Judgment of the Court (Third Chamber) of 21 October 2021, Okrazhna prokuratura – Varna, C-845/19 and C-863/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2014/42/EU – Freezing and confiscation of instrumentalities and proceeds of crime in the European Union – Scope – Confiscation of illegally obtained assets – Economic benefit derived from a criminal offence which has not been the subject of a conviction – Article 4 – Confiscation – Article 5 – Extended confiscation – Article 6 – Confiscation from a third party – Conditions – Confiscation of money allegedly belonging to a third party – Third party having no right to appear as a party in the confiscation proceedings – Article 47 of the Charter of Fundamental Rights of the European Union

Two Bulgarian nationals ('the persons concerned') were convicted of the possession, in February 2019 in Varna (Bulgaria), of highly dangerous narcotics, without authorisation and with a view to their distribution. Following that criminal conviction, the Okrazhna prokuratura – Varna (Regional Public Prosecutor's Office, Varna, Bulgaria) applied to the Okrazhen sad Varna (Regional Court, Varna, Bulgaria) for the confiscation of sums of money which had been discovered in their respective homes in the course of searches.

At the hearing before that court, the persons concerned stated that the sums of money seized belonged to members of their respective families. Those family members did not take part in the proceedings before that court, since national law does not permit them to do so. The referring court refused to authorise the confiscation of those sums of money, taking the view that the criminal offence of which the persons concerned had been convicted was not such as to generate an economic benefit. In addition, although there is evidence that the persons concerned had been selling narcotics, they had not been charged with nor convicted of such a criminal offence. The Regional Public Prosecutor's Office, Varna, brought an appeal against that judgment, arguing that that court had failed to take account of Directive 2014/42 [27] when applying the relevant national provisions.

In those circumstances, the referring court decided to ask the Court of Justice whether Directive 2014/42 only applies in cross-border situations, and further referred questions concerning the extent of the confiscation provided for by that directive and the scope of the right to an effective remedy of a third party who claims, or in respect of whom it is claimed, that he or she is the owner of property which is subject to confiscation. In its judgment, the Court thus gives a ruling on questions of crucial importance for defining the scope of Directive 2014/42 and the interpretation of some of its key concepts.

Findings of the Court

In the first place, the Court finds that the possession of narcotics for the purposes of their distribution comes within the scope of Directive 2014/42, even though all the elements inherent in the commission of that offence are confined within a single Member State. Under the FEU Treaty, [28] such

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27 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ 2014 L 127, p. 39).

28 Article 83(1) TFEU.

an offence is a particularly serious crime with a cross-border dimension, as referred to in that treaty. Consequently, the EU legislature is competent to adopt minimum harmonisation rules concerning the definition of criminal offences and sanctions in that area; that competence also covers situations in which the elements inherent in the commission of a particular offence are confined within a single Member State.

In the second place, the Court finds that Directive 2014/42 not only provides for the confiscation of property constituting an economic benefit derived from the criminal offence in respect of which the perpetrator has been convicted, but also provides for the confiscation of property belonging to that perpetrator in respect of which the national court hearing the case is satisfied that it derives from other criminal conduct. Such confiscation must, however, be carried out in compliance with the safeguards provided for in that directive [29] and is subject to the condition that the offence in respect of which the perpetrator has been convicted is among those listed in the directive [30] and that that offence is liable to give rise, directly or indirectly, to economic benefit.

As regards the first type of confiscation, it is necessary that the proceeds whose confiscation is being contemplated arise from the criminal offence in respect of which the perpetrator has been finally convicted.

As regards the second situation, which corresponds to extended confiscation, [31] the Court notes, first, that, in order to determine whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the modus operandi, for example whether the offence was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. [32] Secondly, the national court must be satisfied on the basis of the circumstances of the case, including the specific facts and available evidence, that the property is derived from criminal conduct. [33] To that end, that court may take account of the fact that the value of the property in question is disproportionate to the lawful income of the convicted person. [34]

Lastly, confiscation from a third party [35] presupposes that it has been established that a suspected or accused person has transferred proceeds to a third party or a third party has acquired such proceeds, and that that third party was aware of the fact that the purpose of that transfer or acquisition was to avoid confiscation.

In the third place, the Court holds that Directive 2014/42, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, precludes national legislation which allows for the confiscation, in favour of the State, of property allegedly belonging to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings. That directive requires Member States to take the necessary measures to ensure that the persons affected by the measures provided for therein, including third parties who claim or in respect of whom it is claimed that they are the owner of the property whose confiscation is being contemplated, have the right to an effective remedy and a fair trial in order to uphold their rights. [36] In addition, that directive provides for several specific safeguards in order to guarantee the preservation of the fundamental rights of such third parties. Among those safeguards is the right of

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29 Article 8(8) of Directive 2014/42.

30 Article 5(2) of Directive 2014/42.

31 Article 5 of Directive 2014/42.

32 Recital 20 of Directive 2014/42.

33 Recital 21 of Directive 2014/42.

34 Article 5(1) of Directive 2014/42.

35 Article 6 of Directive 2014/42.

36 Article 8(1) of Directive 2014/42.

access to a lawyer throughout the confiscation proceedings, [37] which clearly entails the right of the third parties to be heard in the context of those proceedings, including the right to claim ownership of the property concerned by the confiscation. [38]

VI. COMPETITION

1. ARTICLE 101 TFEU

Judgment of the Court (Grand Chamber) of 6 October 2021, Sumal, C-882/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Competition – Compensation for harm caused by a practice prohibited under Article 101(1) TFEU – Determination of the undertakings liable to provide compensation – Action for compensation directed against the subsidiary of a parent company and brought following a decision finding only that the parent company participated in a cartel – Concept of an 'undertaking' – Concept of 'economic unit'

Between 1997 and 1999, the company Sumal SL acquired two trucks from Mercedes Benz Trucks España ('MBTE'), which is a subsidiary of the Daimler group, whose parent company is Daimler AG.

By a decision of 19 July 2016, [39] the Commission found an infringement, by Daimler AG, of EU law rules prohibiting cartels [40] in that Daimler had concluded, between January 1997 and January 2011, arrangements with 14 other European truck producers on pricing and gross price increases for trucks in the European Economic Area (EEA).

Following that decision, Sumal brought an action for damages against MBTE, seeking payment of the sum of EUR 22 204.35 for loss resulting from that cartel. Sumal's action was nevertheless rejected by the Juzgado de lo Mercantil nº 07 de Barcelona (Commercial Court No 7 of Barcelona, Spain) on the ground that MBTE was not referred to in the Commission's decision.

Sumal brought an appeal against that judgment before the Audiencia Provincial de Barcelona (Provincial Court of Barcelona, Spain). In that context, that court wonders whether and, if so, under what conditions, an action for damages may be brought against a subsidiary following a Commission decision finding anticompetitive practices by the parent company. Thus, that court decided to stay the proceedings and refer that question to the Court by way of a reference for a preliminary ruling.

By its judgment delivered by the Grand Chamber, the Court sets out the conditions under which victims of an anticompetitive practice by a company punished by the Commission are entitled to engage, by way of an action for damages brought before the national courts, the civil liability of the punished company's subsidiary companies, which are not referred to in the Commission decision.

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37 Article 8(7) of Directive 2014/42.

38 Article 8(9) of Directive 2014/42.

39 Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824 – Trucks), a summary of which was published in the *Official Journal of the European Union* of 6 April 2017 (OJ 2017 C 108, p. 6)

40 Article 101 TFEU and Article 53 of the EEA Agreement.

Findings of the Court

In accordance with settled case-law, any person is entitled to claim compensation from 'undertakings' which have participated in a cartel or practices prohibited under Article 101 TFEU for the harm caused by those anticompetitive practices. Even if such actions for damages are brought before the national courts, the determination of which entity is required to provide compensation for the harm caused is governed directly by EU law.

Given that such actions for damages are an integral part of the system for enforcement of EU competition rules, in the same way as their enforcement by public authorities, the concept of an 'undertaking', within the meaning of Article 101 TFEU, cannot have a different meaning in the context of the imposition of fines by the Commission on 'undertakings' (public enforcement) and in actions for damages brought against those 'undertakings' before the national courts (private enforcement).

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

Where it is established that a company belonging to such an economic unit has infringed Article 101(1) TFEU such that the 'undertaking' of which it is part has committed an infringement of that provision, the concept of an 'undertaking' and, through it, that of 'economic unit', gives rise to the joint and several liability across the entities of which the economic unit is made up at the time that the infringement was committed.

In that regard, the Court observes, moreover, that the concept of an 'undertaking', used in Article 101 TFEU, is a functional concept, as the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue.

Thus, where the existence of an infringement of Article 101(1) TFEU has been established as regards a parent company, it is possible for the victim of that infringement to seek to engage the civil liability of a subsidiary of that parent company on the condition that the victim proves that, having regard to, first, the economic, organisational and legal links that connect the two legal entities and, second, the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.

It follows that, in circumstances such as those at issue in the main proceedings, in order to bring an action for damages against MBTE as a subsidiary of Daimler AG, Sumal must establish, in principle, that the anticompetitive agreement concluded by Daimler AG concerns the same products as those marketed by MBTE. In so doing, Sumal would show that it is precisely the economic unit of which MBTE, together with its parent company, forms part that constitutes the undertaking which in fact committed the infringement found earlier by the Commission pursuant to Article 101(1) TFEU.

However, in the context of such an action for damages brought against a subsidiary company of a parent company which has been found to have infringed Article 101 TFEU, before the national court concerned, that subsidiary company must dispose of all the means necessary for the effective exercise of its rights of the defence, in particular so as to be able to dispute that it belongs to the same undertaking as its parent company.

That said, where an action for damages relies, as in the present case, on a finding by the Commission of an infringement of Article 101(1) TFEU in a decision addressed to a parent company of the defendant subsidiary company, the latter cannot challenge, before the national court, the existence of an infringement thus found by the Commission. Indeed, Article 16(1) of Regulation No 1/2003 [41]

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41 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

provides that national courts cannot take decisions running counter to the decision adopted by the Commission.

By contrast, in a situation where the Commission has not made a finding of conduct amounting to an infringement in a decision adopted under Article 101 TFEU, the subsidiary company is naturally entitled to dispute not only that it belongs to the same 'undertaking' as the parent company, but also the very existence of the infringement alleged against the parent company.

In that regard, the Court states, moreover, that the possibility for a national court of making a finding of the subsidiary company's liability for the harm caused is not excluded merely because, as the case may be, the Commission has not adopted any decision or that the decision in which it found that there was an infringement did not impose an administrative penalty on that company.

Therefore, Article 101(1) TFEU precludes a national law which provides for the possibility of imputing liability for one company's conduct to another company only in circumstances where the second company controls the first company.

2. ARTICLE 102 TFEU AND ADMISSIBILITY OF AN ACTION FOR ANNULMENT AGAINST A DECISION TO OPEN AN INVESTIGATION

Order of the General Court (First Chamber) of 14 October 2021, Amazon.com and Others v Commission, T-19/21

Link to the complete text of the order

Action for annulment – Competition – Abuse of dominant position – Online sales – Decision to open an investigation – Territorial scope of the investigation – Exclusion of Italy – Act not open to challenge – Preparatory act – Inadmissibility

By decision of 10 November 2020 ('the contested decision'), [42] the European Commission opened an investigation against Amazon.com, Inc. and Amazon Services Europe Sàrl, Amazon EU Sàrl and Amazon Europe Core Sàrl (together, 'Amazon'), an undertaking active on the Internet and carrying out, among other things, online retail transactions and the provision of various online services, in order to examine whether they had abused a dominant position within the meaning of Article 102 TFEU.

According to the Commission, certain of Amazon's commercial practices could artificially favour its own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services. The Commission took the view that, if established, the practices in question may be contrary to Article 102 TFEU.

In the contested decision, the Commission stated that its investigation would cover the whole of the European Economic Area (EEA), with the exception of Italy. In the press release accompanying the adoption of that decision, the Commission stated that the Italian competition authority had begun to investigate partially similar problems in April 2019, focusing on the Italian market.

Amazon brought an action for partial annulment of the contested decision, in so far as it excludes Italy from the territorial scope of the investigation.

42 Commission Decision C (2020) 7692 final, of 10 November 2020, initiating proceedings in Case AT.40703 Amazon – Buy Box.

