COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
January 2022

I. CITIZENSHIP OF THE UNION: LOSS OF CITIZENSHIP OF THE UNION ON ACCOUNT OF LOSS OF NATIONALITY OF A MEMBER STATE

Judgment of the Court (Grand Chamber) of 18 January 2022, Wiener Landesregierung (Révocation d'une assurance de naturalisation), C-118/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Articles 20 and 21 TFEU – Scope – Renunciation of the nationality of one Member State in order to obtain the nationality of another Member State in accordance with the assurance given by the latter to naturalise the person concerned – Revocation of that assurance on grounds of public policy or public security – Principle of proportionality – Statelessness

In 2008 JY, who was then an Estonian national residing in Austria, applied for Austrian nationality. By decision of 11 March 2014, the then competent Austrian administrative authority [1] assured her that she would be granted that nationality if she could prove, within two years, that she had relinquished her Estonian nationality. JY provided confirmation within the prescribed period that she had relinquished her Estonian nationality on 27 August 2015. JY has been stateless since.

By decision of 6 July 2017, the Austrian administrative authority which had become competent [2] revoked the decision of 11 March 2014, in accordance with national law, and rejected JY's application for Austrian nationality. In order to justify its decision, that authority stated that JY no longer satisfied the conditions for grant of nationality laid down by national law. JY had committed, since receiving the assurance that she would be granted Austrian nationality, two serious administrative offences, namely failing to display a vehicle inspection disc and driving while under the influence of alcohol. She had also committed eight administrative offences before that assurance was given to her.

Following the dismissal of her action against that decision, JY lodged an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). That court states that, in view of the administrative offences committed by JY before and after she was given assurance as to the grant of Austrian nationality, the conditions for revocation of that assurance were fulfilled under Austrian law. It asks, however, whether JY's situation falls within EU law and whether, in order to adopt its decision revoking the assurance given as to naturalisation, which prevents JY from recovering her citizenship of the Union, the competent administrative authority was required to have due regard to EU law, in particular the principle of proportionality enshrined in EU law, given the consequences of such a decision for the situation of the person concerned.

In those circumstances, the referring court decided to seek a ruling from the Court of Justice on the interpretation of EU law. In its Grand Chamber judgment, the Court interprets Article 20 TFEU in the context of its case-law [3] concerning the obligations of Member States with regard to the acquisition and loss of nationality under EU law.

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1 The Niederösterreichische Landesregierung (Government of the Province of Lower Austria, Austria).

2 The Wiener Landesregierung (Government of the Province of Vienna, Austria).

3 Arising from the judgments of 2 March 2010, *Rottmann* (C-135/08, EU:C:2010:104), and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189).

Findings of the Court

In the first place, the Court rules that the situation of a person who, having the nationality of one Member State only, renounces that nationality and loses, as a result, his or her status of citizen of the Union with a view to obtaining the nationality of another Member State, following the assurance given by the authorities of the latter Member State that she or he will be granted that nationality, falls, by reason of its nature and its consequences, within the scope of EU law where that assurance is revoked with the effect of preventing that person from recovering the status of citizen of the Union.

In that regard, the Court finds, first, that, when that assurance was revoked, JY was stateless and had lost her status of citizen of the Union. Since the application for dissolution of the bond of nationality with her Member State of origin was made in the context of a naturalisation procedure seeking to obtain Austrian nationality and was a consequence of the fact that JY, taking into account the assurance given to her, complied with the requirements of that procedure, a person such as JY cannot be considered to have renounced voluntarily the status of citizen of the Union. On the contrary, having received from the host Member State the assurance that the nationality of the latter would be granted, the application for dissolution is to intended to fulfil a condition for the acquisition of that nationality and, once obtained, to continue to enjoy the status of citizen of the Union and the rights attaching thereto.

Next, where, in the context of a naturalisation procedure, the competent authorities of the host Member State revoke the assurance as to naturalisation, the person concerned who was a national of one other Member State only and renounced his or her original nationality in order to comply with the requirements of that procedure is in a situation in which it is impossible for that person to continue to assert the rights arising from the status of citizen of the Union. Such a procedure, taken as a whole, affects the status conferred by Article 20 TFEU on nationals of the Member States. It may result in a person in JY's situation being deprived of the rights attaching to that status, although, at the start of that procedure, that person was a national of a Member State and thus had the status of citizen of the Union.

Finally, noting that JY, as an Estonian national, has exercised her freedom of movement and residence by settling in Austria, where she has been living for several years, the Court points out that the underlying logic of gradual integration in the society of the host Member State that informs Article 21(1) TFEU requires that the situation of citizens of the Union, who acquired rights under that provision as a result of having exercised their right to free movement within the European Union and are liable to lose not only their entitlement to those rights but also the very status of citizen of the Union, even though they have sought, by becoming naturalised in the host Member State, to become more deeply integrated in the society of that Member State, falls within the scope of the FEU Treaty provisions relating to citizenship of the Union.

In the second place, the Court interprets Article 20 TFEU as meaning that the competent national authorities and the national courts of the host Member State are required to ascertain whether the decision to revoke, which makes the loss of the status of citizen of the Union permanent for the person concerned, is compatible with the principle of proportionality in the light of the consequences it entails for that person's situation. That requirement of compatibility with the principle of proportionality is not satisfied where such a decision is based on administrative traffic offences which, under the applicable provisions of national law, give rise to a mere pecuniary penalty.

In order to reach that conclusion, the Court states that, where, in the context of a naturalisation procedure initiated in a Member State, that State requires a citizen of the Union to renounce the nationality of his or her Member State of origin, the exercise and effectiveness of the rights which that citizen of the Union derives from Article 20 TFEU require that that person should not at any time be liable to lose the fundamental status of citizen of the Union by the mere fact of the implementation of that procedure. Any loss, even temporary, of that status means that the person concerned is deprived, for an indefinite period, of the opportunity to enjoy all the rights conferred by that status.

It follows that, where a national of a Member State applies to relinquish his or her nationality in order to be able to obtain the nationality of another Member State and thus continue to enjoy the status of citizen of the Union, the Member State of origin should not adopt, on the basis of an assurance given by that other Member State that the person concerned will be granted the nationality of that State, a

final decision concerning the deprivation of nationality without ensuring that that decision enters into force only once the new nationality has actually been acquired.

That said, in a situation where the status of citizen of the Union has already been temporarily lost because, in the context of a naturalisation procedure, the Member State of origin withdraws the nationality of the person concerned before that person has actually acquired the nationality of the host Member State, the obligation to ensure the effectiveness of Article 20 TFEU falls primarily on the latter Member State. That obligation arises, in particular, in respect of a decision to revoke the assurance as to naturalisation which may make the loss of the status of citizen of the Union permanent. Such a decision can therefore be made only on legitimate grounds and subject to the principle of proportionality.

Under the examination of proportionality it is necessary to establish, in particular, whether that decision is justified in relation to the gravity of the offences committed by the person concerned. As regards JY, since the offences committed prior to the assurance as to naturalisation did not preclude that assurance being given, they can no longer be taken into account as a basis for the decision to revoke that assurance. As for those committed after receiving the assurance as to naturalisation, in view of their nature and gravity as well as the requirement that the concepts of public policy and public security be interpreted strictly, they do not show that JY represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security in Austria. Traffic offences, punishable by mere administrative fines, cannot be regarded as capable of demonstrating that the person responsible for those offences is a threat to public policy and public security which may justify the permanent loss of his or her status of citizen of the Union.