In its order, the Court upholds the objection of inadmissibility raised by the Commission and dismisses the action for annulment as inadmissible. It also provides clarification as to the admissibility of actions for annulment of decisions to initiate a competition investigation.

Findings of the Court

In support of its objection of inadmissibility, the Commission raised three pleas of inadmissibility, including a plea alleging that there was no act capable of being the subject of an action for annulment.

In that regard, the Court notes first that, although all acts adopted by the EU institutions, whatever their form, which are intended to produce binding legal effects, are considered challengeable acts within the meaning of Article 263 TFEU, the action for annulment is, in principle, only available against a measure by which the institution concerned definitively determines its position at the end of an administrative procedure. Consequently, intermediate measures, the purpose of which is to prepare for the definitive decision, cannot be treated as acts open to challenge.

The Court points out, in addition, that the legal effects of acts adopted by the institutions must be assessed in the light of their substance and in accordance with objective criteria, such as their content, taking into account, as appropriate, the context in which they were adopted and the powers of the institution which adopted them.

The Court thus concludes that the effects and legal character of the contested decision must be determined in the light of its purpose in the procedure for the implementation of the competition rules, as provided for in Regulation No 1/2003. [43]

The procedure for implementing competition rules was designed to enable the undertakings concerned to communicate their views and to provide the Commission with the clearest possible information before it adopts a decision affecting their interests. Its purpose is, therefore, to create procedural guarantees for their benefit and to ensure that they have the right to be heard by the Commission. It follows that a measure by which the Commission initiates proceedings under Article 102 TFEU, produces, in principle, no more than the ordinary effects of any procedural step and, apart from the procedural aspect, does not affect the legal position of the undertakings targeted by the investigation.

However, since Amazon disputed only the part of the contested decision by which the Commission excluded Italy from the geographical scope of its investigation, and not the contested decision as such, the Court then examines whether that part of the decision also merely produces the effects of a procedural step.

In that regard, the Court observes, in the first place, that in defining the geographical markets to which its investigation would relate, the Commission confined itself to providing an indication which must necessarily appear in a decision to initiate a proceeding under Article 102 TFEU.

In the second place, the Court examines whether the contested decision, while constituting a stage in an administrative procedure, can produce effects going beyond the procedural framework by substantially altering Amazon's rights and obligations or by adversely affecting its procedural rights.

In that context, the Court notes that the purpose of the contested delimitation is to pave the way for the final decision and is capable of evolving during the investigation conducted by the Commission. The exclusion of Italy from the scope of the investigation is, moreover, a purely procedural consequence arising from the opening of that investigation, which cannot transform the contested decision into an act affecting Amazon's legal situation.

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43 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), as amended by Council Regulation (EC) No 487/2009 of 25 May 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (OJ 2009 L 148, p. 1).

Moreover, a decision to initiate a proceeding under Article 102 TFEU does not have the effect of depriving the addressees of their procedural rights. On the contrary, it affords them the opportunity to make their views known and is therefore intended to create procedural guarantees for their benefit and to enshrine their right to be heard by the Commission.

The fact that Amazon would have to defend itself before two different authorities, the Italian competition authority and the Commission, does not deprive it of the protection against parallel proceedings provided for in Article 11(6) of Regulation No 1/2003. That protection concerns two parallel proceedings, where the Commission decides to initiate an investigation procedure against an undertaking which is the subject of a procedure initiated by a national authority in respect of the same allegedly anti-competitive practices, and not that of a request to initiate a proceeding on a specific market in order to benefit from that protection. In any event, if the objective pursued by the system of protection provided for by Article 11(6) is to protect undertakings from parallel proceedings brought by different authorities, that protection does not imply any right, for the benefit of an undertaking, to have a case dealt with in its entirety by the Commission.

In the light of those findings, the Court finds that the part of the contested decision in dispute, in so far as it excludes Italy from the territorial scope of the investigation, constitutes a preparatory act which does not produce legal effects vis-à-vis Amazon within the meaning of Article 263 TFEU. Consequently, it upholds the objection of inadmissibility raised by the Commission.

3. MERGERS

Judgment of the General Court (Tenth Chamber, Extended Composition) of 20 October 2021, Polskie Linie Lotnicze "LOT" v Commission, T-240/18

Competition – Concentrations – Air transport – Decision declaring a concentration compatible with the internal market and the EEA Agreement – Relevant market – Assessment of the effects of the concentration on competition – Absence of commitment – Obligation to state reasons

and

Judgment of the General Court (Tenth Chamber, Extended Composition) of 20 October 2021, Polskie Linie Lotnicze "LOT" v Commission, T-296/18

Competition – Concentrations – Air transport – Decision declaring a concentration compatible with the internal market and the EEA Agreement – Relevant market – Assessment of the effects of the concentration on competition – Commitment – Obligation to state reasons

Faced with a persistent deterioration of its financial situation, in 2016 Air Berlin plc implemented a restructuring plan. In that context, on 16 December 2016, it entered into an agreement with Deutsche Lufthansa AG ('Lufthansa'), in order to sublet to it various aircraft along with their crew.

However, the loss of the financial support, in the form of loans, granted to Air Berlin by one of its main shareholders forced it to file for insolvency on 15 August 2017. In those circumstances, the granting of a guaranteed loan by the German authorities as rescue aid, endorsed by the

Commission, [44] was intended to enable Air Berlin to continue its operations for a period of three months, in order to allow it, inter alia, to dispose of its assets.

That objective was reflected, in particular, by the conclusion of two agreements: first, an agreement concluded on 13 October 2017 providing for the takeover by Lufthansa of, inter alia, a subsidiary of Air Berlin, to which various aircraft and their crew, as well as slots [45] that Air Berlin held at a number of airports, including, in particular, Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel, were to be transferred in advance, and, second, an agreement concluded on 27 October 2017 with easyJet plc, aimed mainly at transferring the slots held by Air Berlin, in particular at Berlin-Tegel airport, to easyJet. Air Berlin ceased its operations on the following day, before being declared insolvent by judicial decision of 1 November 2017.

On 31 October 2017, Lufthansa gave notice to the Commission, pursuant to the latter's powers to control mergers, [46] of the operation provided for by the agreement of 13 October 2017. On 7 November 2017, easyJet, in the same manner, gave notice of the operation provided for by the agreement of 27 October 2017 (together with the operation notified by Lufthansa, 'the mergers in question'). In the light of the commitments given by Lufthansa, [47] the Commission found the merger notified by Lufthansa to be compatible, by Decision C(2017) 9118 final of 21 December 2017, as it did with the merger notified by easyJet, by Decision C(2017) 8776 final of 12 December 2017 (collectively, 'the contested decisions'). The Commission concluded that the mergers in question did not raise serious doubts as to their compatibility with the internal market. On that occasion, for the first time in cases concerning air passenger transport services, the Commission did not define the relevant markets by city pairs between a point of origin and a point of destination ('O & D markets'). First, it found that Air Berlin had ceased its operations prior to and independently of those mergers. It concluded that Air Berlin had withdrawn from all the O & D markets in which it had previously been present. Second, it held that the mergers in question mainly concerned the transfer of slots and found that those slots were not allocated to any particular O & D market. Consequently, it considered it preferable to aggregate, for the purposes of its analysis, all the O & D markets to and from each of the airports with which those slots were associated. In doing so, it defined the relevant markets as those for air passenger transport services to and from those airports. The Commission then went on to verify that those mergers were not such as to create 'a significant impediment to effective competition', in the present case, in particular, by providing easyJet and Lufthansa, respectively, with the ability and incentive to foreclose access to those markets.

Considering that the analysis carried out by the Commission was incorrect, in terms of both its methodology and its results, Polskie Linie Lotnicze 'LOT' ('the applicant'), which presents itself as a direct competitor of the parties to the mergers in question, brought two actions before the General Court, each seeking the annulment of one of the contested decisions.

By its judgments of 20 October 2021, the General Court dismisses those actions, thus accepting, in particular, that the Commission could confine itself to a joint examination of the O & D markets to and from the airports with which Air Berlin's slots were associated, instead of examining individually each of the O & D markets in which Air Berlin, on the one hand, and Lufthansa and easyJet, on the other, were present.

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44 Decision C(2017) 6080 final of 4 September 2017 on State aid SA.48937 (2017/N) – Germany – Rescue Aid in favour of [Air Berlin] (OJ 2017 C 400, p. 7).

45 The slots represent authorisations, for an airline, to use the full range of airport infrastructure necessary for the provision of air transport services, to and from that airport, at a precise date and time.

46 In the present case, the powers provided for by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

47 In the present case, in order to dispel doubts as to the compatibility of the notified merger relating to its position at Düsseldorf airport, Lufthansa had proposed to the Commission, pursuant to Article 6(2) of the EC Merger Regulation, a substantial reduction in the number of slots that would be transferred to it under that merger.

Findings of the Court

In the first place, with respect to the plea alleging a poor definition of the relevant markets, the General Court considers, first of all, that it is futile for the applicant to seek to challenge the factual accuracy of the presentation, made by the Commission, of the mergers in question and of their context. In that connection, the General Court observes, inter alia, that the Commission was entitled to find that Air Berlin's operations had ceased prior to the mergers in question and independently of them, and that, as a result, Air Berlin was no longer present in any O & D market. Next, in so far as Air Berlin's slots were not associated with any O & D market, the General Court considers that the Commission rightly pointed out that the slots could be used by Lufthansa and easyJet, respectively, in O & D markets other than those in which Air Berlin operated. Consequently, it holds that, unlike mergers involving airlines which are still in operation, it was not certain, in this particular case, that the mergers in question would have any effect on competition in the O & D markets in which Air Berlin had been present before it ceased its operations. Lastly, the General Court states that the applicant has not made a plausible case that the individual examination of the O & D markets that it identified could have made it possible to determine the existence of a significant impediment to effective competition that could not be revealed by the market definition adopted by the Commission.

In the second place, with respect to the plea alleging a manifest error in the assessment of the effects of the mergers in question, the General Court recalls, at the outset, that, when exercising the powers conferred on it by the EC Merger Regulation, the Commission has a certain discretion, especially regarding complex assessments of an economic nature which it is called upon to make in that regard. Consequently, review by the EU judicature of the exercise of that discretion must take account of the margin of discretion thus conferred on the Commission. Having stated the above, the General Court considers that the analysis of the effects of the mergers in question on the markets of air passenger transport services to and from the airports concerned did not reveal any manifest error of assessment, taking into account, inter alia, the low rate of congestion at those airports and the limited effect of those mergers on the increase in the slot shares held by Lufthansa and easyJet. With respect to, more specifically, the merger notified by Lufthansa, the applicant is not justified in claiming that the Commission had committed a manifest error in its assessment of the effects of the agreement of 16 December 2016 given, inter alia, that that agreement had already permitted Lufthansa to operate aircraft and their crew for a period of six years before Lufthansa definitively acquired them in connection with that merger. Lastly, as regards the merger notified by easyJet, the General Court notes that the slots are necessary for the provision of air passenger transport services. It concludes that there is a 'vertical' relationship between the allocation of those slots and the provision of those services and that the Commission was therefore entitled to refer to the guidelines on 'non-horizontal' mergers. [48]

In the third place, the General Court rejects the complaints alleging that the commitments given by Lufthansa in connection with the merger of which it gave notice were insufficient, and that no such commitments were given as regards the merger of which easyJet gave notice, on the ground that the applicant is not justified in claiming that those mergers are manifestly liable to constitute a significant impediment to effective competition. For that reason, it also considers unfounded the applicant's complaints that the Commission failed to take account of any potential efficiency gains which might have resulted from those mergers.

In the fourth place, the General Court observes that the applicant has not shown that the financial support which Air Berlin had received under the rescue aid formed part of the assets transferred to easyJet and Lufthansa, respectively, in connection with the mergers in question, and, consequently,

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[48] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6). In addition, the General Court rejects the applicant's complaint alleging infringement of those guidelines, noting that the possession of significant market power on one of the markets concerned is not in itself sufficient to establish the existence of competition concerns.

rejects the complaints that the Commission should have taken account of that aid for the purposes of its analysis. Furthermore, as regards the infringement of Article 8a(2) of Regulation No 95/93, [49] also alleged by the applicant in one of its actions, the General Court notes that the Commission lacked competence to apply that provision.

Lastly, having held that the applicant's plea alleging a failure to state reasons was unfounded and, thus, having rejected all the pleas in law relied on in each of the two cases, the General Court rules that the two actions are to be dismissed, without there being any need, in those circumstances, to rule on their admissibility.

4. STATE AID

Judgment of the Court (Grand Chamber) of 6 October 2021, Sigma Alimentos Exterior v Commission, C-50/19 P

Link to the complete text of the judgment

and

Judgment of the Court (Grand Chamber) of 6 October 2021, World Duty Free Group and Spain v Commission, C-51/19 P and C-64/19 P

Link to the complete text of the judgment

and

Judgment of the Court (Grand Chamber) of 6 October 2021, Banco Santander v Commission, C-52/19 P

Link to the complete text of the judgment

and

Judgment of the Court (Grand Chamber) of 6 October 2021, Banco Santander and Others v Commission, C-53/19 P and C-65/19 P

Link to the complete text of the judgment

and

Judgment of the Court (Grand Chamber) of 6 October 2021, Axa Mediterranean v Commission, C-54/19 P

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49 Specifically, Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), as amended by Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 167, p. 24).

Link to the complete text of the judgment

and

Judgment of the Court (Grand Chamber) of 6 October 2021, Prosegur Compañía de Seguridad v Commission, C-55/19 P

Link to the complete text of the judgment

Appeal – State aid – Article 107(1) TFEU – Tax system – Corporate tax provisions allowing undertakings which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in companies which are tax resident outside that Member State – Concept of 'State aid' – Condition relating to selectivity – Reference system – Derogation – Difference in treatment – Justification for the difference in treatment

In 2007, after a number of written questions had been put by Members of the European Parliament and after a private operator had submitted a complaint, the European Commission initiated a formal procedure to investigate whether the Spanish tax legislation on the amortisation of financial goodwill for acquisitions of shareholdings in other undertakings by resident companies was compatible with the State aid provisions of the FEU Treaty.

Under a tax measure introduced in 2001 into the Spanish Corporate Tax Law ('the tax measure at issue'), the financial goodwill resulting from the acquisition by a resident undertaking of a shareholding at least 5% in a foreign company may be deducted, in the form of an amortisation, from the basis of assessment for the corporate tax for which the resident undertaking is liable, provided that the resident undertaking holds that shareholding without interruption for at least one year. By contrast, acquisitions by undertakings taxable in Spain of shareholdings in other resident undertakings do not give rise to amortisation of financial goodwill, unless there is a business combination.

By decisions of 28 October 2009 [50] and 12 January 2011 [51] ('the decisions at issue'), the Commission declared that the tax measure at issue constituted an aid scheme incompatible with the internal market, and ordered Spain to recover the aid granted.

Seised of several actions for annulment brought by undertakings established in Spain, [52] the General Court annulled those decisions by judgments of 7 November 2014, [53] finding that the Commission had not established that the tax measure at issue was selective – selectivity being one of the necessary and cumulative criteria required to classify a national measure as State aid.

Following the appeals brought by the Commission, the Court of Justice set aside those judgments, on the ground essentially that they were based on an erroneous understanding of the condition relating

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50 Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7. p. 48).

51 Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1). That decision was the subject of two corrigenda published in the *Official Journal of the European Union* on 3 March 2011 and 26 November 2011.

52 In particular, Autogrill España SA (now World Duty Free Group SA), Banco Santander SA, and Santusa Holding SL.

53 Judgments of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939) and *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938, Press Release No 145/14).

to the selectivity of an advantage, and referred the cases back to the General Court. [54] Adjudicating on the referral back, the General Court confirmed that the tax measure at issue was selective and dismissed the actions for annulment brought against the decisions at issue. [55]

Seised on this occasion of the appeals brought by the appellant undertakings and by the Kingdom of Spain ('the appellants'), the Court of Justice, sitting as the Grand Chamber, dismisses those appeals, clarifying its case-law on the selectivity of tax measures.

Findings of the Court

First of all, the Court of Justice dismisses the pleas of inadmissibility raised by the Commission, according to which some of the arguments advanced by the appellants in their appeals had not been raised before the General Court.

In that regard, the Court of Justice recalls that grounds and arguments which arise from the judgment under appeal itself and seek to criticise, in law, its correctness cannot be regarded as changing the subject matter of the proceedings before the General Court. Consequently, the arguments by which the appellants challenge the consequences flowing from the findings of law by the General Court on the pleas and arguments debated before it are admissible.

As regards the selectivity of the tax measure at issue, the Court of Justice clarifies, next, that the mere fact that that measure is of a general nature, in that it may a priori benefit all undertakings subject to corporate tax, depending on whether or not they carry out certain transactions, does not mean that it cannot be selective. It is established that the condition relating to selectivity is fulfilled when the Commission is able to demonstrate that such a measure is a derogation from the normal tax system applicable in the Member State concerned, thereby introducing, through its actual effects, differences in the treatment of operators who are, in the light of the objective pursued by that normal tax system, in a comparable factual and legal situation.

In order to classify a national tax measure as selective, the Commission must follow a three-stage method. First, it must identify the common or normal tax system applicable in the Member State. Next, it must demonstrate that the tax measure at issue is a derogation from that reference system, differentiating between undertakings which, in the light of the objective pursued by the common or normal tax system, are in a comparable factual and legal situation. Lastly, it must ascertain whether that differentiation is justified since it flows from the nature or general structure of the system of which the measure forms part.

In the light of those considerations, in Cases C-51/19 P and C-64/19 P, C-52/19 P, C-53/19 P and C-65/19 P, C-54/19 P and C-55/19 P, the Court of Justice examines the appellants' plea based on an alleged error on the part of the General Court in the determination of the reference system.

In that context, the Court of Justice points out that the determination of the reference system must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law. Consequently, where the tax measure in question is inseparable from the general tax system of the Member State concerned, reference must be made to that system. On the other hand, where it appears that the measure at issue is clearly severable from that general system, it cannot be ruled out that the reference framework to be taken into account may be more limited than that general system, or even that it may equate to that measure itself, where the latter appears as a rule having its own legal logic. In addition, when determining the reference system, the Commission must take account of the characteristics constituting the tax, as

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54 Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, Press Release No 139/16).

55 Judgments of 15 November 2018, *Banco Santander* v *Commission* (T-227/10, not published, EU:T:2018:785), *Sigma Alimentos Exterior* v *Commission* (T-239/11, not published, EU:T:2018:781), *Axa Mediterranean* v *Commission* (T-405/11, not published, EU:T:2018:780), *Prosegur Compañía de Seguridad* v *Commission* (T-406/11, not published, EU:T:2018:793), *World Duty Free Group* v *Commission* (T-219/10 RENV, EU:T:2018:784), and *Banco Santander and Santusa* v *Commission* (T-399/11 RENV, EU:T:2018:787, Press Release No 175/18).

defined by the Member State concerned. By contrast, it is not necessary, during that first stage of the examination of selectivity, to take account of the objectives pursued by the legislature when adopting the measure under examination.

In the present case, the Court considers, first of all, that it is clear from the decisions at issue that the reference system adopted by the Commission consists in the general provisions of the corporate tax system governing goodwill in general.

Next, the Court of Justice rejects the appellants' argument that, in order to determine the reference system, the General Court relied on the regulatory technique chosen by the national legislature in order to adopt the tax measure at issue, namely the introduction of a derogation from the general rule.

In that regard, the Court of Justice points out that the use of a particular regulatory technique, such as the introduction of a derogation from a general rule, by the national legislature is not sufficient to define the relevant reference system for the purposes of assessing selectivity. Such a derogation may nevertheless prove relevant where it follows therefrom, as in the present case, that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime. Consequently, the General Court rightly took into account, among other considerations, the fact that the tax measure at issue constituted a derogation, in order to examine whether it was selective.

In Case C-50/19 P, the Court confirms, in addition, that a national measure may be selective even where obtaining the advantage it confers depends not on the specific characteristics of the beneficiary undertaking but on the transaction that it may or may not decide to carry out. Thus, a measure may be considered selective even when it does not identify *ex ante* a particular category of beneficiaries and when all the undertakings established in the territory of the Member State concerned, regardless of their size, legal form, sector of activity or other specific characteristics, potentially have access to the advantage conferred by that measure on condition that they make a specific type of investment. A finding that a measure is selective is not necessarily the result of it being impossible for certain undertakings to benefit from the advantage provided for by the measure at issue on account of its specific characteristics, but selectivity may arise simply from a finding that a transaction exists which, while comparable to the transaction which is a prerequisite for granting the advantage in question, does not confer a right to that advantage, therefore favouring only undertakings which choose to carry out the latter transaction.

Lastly, the Court holds that, in all the cases under consideration, by identifying, in the context of the second stage of the analysis of selectivity, the objective of the reference system as maintaining a degree of consistency between the tax treatment and accounting treatment of goodwill, the General Court substituted its own reasoning for that of the decisions at issue and thereby erred in law.

That error is not, however, capable of bringing about the setting aside of the judgments under appeal, since the operative parts thereof are founded on other legal grounds. In that regard, the Court of Justice holds that the General Court was fully entitled to refer to its case-law according to which the examination of comparability at the second stage of the analysis of selectivity must be carried out in the light of the objective of the reference system and not in the light of the objective of the measure at issue. Accordingly, the General Court was right to find that undertakings which acquire shareholdings in non-resident companies are, in the light of the objective pursued by the tax treatment of goodwill, in a comparable factual and legal situation to that of undertakings which acquire shareholdings in resident companies. In that regard, the appellants had failed to establish, more specifically, that undertakings acquiring shareholdings in non-resident companies are in a different factual and legal situation to, and thus one which is not comparable to, that of undertakings acquiring shareholdings in Spain.

VII. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the Court (Fifth Chamber) of 28 October 2021, Ferrari, C-123/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Regulation (EC) No 6/2002 – Community designs – Articles 4, 6 and 11 – Infringement proceedings – Unregistered Community design – Appearance of a part of a product – Conditions for protection – Component part of a complex product – Individual character – Act of making available to the public

On 2 December 2014, Ferrari SpA presented to the public for the first time the top-of-the-range FXX K car model, in a press release containing two photographs showing, respectively, a side view and a front view of that vehicle.

Since 2016, Mansory Design & Holding GmbH ('Mansory Design'), established in Germany, has produced and marketed sets of personalisation accessories, known as 'tuning kits', designed to alter the appearance of another road-going Ferrari model, produced in a series, in such a way as to make it resemble the appearance of the Ferrari FXX K.

Ferrari brought an action for infringement and related claims against Mansory Design, on account of an alleged infringement of the rights conferred by three unregistered Community designs in respect of parts of the FXX K model, namely components of its bodywork. Those Community designs arose at the time of the publication of the press release of 2 December 2014.

The Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) dismissed those claims in their entirety.

Following an appeal brought before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), that court dismissed Ferrari's appeal, holding that the first and second designs claimed never existed, since Ferrari had not shown that the minimum requirement of a certain autonomy and consistency of form had been satisfied, whereas the third design claimed did indeed exist, but had not been infringed by Mansory Design.

It was in that context that the Bundesgerichtshof (Federal Court of Justice, Germany), before which Ferrari brought an appeal, asked the Court of Justice to clarify whether the making available to the public of images of a product, such as the publication of photographs of a car, could lead to the making available to the public of a design on a part or a component part of that product and, if so, to what extent the appearance of that part or component part must be independent of the product as a whole in order for it to be possible to examine whether that appearance has individual character.

In its preliminary ruling, the Court holds, inter alia, that EU law must be interpreted as meaning that the making available to the public of images of a product, such as the publication of photographs of a car, results in the making available to the public of a design on a part of that product or on a component part of that product, as a complex product, provided that the appearance of that part or component part is clearly identifiable at the time that design is made available. [56]

Findings of the Court

In the first place, the Court notes that the material conditions required for the protection of a Community design to arise, whether registered or not, namely novelty and individual character, are

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[56] Within the meaning of Article 3(a) and (c), Article 4(2) and Article 11(2) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

the same for both products and parts of a product. [57] Provided that those material conditions are satisfied, the formal condition for giving rise to an unregistered Community design is that of making available to the public within the meaning of Article 11(2) of Regulation No 6/2002. [58] In order for the making available to the public of the design of a product taken as a whole to entail the making available of the design of a part of that product, it is essential that the appearance of that part is clearly identifiable when the design is made available. However, that does not imply an obligation for designers to make available separately each of the parts of their products in respect of which they seek to benefit from unregistered Community design protection.