II. EU LAW AND NATIONAL LAW

Judgment of the Court (Grand Chamber) of 18 January 2022, Thelen Technopark Berlin, C-261/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Freedom to provide services – Article 49 TFEU – Directive 2006/123/EC – Article 15 – Architects' and engineers' fees – Fixed minimum tariffs – Direct effect – Judgment establishing a failure to fulfil obligations delivered during proceedings before a national court or tribunal

In 2016, Thelen, a real estate company, and MN, an engineer, concluded a service contract pursuant to which MN undertook to perform certain services covered by the Verordnung über die Honorare für Architekten- und Ingenieurleistungen (Honorarordnung für Architekten und Ingenieure – HOAI) (German decree of 10 July 2013 on fees for services provided by architects and engineers ; 'the HOAI') in return for payment of a flat-rate fee, the amount of which was EUR 55 025.

One year later, MN terminated that contract and invoiced Thelen for the services performed by way of a final fee invoice. Relying on a provision of the HOAI [4] providing that, for the services which he or she has provided, the service provider is entitled to remuneration at least equal to the minimum rate set by national law, and taking into account the payments already made, MN brought an action before a

[4] Paragraph 7 of that decree makes the minimum rates set in the scale laid down in that paragraph mandatory for planning and supervision services provided by architects and engineers, except in some exceptional cases, and renders invalid any agreement concluded with architects or engineers setting fees lower than the minimum rates.

court in order to claim payment of the remaining amount due – EUR 102 934.59 – that is to say, a sum greater than that agreed by the parties to the contract.

Thelen, having been partly unsuccessful at first and second instance, has brought an appeal on a point of law (*Revision*) before the Bundesgerichtshof (Federal Court of Justice, Germany), which is the referring court in the present case. In its reference for a preliminary ruling, that court recalls that the Court of Justice has previously held [5] that that provision of the HOAI is incompatible with the provision of Directive 2006/123 [6] prohibiting, in essence, the Member States from maintaining requirements which make the exercise of a service activity subject to compliance by the provider with fixed minimum and/or maximum tariffs if those requirements do not satisfy the cumulative conditions of non-discrimination, necessity and proportionality. That court has thus decided to put questions to the Court concerning the issue of whether, when assessing the merits of the action brought by a private individual against another private individual, a national court must disapply the provision of national law on which the application is based where that provision is contrary to a directive, in the present case the Services Directive. In that regard, that court notes that an interpretation of the HOAI in conformity with the Services Directive is not possible in the present case.

Findings of the Court

By its judgment, the Court, sitting as the Grand Chamber, rules that a national court, when hearing a dispute which is exclusively between private individuals, is not required, solely on the basis of EU law, to disapply a piece of national legislation which, in breach of Article 15(1), (2)(g) and (3) of the Services Directive, sets minimum rates for fees for services provided by architects and engineers and which renders invalid agreements derogating from that legislation.

It is true that the principle of the primacy of EU law requires all Member State bodies to give full effect to the various EU provisions. In addition, where the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is unable to interpret national legislation in conformity with EU law, that same principle requires that national court to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means.

However, a national court is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to a provision of EU law if the latter provision does not have direct effect. This is, however, without prejudice to the possibility, for that court, or for any competent national administrative authority, to disapply, on the basis of domestic law, any provision of national law which is contrary to a provision of EU law that does not have such effect.

In the present case, the Court recalled that, according to its own case-law, Article 15(1) of the Services Directive is capable of having direct effect, given that that provision is sufficiently precise, clear and unconditional. However, that provision is being relied on, in the present case, as such in a dispute between private individuals for the purpose of disapplying a piece of national legislation which is contrary to that provision. Specifically, in the dispute in the main proceedings, the application of Article 15(1) of the Services Directive would deprive MN of his right to claim rates for fees corresponding to the minimum rates laid down by the national legislation in question. However, the case-law of the Court excludes that provision from being recognised as having such effect in such a dispute between private individuals.

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5 Judgment of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562), and order of 6 February 2020, *hapeg dresden* (C-137/18, not published, EU:C:2020:84).