In the second place, the Court points out that the concept of 'individual character', within the meaning of Article 6 of Regulation No 6/2002, [59] governs not the relationship between the design of a product and the designs of its component parts, but rather the relationship between those designs and other earlier designs. In order for it to be possible to examine whether the appearance of a part of a product or a component part of a complex product satisfies the condition of individual character, it is necessary for that part or component part to constitute a visible section of the product or complex product, clearly defined by particular lines, contours, colours, shapes or texture. That presupposes that the appearance of that part or component part is capable, in itself, of producing an overall impression and cannot be completely lost in the product as a whole.

Judgment of the General Court (Third Chamber) of 6 October 2021, Indo European Foods v EUIPO – Chakari (Abresham Super Basmati Selaa Grade One World's Best Rice), T-342/20

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Application for EU figurative mark Abresham Super Basmati Selaa Grade One World's Best Rice – Earlier non-registered word mark BASMATI – Agreement on the withdrawal of the United Kingdom from the European Union and Euratom – Transition period – Interest in bringing proceedings – Relative ground for refusal – Article 8(4) of Regulation (EC) No 207/2009 (now Article 8(4) of Regulation (EU) 2017/1001) – Rules governing common law actions for passing off – Likelihood of misrepresentation – Likelihood of dilution of the reputation of the earlier mark

Mr Chakari applied to the European Union Intellectual Property Office (EUIPO) for registration of an EU figurative mark Abresham Super Basmati Selaa One World's Best Rice for rice flour and other food products made of rice. Indo European Foods Ltd filed a notice of opposition to registration of that mark on the basis of the non-registered word mark in the United Kingdom, BASMATI, used to refer to rice, which, under the applicable law in the United Kingdom, would allow it to prohibit the use of the mark applied for.

By decision of 2 April 2020, the Board of Appeal of EUIPO rejected the opposition on the ground that Indo European Foods had failed to prove that the name 'basmati' allowed it to prohibit the use of the mark applied for in the United Kingdom.

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57 Within the meaning of Articles 4 to 6 of Regulation No 6/2002.

58 In accordance with that article, 'a design shall be deemed to have been made available to the public within the European Union if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating within the [European Union]'.

59 Article 6(1) of Regulation No 6/2002 provides that a design is to be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public.

The General Court annuls the decision of the Board of Appeal of EUIPO and adjudicates on the effects of the withdrawal of the United Kingdom from the European Union on pending cases relating to EU trade marks.

Findings of the Court

In the first place, the Court holds that the withdrawal of the United Kingdom from the European Union has not rendered the dispute devoid of purpose.

First, it points out that the withdrawal agreement, [60] which sets out the arrangements for the withdrawal of the United Kingdom from the European Union, entered into force on 1 February 2020 and provides for a transition period from 1 February to 31 December 2020, during which EU law continues to be applicable in the United Kingdom.

Next, the Court notes that the decision of the Board of Appeal was taken on 2 April 2020, that is to say, during the transition period. Until the end of that period, the earlier mark continued to receive the same protection as it would have received had the United Kingdom not withdrawn from the European Union.

Finally, since the purpose of the action before the Court is to review the legality of decisions of the Boards of Appeal of EUIPO, the Court must take into account the date of the contested decision when assessing that legality. For the Court to find that the litigation becomes devoid of purpose following the withdrawal of the United Kingdom from the European Union would amount, for the Court, to taking into account matters arising after the adoption of the contested decision, which do not affect its merits.

In the second place, the Court finds that Indo European Foods retains an interest in bringing proceedings. In that regard, the Court recalls that the interest in bringing proceedings must continue until the final decision, which presupposes that the action must be able to procure an advantage to the party bringing it. First, it rejects EUIPO's argument that the trade mark applicant had no interest in bringing proceedings because, if the opposition were upheld, the applicant would be able to convert his mark into national trade mark applications in all EU Member States. Those considerations apply, in principle, to any opposition proceedings. Secondly, the Court finds that if it were to annul the decision of the Board of Appeal and refer the case back, the Board of Appeal would not be obliged to dismiss the action in the absence of an earlier trade mark protected by the law of a Member State. Following the annulment of a decision of the Board of Appeal, the Board of Appeal must take a new decision on that same action by reference to the situation at the time that the action was brought, since the action is again pending at the same stage as it was before the contested decision.

Moreover, the Court annuls the decision of the Board of Appeal on the ground that the Board of Appeal misapplied the legal tests for the extended form of passing off under the law applicable in the United Kingdom, in that it ruled out the risk of misrepresentation and damage to the goodwill enjoyed by the term 'basmati'.

Judgment of the General Court (Tenth Chamber) of 13 October 2021, Škoda Investment v EUIPO – Škoda Auto (Representation of an arrow with wing), T-712/20

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Application for an EU figurative mark representing an arrow with wing – Earlier EU figurative mark representing an arrow with wing – Relative ground for refusal –

60 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7).

Partial rejection of the opposition – Limited scope of the opposition in the context of the appeal before the Board of Appeal – Partial withdrawal of the opposition – Plea raised by the Board of Appeal of its own motion – Prohibition on ruling *ultra petita*

Škoda Auto a.s. applied to the European Union Intellectual Property Office (EUIPO) for registration of an EU figurative mark representing an arrow with wing. The applicant, Škoda Investment a.s., opposed the registration of that mark in respect of all the goods and services referred to in that application.

The Opposition Division of EUIPO rejected that opposition as inadmissible. The applicant brought an appeal against that decision and requested, in the statement setting out the grounds of appeal, that it be annulled in part in so far as it concerned only certain goods and services.

The Board of Appeal of EUIPO inferred from this that the applicant had withdrawn its appeal in respect of the other goods and services covered by the mark applied for. The effect of that partial withdrawal was that the goods and services not mentioned in that statement no longer formed part of the opposition proceedings and that, as regards those goods and services, the rejection of the opposition had become final. Consequently, the Board of Appeal partially annulled the decision of the Opposition Division in respect of the contested goods and services and referred the case back to it for further examination of those goods and services.

In its judgment, the Court dismisses the applicant's action and provides clarification as to the scope of the examination carried out by the Boards of Appeal of EUIPO in opposition proceedings. In that context, the case-law established in proceedings before the EU Courts concerning the relationship between pleas raised of the Board's own motion and the form of order sought in an action applies. [61]

Findings of the Court

First of all, the Court recalls that the Board of Appeal, in the context of an appeal relating to a relative ground for refusal of registration of a mark, which is brought against a decision of the Opposition Division, cannot adjudicate beyond the subject matter of the appeal brought before it. [62] That Board, in accordance with the jurisdiction of the EU Courts under the system for governing judicial review proceedings, can only annul the decision of the Opposition Division within the limits of the submissions which an appellant set out in its appeal.

Next, the Court observes that the Board of Appeal must examine of its own motion the pleas relating to the issues of law which have not been raised by the parties, but which concern essential procedural requirements, such as the rules on admissibility of an opposition. [63] Nonetheless, that power does not mean that the Board of Appeal has the power to modify of its own motion the form of order sought by an appellant in the appeal brought before it, since such an approach would disregard the distinction between the pleas in law and the form of order sought, the latter of which defines the limits of an appeal. Thus, by examining of its own motion a plea relating to essential procedural requirements, the Board of Appeal does not go beyond the scope of the dispute before it or in any way infringe the rules of procedure relating to the presentation of the subject matter of the dispute. However, it would be different if, following the examination of the decision forming the subject matter of the appeal, the Board of Appeal, on the basis of such an examination of its own motion, were to declare an annulment going beyond what was sought in the duly submitted form of order before it,

61 Judgment of 14 November 2017, *British Airways* v *Commission* (C-122/16 P, EU:C:2017:861, paragraphs 89 and 90).

62 See, in particular, Article 47(5), Article 71(1), first sentence, and Article 95(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).

63 Article 27(2) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation 2017/1001 and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

on the ground that such an annulment was necessary in order to correct the unlawfulness found of its own motion in carrying out that analysis.

Finally, the Court concludes that, in the present case, the applicant is not justified in claiming that the Board of Appeal should have annulled the decision of the Opposition Division in its entirety, since the effect of that decision would have been to rule outside the subject matter of the dispute as defined by the applicant itself.

VIII. ECONOMIC AND MONETARY POLITICY

Judgment of the General Court (Ninth Chamber, Extended Composition) of 6 October 2021, Ukrselhosprom PCF and Versobank v ECB, T-351/18 and T-584/18

Link to the complete text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Specific supervisory tasks assigned to the ECB – Decision to withdraw a credit institution's authorisation – Breach of legislation on combating money laundering and the financing of terrorism – Admissibility – Powers of the national competent authorities (NCAs) of participating Member States and of the ECB under the Single Supervisory Mechanism (SSM) – Equal treatment – Proportionality – Protection of legitimate expectations – Legal certainty – Misuse of powers – Rights of the defence – Obligation to state reasons

Versobank AS is a credit institution established in Estonia, whose main shareholder is Ukrselhosprom PCF LLC.

Versobank, as a less significant credit institution, was under the prudential supervision of Finantsinspektsioon (FSA, Estonia), acting as the national competent authority (NCA). [64] The latter was also competent in relation to, inter alia, the monitoring of compliance with rules intended to combat money laundering and the financing of terrorism ('AML/CFT').

From 2015 onwards, the FSA identified recurring breaches by Versobank in connection with, first, the ineffectiveness of its AML/CFT regime as regards the management of the risks stemming from its business model and, secondly, the inadequacy of the AML/CFT governance arrangements which it had in place. After carrying out an on-site inspection and sending Versobank a number of notices to comply with the legal requirements, the FSA adopted a precept requiring Versobank immediately to remedy the shortcomings identified during that inspection and requiring it to take certain steps.

Following further on-site inspections, the FSA found that Versobank had still not complied with all the obligations imposed by that precept and considered it necessary to carry out a thorough investigation. Thus, it found that there had been material and severe breaches of AML/CFT legislation.

64 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the Basic SSM Regulation'), Articles 2(2) and 6.

On 8 February 2018, the European Central Bank (ECB) received from the FSA a proposal to withdraw Versobank's license. [65] On 26 March 2018, the ECB adopted and notified to Versobank its decision to withdraw the banking license. [66]

Following a request by Ukrselhosprom PCF for review of the ECB's decision of 26 March 2018, the Governing Council of the ECB adopted the decision of 17 July 2018, [67] which repealed and replaced the decision of 26 March.

The Court, sitting in an extended composition, considers that there is no need to adjudicate on Case T-351/18. In addition, in Case T-584/18, the Court dismisses the action of Ukrselhosprom PCF and Versobank in its entirety.

Findings of the Court

In the first place, the Court finds that there is no longer any need to adjudicate on the action brought in Case T-351/18 seeking annulment of the decision of 26 March 2018.

In that regard, after recalling the scope and conduct of the procedure for the administrative review of ECB decisions, [68] the Court points out that the decision adopted following that review is retroactive to the time at which the initial decision took effect, whatever the outcome of that review. Thus, the replacement of the initial decision by an identical or amended decision at the end of the review procedure results in the definitive disappearance of the original decision from the legal order.

In the present case, the Court notes that the decision of 17 July 2018 was adopted following the administrative review of the decision of 26 March 2018 and was identical in content to that decision. Therefore, by its decision of 17 July 2018, the ECB replaced the decision of 26 March 2018 with retroactive effect to the time at which the latter took effect and did not merely abrogate that decision for the future. Consequently, Ukrselhosprom PCF and Versobank retain no interest in obtaining the annulment of the decision of 26 March 2018 and the action against that act is devoid of purpose.

In the second place, in relation to the action brought by Ukrselhosprom PCF and Versobank in Case T-584/18, the Court confirms, first, the ECB's competence to withdraw the authorisation of a credit institution and, more specifically, to adopt the decision of 17 July 2018. Thus, it states that a decision establishing that the resolution of a credit institution is not in the public interest, such as that adopted by the FSA in its functions as a national resolution authority, in no way prohibits the ECB from subsequently adopting a decision withdrawing authorisation. Moreover, the coexistence of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), which share the same mission of protecting the stability and safety of the European Union's financial system, cannot be understood as precluding the possibility for the competent authority for prudential supervision, in the present case the ECB, to withdraw authorisation, in the absence of the conditions required for adopting a resolution measure, namely where the credit institution in question is not at risk of becoming unviable.

Secondly, the Court confirms the power of the ECB to adopt a decision withdrawing authorisation on the ground of infringement of AML/CFT obligations, recalling that withdrawal of authorisation is also

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65 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (OJ 2014 L 141, p. 1; 'the SSM Framework Regulation'), Article 80.

66 Decision of the European Central Bank ECB/SSM/2018_EE_1 WHD_2017-0012 of 26 March 2018 withdrawing the banking licence of Versobank AS ('the decision of 26 March 2018').

67 Decision ECB/SSM/2018_EE_2 WHD_2017-0012 of the European Central Bank (ECB) of 17 July 2018, replacing the ECB's initial decision of 26 March 2018, to withdraw the authorisation of the credit institution Versobank ('the decision of 17 July 2018').

68 As described in Article 24(1) and (7) of the Basic SSM Regulation.

provided for where a credit institution fails to comply with those obligations. [69] Accordingly, the Court finds that it was therefore without disregarding the division of powers between the NCAs of the participating Member States and the ECB under the SSM that the facts constituting breaches of the AML/CFT legislation were established by the FSA, whereas the legal assessment of whether those facts justified withdrawal of authorisation and the assessment of proportionality were reserved for the ECB.

Thirdly, the Court holds that the notification procedure, known as the 'passporting' procedure, is binding in nature. [70] Thus, it recalls that a credit institution wishing to establish a branch within the territory of another Member State shall notify the competent authorities of its home Member State. [71] Moreover, the Court states that the fact that the notification procedure is not purely a formality stems (i) from the power of the competent authority of the home Member State to refuse to communicate that information to the competent national authority of the host Member State and (ii) from the margin of discretion available to that first authority when assessing that information

Fourthly, as regards infringement of the principle of proportionality, the Court considers that, in the present case, the withdrawal of authorisation did not go beyond what was appropriate and necessary to attain the objectives of putting an end to the breaches committed by Versobank. Furthermore, the Court notes, inter alia, the options of self-liquidation and sale to another investor did not constitute alternative measures to the withdrawal of authorisation for the purposes of achieving the objectives legally pursued by the ECB.

Fifthly, the Court rejects the arguments alleging infringement of the principle of equal treatment and non-discrimination on the ground that there was no comparative analysis between the breaches alleged against Versobank and those committed by other credit institutions. According to the Court, such an analysis is not necessary in order to take action against a natural or legal person in respect of unlawful conduct.

Sixthly and last, the Court rejects the arguments alleging infringement of Ukrselhosprom PCF's right of access to the file. First, as regards the first request for access to the file, the Court notes that the ECB did not err in not granting that request since it was not a party concerned [72] at the time that request was made. Secondly, as regards the second request for access made in the course of the review procedure, the Court notes that the Administrative Board of Review accepted that request in its capacity as an applicant for review. [73]

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69 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 67), Article 67.

70 Directive 2013/36, Article 39.

71 Directive 2013/36, Article 35.

72 The Basic SSM Regulation, Article 22(2); the SSM Framework Regulation, Articles 26 and 32.

73 Decision 2014/360/EU of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ 2014 L 175, p. 47), Article 20.

IX. ENVIRONMENT: HABITATS DIRECTIVE

Judgment of the Court (Second Chamber) of 28 October 2021, Magistrat der Stadt Wien (Grand hamster – II), C-357/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 12(1) – System of strict protection for animal species – Annex IV(a) – European hamster (*Cricetus cricetus*) – Resting places and breeding sites – Deterioration or destruction

A property developer carried out construction work on land on which the European hamster (*Cricetus cricetus*), a species protected under Annex IV(a) to the Habitats Directive, [74] had settled. Before the works in question were carried out, the property developer, without the prior authorisation of the competent authority, took steps, inter alia, to remove that species from the construction site to other specially protected areas, which led to the destruction of at least two of the burrow entrances.

The Magistrat der Stadt Wien (City Council of Vienna, Austria) therefore ordered IE, as an employee of the property developer, to pay a fine for having damaged and destroyed resting places and breeding sites of the European hamster.

IE brought an action before the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) challenging the imposition of the fine on the grounds that the burrows on the relevant land were not being used by the European hamster (*Cricetus cricetus*) when the harmful measures were implemented and, moreover, that those measures did not lead to the deterioration or destruction of resting places or breeding sites of that animal species.

It was in that context that the referring court decided to ask the Court of Justice about the scope in both place and time of the concept of 'breeding site' and of the criteria for distinguishing between 'deterioration' and 'destruction' of a breeding site and/or a resting place, within the meaning of Article 12(1)(d) of the Habitats Directive.

Findings of the Court

First of all, as regards the scope of the spatial protection of breeding sites, the Court gives a literal, systematic and teleological interpretation of Article 12(1)(d) of the Habitats Directive.

As is apparent, first, from the wording of that provision, Article 12(1)(d) of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive in their natural range, prohibiting the deterioration or destruction of breeding sites or resting places.

As regards, secondly, the context of which that provision forms part, the Court points out that the prohibition laid down therein seeks to safeguard the ecological functionality of breeding sites and to preserve significant parts of the habitat of protected animal species, so that those species may benefit from the conditions required in order, inter alia, to reproduce there. It follows that the term 'breeding site' must be understood as encompassing all the areas necessary to enable the animal species concerned to reproduce successfully, including the surroundings of that site.

That interpretation is borne out by the objectives of the directive. That directive aims, with a view to the preservation of biodiversity, to maintain or restore, at favourable conservation status, natural

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74 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

habitats and species of wild fauna and flora of interest for the European Union. It follows therefrom that the system of protection provided for in Article 12(1) of the Habitats Directive must therefore be capable of effectively preventing harm being caused to the habitat of protected animal species.

An interpretation of the term 'breeding site' which seeks to limit the scope of that concept only to the burrows of the European hamster is liable to exclude from that protection areas necessary for the reproduction and for the birth of the offspring of that animal species. Furthermore, the protection of a breeding site would be rendered redundant if human activities, carried out in the vicinity of that site, had the aim or effect of that animal species no longer frequenting the breeding site concerned.

Next, as regards the temporal scope of the protection of breeding sites, the Court adopts a broad interpretation of that protection, akin to the broad interpretation given to the temporal scope of the concept of 'resting place'. [75]

Thus, in order to ensure the strict protection offered by Article 12(1)(d) of the Habitats Directive, the breeding sites of a protected animal species must enjoy protection for as long as is necessary in order for that animal species successfully to reproduce. From that point of view, the protection referred to therein also extends to breeding sites that are no longer occupied, where there is a sufficiently high probability that that animal species will return to those sites in order to reproduce there.

Finally, the Court clarifies the criterion for distinguishing between the concepts of 'deterioration' and 'destruction' of a breeding site or resting place within the meaning of Article 12(1)(d) of the Habitats Directive.

Taking into consideration the usual meaning in everyday language of those words, the context in which they are used and the objectives pursued by the Habitats Directive, the Court concludes that the decisive criterion for establishing a distinction between, on the one hand, an act causing deterioration of a breeding site or a resting place and, on the other, an act causing its destruction, is the degree of harm to the ecological functionality of the breeding site or of that resting place, whether or not that interference is intentional. For the purposes of that determination, account must be taken of the ecological requirements of each animal species concerned and of the situation at individual level of the members of that animal species occupying the breeding site or resting place concerned.

It follows that the concepts of 'deterioration' and 'destruction', referred to in Article 12(1)(d) of the Habitats Directive, must be interpreted as meaning, respectively, the gradual reduction of the ecological functionality of a breeding site or resting place of a protected animal species and the total loss of that functionality, irrespective of whether or not such harm is intentional.

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75 The dispute in the main proceedings has already given rise to a request for a preliminary ruling, on which the Court ruled in the judgment of 2 July 2020, *Magistrat der Stadt Wien (Grand hamster)* (C-477/19, EU:C:2020:517). In that judgment, the Court held that the protection of the resting places of the European hamster (*Cricetus cricetus*) also covers resting places which are no longer occupied by that animal species where there is a sufficiently high probability that that animal species will return to those resting places.

X. INTERNATIONAL AGREEMENTS

1. ARBITRATION CLAUSE IN AN INTERNATIONAL AGREEMENT

Judgment of the Court (Grand Chamber) of 26 October 2021, PL Holdings, C-109/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Agreement between the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, of the one part, and the Government of the People's Republic of Poland, of the other, concerning the reciprocal promotion and protection of investments, signed on 19 May 1987 – Arbitration proceedings – Dispute between an investor from one Member State and another Member State – Arbitration clause provided for in that agreement contrary to EU law – Invalidity – Ad hoc arbitration agreement between the parties to that dispute – Participation in the arbitration proceedings – Tacit expression by that other Member State of its intention to conclude that arbitration agreement – Unlawfulness

In 2013, the voting rights of PL Holdings, a company incorporated under Luxembourg law, attached to shares it owned in a Polish bank were suspended, and it was forced to sell those shares. PL Holdings disagreed with the decision requiring it to do so, which had been taken by the Komisja Nadzoru Finansowego (Polish Financial Supervision Authority), and decided to initiate arbitration proceedings against Poland. To that end, PL Holdings, relying on the bilateral investment treaty concluded in 1987 between Belgium and Luxembourg, on the one hand, and Poland, on the other, [76] ('the BIT') submitted a request for arbitration to the arbitral tribunal stipulated in an arbitration clause in that treaty. [77]

By two arbitral awards of 28 June and 28 September 2017, the arbitral tribunal concluded that it had jurisdiction to settle the dispute at issue, declared that Poland had failed to comply with its obligations under the BIT and ordered it to pay damages to PL Holdings.

The action before the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) in which Poland sought to have the arbitral awards set aside was dismissed. That court held, inter alia, that even though the arbitration clause in the BIT, according to which a dispute relating to that treaty must be decided by an arbitration body, is invalid, that invalidity does not prevent a Member State and an investor from another Member State from concluding an ad hoc arbitration agreement at a later stage in order to settle that dispute.

After an appeal was brought against the decision of the court of appeal, the Högsta domstolen (Supreme Court, Sweden) decided to seek clarification from the Court of Justice as to whether Articles 267 and 344 TFEU precluded the conclusion of an ad hoc arbitration agreement between the parties to the dispute where the content of that agreement is identical to an arbitration clause that is set out in the BIT and is contrary to EU law.

The Court, sitting in Grand Chamber formation, develops its case-law from the judgment in *Achmea* [78] and finds that EU law prohibits the conclusion by a Member State of such an arbitration clause.

Findings of the Court

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76 Agreement between the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, of the one part, and the Government of the People's Republic of Poland, of the other, concerning the reciprocal promotion and protection of investments, signed on 19 May 1987.

77 Article 9 of the BIT.

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

In the first place, by relying on the judgment in *Achmea*, the Court confirms that the arbitration clause in the BIT, according to which an investor from one of the Member States may, in the event of a dispute concerning investments in the other Member State that concluded the BIT, bring arbitration proceedings against the latter State before an arbitral tribunal whose jurisdiction that State has undertaken to accept, is contrary to EU law. That clause is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU. That clause is, therefore, incompatible with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU and has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU.

In the second place, the Court finds that, to allow a Member State to submit a dispute which may concern the application or interpretation of EU law to an arbitral body with the same characteristics as the body referred to in such an arbitration clause that is invalid because it is contrary to EU law, by concluding an ad hoc arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, the articles referred to above.

First of all, that ad hoc arbitration agreement would produce, with regard to the dispute in the context of which it was concluded, the same effects as those resulting from the arbitration clause at issue. The fundamental reason for that arbitration agreement is precisely to replace that clause in order to maintain its effects despite that provision's being invalid.

Next, the consequences of that Member State's circumventing its obligations are no less serious because this is an isolated case. In fact, that legal approach could be adopted in a multitude of disputes which may concern the application and interpretation of EU law, thus allowing the autonomy of that law to be undermined repeatedly.