6 The provision in question is Article 15(1), (2)(g) and (3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36 ; 'the Services Directive'). More specifically, under that provision, the Member States must examine whether their legal system makes the exercise of a service activity subject to compliance by the provider with fixed minimum and/or maximum tariffs and must ensure that any such requirements are compatible with the conditions of non-discrimination, necessity and proportionality.

The Court adds that, under Article 260(1) TFEU, if the Court finds that a Member State has failed to fulfil an obligation, that Member State is required to take the necessary measures to comply with the judgment of the Court, with the competent national courts and administrative authorities being required, for their part, to take all appropriate measures to enable EU law to be fully applied, disapplying, if the circumstances so require, a provision of national law which is contrary to EU law. However, the purpose of judgments finding that there has been such a failure to fulfil obligations is, first and foremost, to lay down the duties of the Member States when they fail to fulfil their obligations, and not to confer rights on individuals. Thus, those courts or authorities are not required, solely on the basis of such judgments, to disapply in a dispute between private individuals a piece of national legislation which is contrary to a provision of a directive.

By contrast, a party which has been harmed as a result of national law not being in conformity with EU law could rely on the case-law of the Court in order to obtain, if appropriate, compensation for loss or damage caused by that law not being in conformity with EU law. According to that case-law, it is for each Member State to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with EU law.

The Court emphasises in that regard that, having previously held that the national legislation at issue in the main proceedings is not compatible with EU law, and that maintaining that legislation thus constitutes a failure to fulfil obligations on the part of the Federal Republic of Germany, that breach of EU law must be regarded as sufficiently serious for the purposes of its case-law relating to the incurring of the non-contractual liability of a Member State for breach of EU law.

III. COMPETITION

1. ARTICLE 102 TFEU

Judgment of the General Court (Seventh Chamber, Extended Composition) of 19 January 2022, Deutsche Telekom v Commission, T-610/19

Action for annulment and for damages – Competition – Abuse of dominant position – Slovak market for broadband telecommunications services – Decision finding an infringement of Article 102 TFEU and of Article 54 of the EEA Agreement – Judgment annulling the decision in part and reducing the amount of the fine imposed – Refusal of the Commission to pay default interest – Article 266 TFEU – Article 90(4)(a) of Delegated Regulation (EU) Nº 1268/2012 – Sufficiently serious breach of a rule of law conferring rights on individuals – Loss of use of the amount of the fine that had been unduly paid – Loss of profits – Default interest – Rate – Harm

By decision of 15 October 2014, [7] the European Commission imposed on Deutsche Telekom AG ('Deutsche Telekom') a fine of EUR 31 070 000 for abuse of its dominant position on the Slovak market for broadband telecommunications services, in infringement of Article 102 TFEU and Article 54 of the EEA Agreement.

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7 Decision C(2014) 7465 final relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39523 – Slovak Telekom), rectified by Commission Decision C(2014) 10119 final of 16 December 2014, and also by Commission Decision C(2015) 2484 final of 17 April 2015.

Deutsche Telekom brought an action for annulment of that decision but paid the fine on 16 January 2015. By its judgment of 13 December 2018, [8] the General Court upheld Deutsche Telekom's action in part and, exercising its unlimited jurisdiction, reduced the amount of the fine by EUR 12 039 019. On 19 February 2019, the Commission repaid that amount to Deutsche Telekom.

However, by letter of 28 June 2019 ('the contested decision'), the Commission refused to pay default interest to Deutsche Telekom for the period between the date of payment of the fine and the date of reimbursement of the portion of the fine held not to be due ('the period in question').

Deutsche Telecom accordingly brought an action before the Court seeking annulment of the contested decision and an order directing the Commission to pay compensation for lost revenue as a result of the loss of use, during the period in question, of the principal amount of the portion of the fine unduly paid or, in the alternative, compensation for the harm suffered as a result of the Commission's refusal to pay default interest on that amount.