Furthermore, each request for arbitration made to a Member State, on the basis of an invalid arbitration clause, may constitute an offer of arbitration and that State could then be regarded as having accepted that offer simply because it failed to put forward specific arguments against the existence of an ad hoc arbitration agreement. That situation would have the effect of maintaining the effects of the commitment made by that Member State – which is contrary to EU law and is, therefore, invalid – to accept the jurisdiction of the arbitration body before which the matter was brought.

Lastly, it follows both from the judgment in *Achmea*, and from the principles of the primacy of EU law and of sincere cooperation, not only that the Member States cannot undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law, but also that, where that dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, they are required to challenge the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body. [79]

Any attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would run counter that obligation to challenge its validity and would thus be liable to render the actual legal basis of that contract unlawful since it would be contrary to the provisions and fundamental principles governing the EU legal order.

Consequently, the Court concludes that the national court is obliged to set aside an arbitral award made on the basis of an arbitration agreement that infringes EU law.

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79 A conclusion also confirmed by Article 7(b) of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (OJ 2020 L 169, p. 1).

2. EXTERNAL COMPETENCE OF THE EUROPEAN UNION

Opinion of the Court (Grand Chamber) of 6 October 2021, 1/19 (Istanbul Convention)

Link to the complete text of the opinion

Opinion pursuant to Article 218(11) TFEU – Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) – Signature by the European Union – Draft conclusion by the European Union – Concept of an 'agreement envisaged', within the meaning of Article 218(11) TFEU – External competences of the European Union – Substantive legal basis – Article 78(2) TFEU – Article 82(2) TFEU – Article 83(1) TFEU – Article 84 TFEU – Article 336 TFEU –Articles 1 to 4a of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice – Partial participation of Ireland in the conclusion of the Istanbul Convention by the European Union – Possibility of splitting the act concluding an international agreement into two separate decisions according to the applicable legal bases – Practice of 'common accord' – Compatibility with the TEU and the TFEU

The Istanbul Convention on preventing and combating violence against women and domestic violence [80] falls, in part, within the competences of the European Union and, in part, within those of the Member States. It is therefore intended to be a mixed agreement, concluded as such by the European Union and the Member States. The Commission proposal for a decision on the signing of that convention, on behalf of the European Union, indicated, as the substantive legal basis, Article 82(2) and Article 84 TFEU. Since that proposal did not obtain sufficient support within the Council of the European Union, the Council decided to limit the signature of that convention to the matters covered by it which fall within the exclusive competence of the European Union, as identified by the Council. The Council therefore replaced the abovementioned substantive legal basis with Article 78(2), Article 82(2) and Article 83(1) TFEU. Furthermore, in order to take account of Ireland's particular situation, in the light of Protocol No 21, [81] the signature decision was divided into two separate decisions.

Those two decisions concern the signature of the Istanbul Convention as regards, respectively, the matters linked to judicial cooperation in criminal matters [82] and to asylum and non-refoulement. [83] In accordance with those two decisions, the Istanbul Convention was signed on behalf of the European Union on 13 June 2017. However, to date, no decision on the conclusion of that convention by the European Union has been adopted, since the Council appears to regard the adoption of such a decision as being contingent on the prior existence of a 'common accord' of all the Member States to be bound by that convention in the areas within their competence.

On 9 July 2019, the European Parliament submitted to the Court of Justice a request for an Opinion under Article 218(11) TFEU concerning the conclusion of the Istanbul Convention by the European

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80 Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted on 7 April 2011 ('the Istanbul Convention').

81 Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU ('Protocol No 21').

82 Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters (OJ 2017 L 131, p. 11).

83 Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement (OJ 2017 L 131, p. 13).

Union. By its first question, the Parliament asks, first, what the appropriate legal bases for the Council act concluding that convention are and, secondly, whether it is necessary or possible to split both the act authorising the signature of the convention and the act concluding that convention into two separate decisions. By its second question, the Parliament asks, in essence, whether the Treaties allow or require the Council to wait, before concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States to be bound by that convention in the fields falling within their competences.

In its Opinion, the Court, sitting as a Grand Chamber, answers the Parliament's questions as follows.

First, subject to full compliance, at all times, with the requirements laid down in Article 218(2), (6) and (8) TFEU, the Treaties do not prohibit the Council, acting in conformity with its Rules of Procedure, from waiting, before adopting the decision concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States. However, the Treaties do prohibit the Council from adding a further step to the conclusion procedure laid down in that article by making the adoption of the decision concluding that convention contingent on the prior establishment of such a 'common accord'.

Secondly, the appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement is made up of Article 78(2), Article 82(2) and Articles 84 and 336 TFEU.

Thirdly, Protocols No 21 and No 22 [84] justify the division of the act concluding the Istanbul Convention into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland or the Kingdom of Denmark is not participating in the measures adopted in respect of the conclusion of the envisaged agreement which fall within the scope of those protocols, considered in their entirety.

Findings of the Court

Admissibility of the request for an Opinion

The purpose of the opinion procedure is to forestall complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the European Union. Having regard, inter alia, to that purpose, the Court finds that the request for an Opinion is admissible, with the exception of the second part of the first question, in so far as it relates to the division of the act authorising the signature of the Istanbul Convention into two decisions. The Istanbul Convention was signed by the European Union more than two years before the request for an Opinion was submitted, with the result that the preventive objective pursued by Article 218(11) TFEU could no longer be achieved. Furthermore, the Parliament could have challenged the signature decisions by means of an action for annulment.

The practice of 'common accord'

As regards the practice of waiting for the 'common accord' of the Member States to be bound by a mixed agreement, the Court observes, first of all, that the Treaties prohibit the Council from making the initiation of the procedure for concluding a convention contingent upon the prior establishment of such a 'common accord'. If that practice were to have such a scope, it would establish a hybrid decision-making process, since the European Union's ability to conclude a mixed agreement would depend entirely on each Member State's willingness to be bound by that agreement in the fields falling within their competences. Such a hybrid decision-making process is incompatible with Article 218(2), (6) and (8) TFEU, which envisages the conclusion of an international agreement as an act which is adopted by the Council acting by a qualified majority.

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84 Protocol (No 22) on the position of Denmark, annexed to the TEU and the TFEU ('Protocol No 22').

That being said, within the limits of the procedure laid down in those provisions, both the decision whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time for adopting such a decision fall within the Council's political discretion. Consequently, nothing precludes the Council from extending its discussions in order to achieve closer cooperation between the Member States and the EU institutions in the conclusion process, which may involve waiting for a 'common accord'.

However, that political discretion is to be exercised, in principle, by a qualified majority, so that such a majority within the Council may, at any time and in accordance with the rules laid down by its Rules of Procedure, require the closure of the discussions and the adoption of the decision concluding the international agreement.

The appropriate legal bases for the conclusion of the Istanbul Convention

In the context of the question concerning legal bases, the Court is first required to define the subject matter and scope of its examination. In that regard, since the decision concluding the Istanbul Convention must be adopted by the Council by qualified majority, after obtaining the consent of the Parliament, it is for those institutions to specify, within the limits of the question referred, the scope of the 'agreement envisaged' within the meaning of Article 218(11) TFEU. Accordingly, the Court examines the Istanbul Convention solely in the light of the parts of that convention which, according to the wording of that question and according to the content of the signature decisions, are to be covered by the act concluding that convention. In the light of those factors, the Court starts from the premiss that that act will relate to the provisions of the Istanbul Convention which are linked to judicial cooperation in criminal matters, asylum and non-refoulement and the obligations of the institutions and public administration of the European Union, in so far as those provisions fall within the competence of the European Union.

As regards, in the first place, judicial cooperation in criminal matters, having regard to the number and scope of the provisions of the Istanbul Convention which fall within the competence of the European Union referred to in Article 82(2) TFEU [85] and Article 84 TFEU, [86] the Court holds that those two provisions should be among the legal bases of the act concluding that convention. By contrast, the scope of the obligations contained in the Istanbul Convention falling within the area covered by Article 83(1) TFEU [87] is extremely limited for the European Union, with the result that the act concluding that convention cannot be based on that provision.

As regards, in the second place, asylum and non-refoulement, although the Istanbul Convention contains only three articles relating to those matters, they form a separate chapter which cannot be regarded as incidental or extremely limited in scope, with the result that Article 78(2) TFEU [88] should form part of the substantive legal basis of the act concluding that convention.

In the third place, as regards its public administration, the European Union must ensure that the obligations imposed by the Istanbul Convention which fall within the scope of Article 336 TFEU [89] are fully satisfied, and that provision must therefore be one of the legal bases.

The division of the act concluding the Istanbul Convention into two separate decisions

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85 Under that provision, the European Union may establish minimum rules concerning, inter alia, the admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime.

86 That provision confers on the European Union the competence to establish measures to promote and support the action of Member States in the field of crime prevention.

87 In accordance with that provision, European Union has competence to establish minimum rules concerning the definition of criminal offences and sanctions in, inter alia, the area of trafficking in human beings and sexual exploitation of women and children.

88 That provision concerns the European Union's competences in the area of asylum, subsidiary protection and temporary protection.

89 Relating to the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the Union.

The question concerning the division of the act concluding the Istanbul Convention into two decisions is linked to the applicability of Protocol No 21 as regards Ireland, as a result of the identification of provisions falling within Title V of Part Three of the TFEU as legal bases for the conclusion of the envisaged agreement. In principle, Ireland does not take part in the adoption by the Council of measures falling under that title unless it notifies its wish to take part. On the basis of that protocol, Ireland intended not to take part in the conclusion, by the European Union, of the part of the Istanbul Convention relating to asylum and non-refoulement, while participating in the conclusion of other parts of that convention.

However, selective participation in a single measure covered by Protocol No 21 is precluded. Similarly, a division of the act concluding the envisaged agreement into two decisions in order to enable Ireland to participate in the adoption of one of the two decisions but not in the other is not authorised, even though each of the decisions concluding the agreement would concern measures falling within Title V of Part Three of the TFEU.

That being said, if it is established that different legal bases are applicable to an act concluding an international agreement, there may be an objective need to divide that act into two or more decisions. That may be the case, inter alia, if such a division is intended to take account of the fact that Ireland or the Kingdom of Denmark is not taking part in the measures envisaged in respect of the conclusion of an international agreement which fall within the scope, respectively, of Protocols No 21 and No 22, whereas other measures envisaged in respect of that conclusion do not fall within that scope. In the present case, since the substantive legal basis for the act concluding the envisaged agreement includes Article 336 TFEU, which does not fall within the scope of Protocols No 21 and No 22, an objective need to divide the act concluding the Istanbul Convention may be established.

XI. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS: ACCESS TO DOCUMENTS

Judgment of the General Court (Fifth Chamber) of 29 September 2021, AlzChem Group v Commission, T-569/19

Link to the complete text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Documents relating to a procedure for the recovery of State aid following a decision declaring the aid incompatible with the internal market and ordering its recovery – Refusal to grant access – Exception relating to the protection of the purpose of inspections, investigations and audits – Overriding public interest – Principle of non-discrimination – Obligation to state reasons

The applicant, AlzChem Group AG, is a German company which operates in the chemical industry. It intervened as an interested party in the procedure that led to Decision 2015/1826, [90] by which the European Commission found, inter alia, that Novácke chemické závody, a.s., a Slovak chemical company, had received State aid from the Slovak Republic that was unlawful and incompatible with the internal market, and ordered the recovery of that aid.

[90] Commission Decision (EU) 2015/1826 of 15 October 2014 on the State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia for NCHZ (OJ 2015 L 269, p. 71).

In April 2019, the applicant submitted to the Commission a request for access to documents under Regulation No 1049/2001. [91] That request concerned the relevant documents held by the Commission containing information on the state of progress of the recovery procedure and the amount of State aid recovered by the Slovak Republic following Decision 2015/1826 ('the requested documents'). After the rejection of its request, the applicant submitted a confirmatory application to the Commission.

By decision of 22 July 2019, [92] the Commission refused to grant the applicant access to the requested documents, taking the view that they came under, first, the exception relating to the protection of investigations [93] and, secondly, the exception relating to the protection of commercial interests. [94] The applicant subsequently brought an action for annulment of that decision.

The General Court dismisses the applicant's action and, in its judgment, provides a useful addition to case-law as regards the exception relating to the protection of the purpose of investigations. It also recognises a general presumption of confidentiality applicable to documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid.

Findings of the Court

By way of preliminary observations, the Court provides a summary of the identification of actionable measures and the applicable time limit for bringing an action following a request for access to documents under Regulation No 1049/2001.

Thus, in the first place, under Article 8 of Regulation No 1049/2001, the Commission can extend the initial time limit [95] for responding to a request for access only once and, on the expiry of the extended period, an implied decision to refuse access is deemed to have been adopted. In that regard, the Court states that the initial time limit is mandatory and cannot be extended other than in the circumstances provided for in Article 8(2) of Regulation No 1049/2001. Such an implied decision refusing access may be the subject of an action for annulment, [96] as is the case for the express refusal decision, which is the definitive response to the confirmatory application for access to the documents in question. The Court also states that if the implied decision has been the subject of an action for annulment, the applicant loses its interest in continuing proceedings by reason of the adoption of the express decision, and there is no longer any need to give a ruling on that action. If the express decision was adopted before the action was brought against the implied decision, any action subsequently brought against the implied decision would then be inadmissible.

In the second place, the Court states that the time limit for bringing an action for annulment of the express decision must be calculated in accordance with the provisions of Article 263 TFEU and cannot be counted from the date of the implied refusal decision.

As regards the substance, the Court examines, first of all, whether there is a general presumption of confidentiality applicable to documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid. In that regard, the Court states that, according to the case-law, [97] the general presumption of confidentiality which concerns documents in the administrative file relating to a procedure for reviewing State aid expressly covers documents which are part of the investigation carried out by the Commission in order to find in a decision that, inter

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91 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

92 Commission Decision C(2019) 5602 final of 22 July 2019.

93 Exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001.

94 Exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001.

95 Laid down in Article 8(1) of Regulation No 1049/2001.

96 In accordance with the provisions on Article 263 TFEU.

97 See, inter alia, judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 61).

alia, there is State aid and order that it be recovered. However, the EU Courts have not yet had to rule on a refusal to grant access to documents relating to the stage of implementation of such a Commission decision by the Member State concerned. Therefore, although it is true that the recognition of the general presumption of confidentiality in the case-law concerns the administrative file in the context of a review procedure, [98] that general presumption is certain only as concerns documents forming part of the administrative procedure leading to the adoption of a decision by the Commission in which the latter finds that, inter alia, there is State aid and orders its recovery.

Furthermore, as regards the documents relating to the implementation phase of a decision in which the Commission orders the recovery of State aid, they may indeed be formally part of the same file containing the documents relating to the investigation conducted by the Commission which led it to adopt that decision. All the documents relate to the same national measure or measures. However, the exceptions relating to the protection of the purpose of inspections, investigations and audits must be interpreted and applied strictly in so far as they derogate from the principle of the widest possible public access to documents held by the EU institutions. Therefore, it cannot be held that the general presumption of confidentiality in relation to the review of State aid, as recognised by the case-law, necessarily covers the documents relating to the stage of implementation of the Commission's decision on the basis that they are supposedly part of the same administrative file.

The Court therefore examines whether the latter documents may also be covered by a general presumption of confidentiality, whether it be that relating to the review of State aid or another general presumption of confidentiality. In that regard, the Court states that the EU Courts have identified a number of criteria for recognising a general presumption of confidentiality, which relate to the documents concerned, on the one hand, and the undermining of the interest protected by the exception in question, on the other.

As regards the documents concerned, the Court points out that, in order for a general presumption of confidentiality to be validly relied upon against a person requesting access to documents on the basis of Regulation No 1049/2001, it is necessary that the documents in question belong to the same category of documents or be documents of the same nature.

In that regard, the General Court notes that the Court of Justice has indeed held that all the documents in the administrative file relating to a procedure for reviewing State aid formed a single category. Nevertheless, the EU Courts have not ruled on whether the documents which led to the adoption of the decision by which the Commission found that there was State aid and that it should be recovered, and the documents relating to the procedure for reviewing the implementation of that decision belong to the same category of documents. Even though they may belong to the same Commission file, the fact remains that, strictly speaking, they come under two different categories of documents. On the other hand, the documents relating to the procedure for reviewing the implementation of a Commission decision ordering the recovery of State aid form a single category, in that they are clearly defined by the fact that they all belong to the file relating to an administrative procedure, subsequent to the procedure which led to the adoption of that decision.

As regards the undermining of the interest protected by the relevant exception, namely the protection of the purpose of investigations, the Court finds, first, that the procedure for reviewing the implementation of the decision requiring the recovery of State aid does correspond to 'investigations' carried out by the Commission. [99] Such an activity constitutes a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order for that institution to take a position in the context of its functions provided for by the EU and FEU Treaties. That procedure does not necessarily have to have the purpose of detecting or pursuing an offence or

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98 Opened in accordance with Article 108(2) TFEU.

99 Within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

irregularity. The concept of 'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation.

According to the Court, in view of the particular position of the Member State concerned in the procedure for reviewing the implementation of a decision ordering the recovery of State aid, in principle, disclosure of documents relating to that procedure would undermine the dialogue and, therefore, the cooperation between the Commission and that Member State. Consequently, the Court rules that the Commission did not err in law in finding that the documents relating to the procedure for reviewing the implementation of a decision ordering the recovery of State aid were covered by a general presumption of confidentiality under the exception relating to the protection of the purpose of investigations, as provided for in Regulation No 1049/2001.

2. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Second Chamber) of 22 September 2021, Sociedade da Água de Monchique v EUIPO – Ventura Vendrell (chic ÁGUA ALCALINA 9,5 PH), T-195/20

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Application for the EU figurative mark chic ÁGUA ALCALINA 9,5 PH – Earlier EU word mark CHIC BARCELONA – Relative ground for refusal – No likelihood of confusion – Article 8(1)(b) of Regulation (EU) 2017/1001

Sociedade da Água de Monchique, SA, applied for registration of the EU figurative mark chic ÁGUA ALCALINA 9,5 PH.

Following an opposition filed by Mr Ventura Vendrell, the Board of Appeal of the European Union Intellectual Property Office (EUIPO) refused to register the mark applied for, inter alia, for the following goods in Class 32: [100] 'Bottled drinking water; mineral water (non-medicated –); mineral water [beverages]'.

The opposition was based, inter alia, on the earlier EU word mark CHIC BARCELONA, registered for the following goods in Class 33: 'Alcoholic beverages (except beer); wine; sparkling wines; liqueurs; spirits [beverages]; brandy'. The Board of Appeal found that there was a low degree of similarity between the goods at issue and concluded that there was a likelihood of confusion between the marks at issue. [101]

The General Court annuls the decision of the Board of Appeal and holds that the goods in question are dissimilar.

Findings of the Court

As a preliminary point, the Court states that EUIPO may endorse an applicant's claim for annulment of a decision of a board of appeal without the action becoming devoid of purpose. EUIPO is not obliged to defend systematically every contested decision and, given the independence of the Boards of Appeal, it may not amend or withdraw their decisions or give instructions to that effect.

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[100] 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.

[101] 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 regards the comparison of the goods, the Court finds, first, that, due to the absence of alcohol in their composition, the bottled and mineral waters covered by the mark applied for differ in nature to all the goods covered by the earlier mark. In that regard, it points out that the effects in the consumption of alcohol are not found in the consumption of bottled water or mineral waters. Also, for a non-negligible part of the public of the European Union, alcohol consumption is likely to pose a genuine health problem.

Secondly, the purpose and method of use of the goods in question are different. Unlike bottled water and mineral waters, alcoholic beverages are not generally intended to quench thirst and do not correspond to a vital need.

Thirdly, the goods at issue are not complementary because the purchaser of one of the goods covered by the mark applied for is not obliged to purchase a product covered by the earlier mark and vice versa.

Fourthly, the goods at issue are not in competition with each other. Given the difference resulting from the presence or absence of alcohol, the average consumer would not regard them as interchangeable. Moreover, bottled water and mineral waters are, in general, significantly less expensive than alcoholic beverages. Since price can have a decisive influence on the question of product interchangeability, the goods in question are not, from that point of view, interchangeable.

Fifthly, as regards the distribution channels of the goods at issue, the fact that they can be sold in the same establishments does not mean that they must be regarded as similar.

Accordingly, the Court finds that the goods at issue are not similar to a low degree, but are dissimilar, and rules out any likelihood of confusion between the marks at issue.

3. INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, Front Polisario v Council, T-279/19

External relations – International agreements – Euro-Mediterranean Association Agreement EC-Morocco – Agreement in the form of an Exchange of Letters on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement – Decision approving the conclusion of the agreement– Action for annulment – Admissibility – Capacity to bring legal proceedings – Direct concern – Individual concern – Territorial scope – Competence – Interpretation of international law adopted by the Court – Principle of self-determination – Principle of the relative effect of treaties – Possibility of relying on them – Concept of consent – Implementation – Discretion – Limits – Maintenance of the effects of the contested decision

and

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, Front Polisario v Council, T-344/19 and T-356/19

External relations – International agreements – Euro-Mediterranean Association Agreement EC-Morocco – Sustainable Fisheries Partnership Agreement between the European Union and Morocco – Protocol on the implementation of the Partnership Agreement – Exchange of letters accompanying the Partnership Agreement – Conclusion decision – Regulation on the allocation of fishing opportunities between Member States – Action for annulment – Admissibility – Capacity to bring legal proceedings – Direct concern – Individual concern – Territorial scope – Competence – Interpretation of international law adopted by the Court – Principle of self-determination – Principle of the relative effect of treaties – Possibility of relying on them – Concept of consent – Implementation – Discretion – Limits – Maintenance of the effects of the contested decision

The present cases concern actions for annulment brought by the Front populaire pour la liberation de la Saguia el-Hamra et du Rio de oro (Front Polisario) ('the applicant') against two Council decisions approving the conclusion of agreements between the European Union and the Kingdom of Morocco. [102]

The agreements approved by the contested decisions ('the agreements at issue') are the result of negotiations conducted on behalf of the European Union with Morocco to amend previous agreements in the light of two judgments delivered by the Court of Justice. [103] Firstly, the negotiations concerned the conclusion of an agreement amending the protocols of the Euro-Mediterranean Association Agreement [104] on the arrangements applying to imports into the European Union of agricultural products originating in Morocco and the arrangements concerning the definition of originating products in order to extend to products originating in Western Sahara, which are subject to export controls by the customs authorities of the Kingdom of Morocco, the tariff preferences granted to products originating in Morocco and exported to the European Union. Second, the aim was to amend the fisheries agreement between the European Community and Morocco [105] and, in particular, to include the waters adjacent to the territory of Western Sahara within its scope.

By applications lodged in 2019, the applicant requested annulment of the contested decisions. Claiming to act 'on behalf of the Sahrawi people', the applicant argues, inter alia, that by approving the agreements at issue through the contested decisions without the consent of the people of Western Sahara, the Council infringed the European Union's obligations in the context of its relations with Morocco under EU and international law. According to the applicant, those agreements apply to Western Sahara, provide for the exploitation of its natural resources and encourage the policy of annexation of that territory by Morocco. In addition, the Sustainable Fisheries Partnership Agreement applies to the waters adjacent to that territory. In particular, the applicant claims that the agreements are in breach of the Court of Justice's judgments in *Council* v *Front Polisario* (C-104/16 P) and *Western Sahara Campaign UK* (C-266/16), which exclude such territorial scope.

By its judgments in Case T-279/19 and the Joined Cases T-344/19 and T-356/19, the General Court annuls the contested decisions but decides that the effects of those decisions be maintained over a certain period, [106] since annulling them with immediate effect could have serious consequences on the European Union's external action and call into doubt legal certainty in respect of the international commitments to which it has agreed. On the contrary, the Court dismisses as inadmissible the applicant's action in Case T-356/19 against the regulation on

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102 Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2019 L 34, p. 1), and Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019 L 77, p. 4); 'the contested decisions'.

103 Judgments of 21 December 2016, Council v Front Polisario (C-104/16 P) and of 27 February 2018, Western Sahara Campaign UK (C-266/16). In those judgments, the Court stated that the Association Agreement is applicable only to the territory of Morocco and not to Western Sahara, and that neither the Fisheries Agreement nor the Protocol thereto are applicable to the waters adjacent to the territory of Western Sahara.