By its judgment, the Seventh Chamber, Extended Composition, of the General Court upholds in part Deutsche Telekom's action for annulment and compensation. In that respect, it provides clarifications with regard to the Commission's obligation to pay default interest on the portion of a fine which, following a judgment of the EU Courts, must be reimbursed to the undertaking concerned.

Findings of the General Court

In the first place, the Court rejects Deutsche Telekom's claim for compensation, on the basis of the non-contractual liability of the European Union, for the alleged loss of revenue which it claims resulted from the loss of use, during the period in question, of the portion of the fine that had been unduly paid and which corresponds to the annual return on its invested capital or to the weighted average cost of its capital.

In that regard, the Court notes that, in order for the European Union to incur non-contractual liability, a number of cumulative conditions must be satisfied: there must be a sufficiently serious breach of a rule of law conferring rights on individuals ; the damage must actually have occurred ; and there must be a causal link between the breach and the harm suffered, these being matters which the applicant must prove.

In the present case, however, Deutsche Telekom failed to adduce conclusive proof of the actual and certain nature of the harm alleged. More specifically, Deutsche Telekom demonstrated neither that it would necessarily have invested the amount of the fine that had been unduly paid in its business nor that the loss of the use of that amount led it to abandon specific and actual projects. Deutsche Telekom had also failed in this context to demonstrate that it did not have the necessary funds to take advantage of an investment opportunity.

In the second place, the Court addresses Deutsche Telekom's claim, put forward in the alternative, for compensation for infringement of Article 266 TFEU, the first paragraph of which provides for the obligation on institutions whose act has been declared void by a judgment of the EU Courts to take all necessary measures to comply with that judgment.

The Court notes, first, that, by imposing on the institutions the obligation to take all necessary measures to comply with the judgments of the EU Courts, the first paragraph of Article 266 TFEU confers rights on the individuals who have been successful in their actions before those Courts. Second, the Court notes that default interest represents an essential component of the obligation on the institutions under that provision to restore an applicant to his, her or its original position. It therefore follows from that provision that, in the event of cancellation and reduction of a fine imposed on an undertaking for infringement of competition rules, there is an obligation on the Commission to repay the amount of the fine unduly paid together with default interest.

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8 Judgment of 13 December 2018, *Deutsche Telekom* v *Commission* (T-827/14, EU:T:2018:930).

The Court clarifies that, since the applicable financial legislation [9] gives companies which have provisionally paid a fine that is later cancelled and reduced a right to claim restitution, and since the cancellation and reduction of the amount of the fine made by the EU Courts have retroactive effect, Deutsche Telekom's claim existed and was certain as to its maximum amount at the date of the provisional payment of the fine. The Commission was therefore required, under the first paragraph of Article 266 TFEU, to pay default interest on the portion of the fine held not to be due by the Court, for the entire period in question. That obligation is designed to provide compensation at a standard rate for the loss of use of the monies owed in connection with an objective delay and to encourage the Commission to exercise particular care when adopting a decision involving the payment of a fine.

The Court adds that, contrary to what the Commission has submitted, the obligation to pay default interest does not conflict with the deterrent function of fines in competition cases, since that deterrent function is necessarily taken into account by the EU Courts when exercising their unlimited jurisdiction to reduce, with retroactive effect, the amount of a fine. Moreover, the deterrent function of fines must be reconciled with the principle of effective judicial protection set out in Article 47 of the Charter of Fundamental Rights of the European Union, compliance with which is ensured by means of judicial review as provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine.

The Court also rejects the other arguments put forward by the Commission.

First, even if the amount of the fine paid by the applicant did not yield interest while it was in the Commission's possession, the Commission was required, following the judgment of the Court of 13 December 2018, to reimburse to the applicant the portion of the fine held to have been unduly paid, together with default interest, without this being precluded by Article 90 of Delegated Regulation N° 1268/2012, which deals with the recovery of fines. In addition, the obligation to pay default interest follows directly from the first paragraph of Article 266 TFEU and the Commission is not entitled to determine, by way of an individual decision, the conditions under which it will pay default interest in the event of annulment of a decision imposing a fine and a reduction in the amount of that fine.

Second, the interest due in the present case is default interest, not compensatory interest. Deutsche Telekom's principal claim was a claim for restitution, relating to the payment of a fine that had been made provisionally. That claim existed and was certain as to its maximum amount or at least could be determined on the basis of established objective factors at the date of that payment.

Since the Commission was required to repay to Deutsche Telekom the portion of the fine that had been unduly paid, together with default interest, and since the Commission had no discretion in that regard, the Court concludes that the refusal to pay that interest to Deutsche Telekom constitutes a serious breach of the first paragraph of Article 266 TFEU, which results in the European Union incurring non-contractual liability. Given the direct link between the infringement that occurred and the harm consisting in the loss, during the period in question, of default interest on the portion of the fine that had been unduly paid, the Court awards Deutsche Telekom compensation in the amount of EUR 1 750 522.38, calculated by application, by analogy, of the rate provided for in Article 83(2)(b) of Delegated Regulation N° 1268/2012, namely the rate applied by the European Central Bank in January 2015 to its principal refinancing operations, that being 0.05 %, increased by three and a half percentage points.

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9 Commission Delegated Regulation (EU) N° 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) N° 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1) and Regulation (EU, Euratom) N° 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) N° 1605/2002 (OJ 2012 L 298, p. 1).

Judgment of the General Court (Fourth Chamber, Extended Composition) of 26 January 2022, Intel Corporation v Commission, T-286/09 RENV

Link to the complete text of the judgment

Competition – Abuse of dominant position – Microprocessors market – Decision finding an infringement of Article 102 TFEU and of Article 54 of the EEA Agreement – Loyalty rebates – 'Naked' restrictions – Characterisation as abuse – As-efficient-competitor analysis – Overall strategy – Single and continuous infringement

By decision of 13 May 2009, [10] the European Commission imposed on the microprocessor manufacturer Intel a fine of € 1.06 billion for having abused its dominant position on the worldwide market for x86 [11] processors [12] between October 2002 and December 2007, by implementing a strategy intended to exclude competitors from the market.

According to the Commission, that abuse was characterised by two types of commercial conduct engaged in by Intel vis-a-vis its trading partners, namely naked restrictions and conditional rebates. As regards conditional rebates more specifically, Intel was found to have granted to four strategic original equipment manufacturers ('OEMs') (Dell, Lenovo, Hewlett-Packard (HP) and NEC), rebates which were conditional on those OEMs purchasing all or almost all of their x86 central processing units (CPUs) from Intel. Similarly, Intel was found to have awarded payments to a European retailer of microelectronic devices (Media-Saturn-Holding ; 'MSH') which were conditional on MSH selling exclusively computers containing Intel's x86 CPUs. Those rebates and payments ('the rebates at issue') ensured the loyalty of the four OEMs and MSH and thereby significantly diminished the ability of competitors to compete on the merits of their own x86 processors. According to the Commission, Intel's anticompetitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

The action brought by Intel against that decision was dismissed in its entirety by the General Court by judgment of 12 June 2014. [13] By judgment of 6 September 2017, on the appeal brought by Intel, the Court of Justice set aside that judgment and referred the case back to the General Court. [14]

In support of its claim for annulment of the initial judgment, Intel criticised the General Court in particular for having erred in law on account of the failure to examine the rebates at issue in the light of all the relevant circumstances. In that regard, the Court of Justice noted that the General Court, like the Commission, had relied on the assumption that the fidelity rebates granted by an undertaking in a dominant position were by their very nature capable of restricting competition, with the result that it was not necessary to analyse all the circumstances of the case or to carry out an as-efficient-competitor ('AEC') test. [15] Nevertheless, the Commission did carry out, in its decision, an in-depth

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10 Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 – Intel).