104 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ L 70, 2000, p. 2).

105 Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ L 141, 2006, p. 4).

106 Namely, a period not exceeding the two-month period for lodging an appeal or the date of delivery of the judgment of the Court ruling on any such appeal.

the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement, due to a lack of direct concern. [107]

Findings of the Court

Admissibility of the actions

In the first place, the Court determines whether the applicant has the legal capacity to bring proceedings before the EU Courts. According to the Council and the interveners, the applicant does not possess legal personality under the national law of any Member State, is not a subject of international law and does not satisfy the criteria laid down by the Courts of the European Union to allow an entity deprived of legal personality to be recognised as having the capacity to bring proceedings before the courts. In their view, the applicant is therefore not a legal person within the meaning of the fourth paragraph of Article 263 TFEU.

Referring to its previous decisions, the Court states that they do not preclude an entity, irrespective of its legal personality under national law, from being recognised as having capacity to bring proceedings before the EU Courts, in particular where such recognition is necessary to meet the requirements of effective judicial protection, since a restrictive interpretation of the concept of legal person must be ruled out. In examining whether the applicant has legal personality under public international law, the Court finds that the applicant's role and representativeness are capable of conferring upon it *locus standi* before the EU Courts.

In that regard, the Court determines that the applicant is recognised internationally as a representative of the people of Western Sahara, even if that recognition is confined to the self-determination process of that territory. Furthermore, its participation in that process implies that it has the necessary autonomy and competencies to act within that context. Ultimately, effective judicial protection requires that the applicant be regarded as having the capacity to bring an action before the Court to defend the right of the people of Western Sahara to self-determination. The Court therefore concludes that the applicant is a legal person within the meaning of the fourth paragraph of Article 263 TFEU and rejects the Council's plea of inadmissibility.

In the second place, the Court examines the Council's plea of inadmissibility alleging that the applicant does not have a legal interest in bringing proceedings. As to whether the applicant is directly concerned by the contested decisions, the Court notes that a decision on the conclusion, on behalf of the European Union, of an international agreement forms an integral part of that agreement and that, accordingly, the effects of the implementation of that agreement on the legal position of a third party are relevant to the assessment of whether that third party is directly concerned by the decision at issue. In the present case, in order to defend the rights that the people of Western Sahara derive from the rules of international law which are binding on the European Union, the applicant must be able to rely on the effects of the agreements at issue on those rights to establish that it is directly concerned. The Court takes the view that, in so far as the agreements at issue apply expressly to Western Sahara and, as regards the decision concerning the Sustainable Fisheries Partnership Agreement, to the waters adjacent to that territory, they concern the people of that territory and require the consent of its people. Consequently, the Court concludes that the contested decisions directly concern the legal situation of the applicant as a representative of the people of Western Sahara and as one of the parties to the self-determination process of that territory. Finally, the Court notes that the implementation of the agreements at issue, as regards their territorial application, is purely automatic and leaves no degree of discretion to the addressees of those agreements.

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[107] Council Regulation (EU) 2019/440 of 29 November 2018 on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto (OJ 2019, L 77, p 1).

As to whether the applicant is individually concerned, the Court finds that, having regard to the circumstances which resulted in the conclusion that it was directly concerned, in particular its legal position as a representative of the people of Western Sahara and a party to the self-determination process of that territory, the applicant must be regarded as concerned by the contested decisions by reason of certain special characteristics that differentiate it in a way similar to that of an addressee of those decisions.

The merits of the actions

As regards substance and, more specifically, the question of whether the Council has infringed the obligation to comply with the case-law of the Court of Justice concerning the rules of international law applicable to the agreements at issue, the General Court finds that, in the judgment in *Council* v *Front Polisario*, the Court of Justice inferred from the principle of self-determination and the principle of the relative effect of treaties clear, precise and unconditional obligations towards Western Sahara in the context of its relations with Morocco, namely both to respect its separate and distinct status and to secure the consent of its people in the event of the implementation of the Association Agreement in that territory. Therefore, the applicant must be able to invoke the violation of those obligations against the contested decisions in so far as that violation may concern the people of Western Sahara, as a third party to the agreement concluded between the European Union and Morocco. In that respect, the Court rejects the argument put forward by the applicant that it would be impossible for the European Union and Morocco to conclude an agreement which applies to Western Sahara, since that possibility is not precluded by international law as interpreted by the Court.

On the contrary, the Court upholds the applicant's argument that the requirement relating to the consent of the people of Western Sahara, as a third party to the agreements at issue, for the purposes of the principle of the relative effect of treaties, has not been respected.

In that regard, the Court considers that the rule of international law, according to which the consent of a third party to an international agreement may be presumed where the parties to that agreement intended to confer rights on it, is not applicable in the present case, since the agreements at issue are not intended to confer rights on the people of Western Sahara, but to impose obligations on them.

Moreover, the Court notes that, where a rule of international law requires the consent of a party or a third party, the expression of that consent is a precondition for the validity of the act for which it is required, the validity of that consent itself depends on its being free and genuine, and the act must be enforceable against the party or third party having validly consented to it. However, the steps taken by the EU authorities before the conclusion of the agreements at issue cannot be regarded as having secured the consent of the people of Western Sahara to those agreements in accordance with the principle of the relative effect of treaties, as interpreted by the Court of Justice. The General Court states, in that regard, that the institutions' discretion in external relations did not allow them, in this case, to decide whether they could meet that requirement.

In particular, the Court finds, first, that in view of the legal definitions of 'people' and 'consent' in international law, the 'consultations' conducted by the institutions with the 'people concerned' did not amount to an expression of the consent of the people of Western Sahara. That approach made it possible, at most, to obtain the opinion of the parties concerned, although that opinion did not determine the validity of the agreements at issue or bind those parties in such a way that those agreements could be enforced against them. Next, the Court considers that the various factors relating to the specific situation in Western Sahara, relied on by the Council, do not show that it would be impossible, in practice, to secure the consent of the people of Western Sahara to the agreements at issue, as a third party to those agreements. Lastly, the Court notes that the institutions cannot validly rely on the letter of 29 January 2002 from the UN Legal Counsel to substitute the criterion of the benefits of the agreements at issue for the populations concerned for the requirement of the expression of such consent. The Court concludes that the Council did not sufficiently take into account all the relevant factors relating to the situation in Western Sahara and wrongly considered that it had a degree of discretion in deciding whether to comply with that requirement.

4. COMMON FOREIGN AND SECURITY POLICY

Judgment of the General Court (Fourth Chamber) of 22 September 2021, Al-Imam v Council, T-203/20

Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds – Rights of the defence – Right to effective judicial protection – Error of assessment – Proportionality – Right to property – Damage to reputation

The applicant, Mr Maher Al-Imam, is a Syrian businessperson with financial interests in tourism, telecommunications and real estate.

His name was included in 2020 on the lists of persons and bodies covered by the restrictive measures imposed against the Syrian Arab Republic by the Council, [108] and was then maintained on those lists, [109] on the grounds that he was a leading businessperson operating in Syria, that he was benefiting from the Syrian regime and that he was supporting its financing and construction policies, as the chief executive officer of the regime-backed Telsa Group LLC and Castro LLC, and because of his other financial interests. Those grounds were based on the one hand on the criterion of classification as a leading businessperson operating in Syria, laid down in Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255, [110] as amended by Decision 2015/1836, and Article 15(1a)(a) of Regulation No 36/2012, [111] as amended by Regulation 2015/1828, and, on the other hand, on the criterion of classification as a person associated with the Syrian regime laid down in Article 27(1) and Article 28(1) of that decision and in Article 15(1)(a) of that regulation.

The Court rejects the action brought by the applicant in relation to the requests for both annulment of the contested measures and compensation of the loss allegedly suffered as a result of those measures, having examined in particular whether, on the basis of the right to be heard, the time limit for submission to the Council of applications for review of the restrictive measures potentially submitted by the persons included on those lists is reasonable.

Findings of the Court

First, with regard to whether the applicant's right to be heard has been infringed because of the short time limit for lodging an application for review, the Court notes that this time limit was eight working days from the day of publication in *the Official Journal of the European Union* of the notice for persons and bodies covered by the measures in question until the final date indicated in that notice for the submission of that application. It should be noted that Council Regulation No 36/2012 does not set a time limit for the submission of an application for review or for observations.

In this case, the Court notes that compliance with a reasonable time requirement in the conduct of administrative procedures constitutes a general principle of EU law and observance of that principle is

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[108] Council Implementing Decision (CFSP) 2020/212 of 17 February 2020 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 431, p. 6) and Council Implementing Regulation (EU) 2020/211 of 17 February 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 431, p. 1).

[109] Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1).

[110] Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria (OJ 2013 L 147, p. 14), as amended by Council Decision (CFSP) 2015/1836 of 12 October 2015 (OJ 2015 L 266, p. 75).

[111] Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1), as amended by Council Regulation (EU) 2015/1828 of 12 October 2015 (OJ 2015 L 266, p. 1).

ensured by the EU Courts and is laid down as a component of the right to good administration in Article 41(1) of the Charter of Fundamental Rights of the European Union. The case-law also suggests that where the duration of a procedure is not set by a provision of EU law, the 'reasonableness' of the period of time is to be appraised in the light of all of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the parties.

In this case, the Court finds that setting a final date for the submission of applications for review is a legitimate means for the Council to ensure that it receives the observations and evidence submitted by the persons and bodies concerned before the end of the review phase and has sufficient time to examine those elements with the necessary diligence. It considers that the time limit of 12 days resulting from the final date set was, admittedly, a short period, in that it would require the applicant to determine the content of the notice and the grounds to be relied on and to draft observations that could be accompanied by evidence. However, the Court notes that, first, there are no formal requirements laid down for the submission of an application for review and, second, the lodging of an application for review establishes a dialogue between the Council and the person or body concerned that is not subject to any limitations in terms of time frame or the number of letters exchanged. There is, therefore, nothing to prevent an application for review containing summary observations being lodged within the mandated time limit and then being supplemented, where applicable, with additional observations or evidence as part of a subsequent process of exchange with the Council. The Court therefore holds that the time limit of 12 days provided by the Council in the notice published in the Official Journal on 18 February 2020 for the submission of applications for review does not constitute grounds for considering that the applicant's right to be heard has been infringed.

In any event, in so far as the applicant is able, in accordance with Article 32(3) of Regulation No 36/2012, to submit an application or relevant observations at any time, the Court emphasises that the final date set by the Council in the notice published in the Official Journal was merely indicative. Such an indication is useful in order to allow the persons and bodies concerned to submit their applications for review before the Council's internal review phase is completed and before new instruments are adopted by the Council.

Second, with respect to the arguments asserted by the applicant whereby, first, potential observations submitted are not analysed immediately and, second, the Council decides to examine the lists in question only once a year, the Court notes that the applicant can submit observations at any time to which the Council will provide a response without waiting for the annual review phase. It should also be noted, on the basis of Article 34 of Decision 2013/255, as amended by Decision 2015/1836, that this decision is constantly monitored, such that it can be extended, or amended if applicable, if the Council believes that its objectives are not being achieved.

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 14 October 2021, Landespolizeidirektion Steiermark and Others (Machines à sous), Case C-231/20, ECLI:EU:C:2021:845
- 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 29 September 2021, Nec v Commission, Case T-341/18
- Judgment of 29 September 2021, Nichicon Corporation v Commission, Case T-342/18
- 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
- Judgment of 29 September 2021, Nippon Chemi-Con Corporation v Commission, Case T-363/18, ECLI:EU:T:2021:638
- Judgment of 6 October 2021, Covestro Deutschland v Commission, Case T-745/18, ECLI:EU:T:2021:644
- Judgment of 6 October 2021, Tempus Energy Germany and T Energy Sweden v Commission, Case T-167/19, ECLI:EU:T:2021:645
- Judgment of 6 October 2021, Daw v EUIPO (Muresko), Case T-32/21, ECLI:EU:T:2021:643
- Judgment of 20 October 2021, JMS Sports v EUIPO – Inter-Vion (Élastique pour cheveux en spirale), Case T-823/19, ECLI:EU:T:2021:718
- Order of 25 October 2021, 4B Company v EUIPO - Deenz [Pendentif (bijou)], Case T-329/20, ECLI:EU:T:2021:732