11 Microprocessors used in computers can be subdivided into two categories, namely x86 processors and processors based on another architecture. The x86 architecture is a standard designed by Intel which can run both Windows and Linux operating systems.

12 The processor is a key component of any computer, both in terms of overall performance and cost of the system.

13 Judgment of the General Court of 12 June 2014, Intel v Commission, T-286/09 (see also Press Release Nº 82/14).

14 Judgment of the Court of Justice of 6 September 2017, Intel v Commission, C-413/14 P (see also Press Release Nº 90/17) ('the judgment on the appeal').

15 The economic analysis carried out in this test concerns, in the present case, the capability of the rebates to foreclose a competitor which is as efficient as Intel, albeit not dominant. More precisely, the analysis seeks to establish at what price a competitor as efficient as Intel and facing the same costs as Intel would have had to offer processors in order to compensate an OEM or retailer of microelectronic devices for the loss of the rebates at issue, in order to determine whether, in such a situation, that competitor can still cover its costs.

examination of those circumstances, which led it to conclude that an as-efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor. The Court of Justice concluded that the AEC test had played an important role in the Commission's assessment of whether the scheme at issue was capable of having foreclosure effects on competitors, with the result that the General Court was required to examine all of Intel's arguments concerning that test and how the Commission had applied it. Since the General Court had failed to conduct such an examination, the Court of Justice set aside the initial judgment and referred the case back to the General Court in order for it to examine, in the light of the arguments put forward by Intel, the capability of the rebates at issue to restrict competition.

By its judgment of 26 January 2022, the General Court, giving a ruling on the referral back, sets aside in part the contested decision in so far as it characterises the rebates at issue as abusive within the meaning of Article 102 TFEU and imposes a fine on Intel in respect of all of its actions characterised as abusive.

Findings of the General Court

As a preliminary point, the General Court provides clarification regarding the scope of the dispute following the referral back. In that regard, it observes that the setting aside of the initial judgment was justified only by one single error resulting from the failure to take into consideration, in the initial judgment, Intel's line of argument seeking to challenge the Commission's AEC analysis. Accordingly, the General Court takes the view that it can accept, for the purposes of its examination, all the findings not vitiated by the error thus found by the Court of Justice, in the present case being the findings in the initial judgment concerning the naked restrictions and their unlawfulness under Article 102 TFEU. According to the General Court, the Court of Justice did not invalidate, even in principle, the distinctions established in the contested decision between practices constituting such restrictions and Intel's other actions which alone are the subject of the AEC analysis in question. Second, the General Court accepted the findings in the initial judgment according to which the Commission had established the existence of the rebates at issue in the contested decision.

Having provided that clarification, the General Court then commences, in the first place, the examination of the forms of order seeking the annulment of the contested decision by setting out the method defined by the Court of Justice for assessing whether a system of rebates has the capacity to restrict competition. In that respect, it recalls that, although a system of rebates set up by an undertaking in a dominant position on the market may be characterised as a restriction of competition, since, given its nature, it may be assumed to have restrictive effects on competition, what is involved, in the present case, is a mere presumption, which cannot relieve the Commission, in any event, of the obligation to conduct an analysis of anticompetitive effects. Accordingly, where an undertaking in a dominant position submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, was not capable of producing the foreclosure effects alleged against it, the Commission must analyse the foreclosure capacity of the scheme of rebates. In the context of that analysis, it is for the Commission not only to analyse, first, the extent of the undertaking's dominant position on the relevant market, and, second, the share of the market covered by the contested practice, together with the conditions and arrangements for granting the rebates in question, their duration and their amount, but also to assess the possible existence of a strategy intended to exclude at least as-efficient competitors. In addition, where the Commission has carried out an AEC test, that test is one of the factors which must be taken into account by the Commission in order to assess whether the rebate scheme is capable of restricting competition.

In the second place, the General Court reviews, first of all, whether the Commission's assessment of the capability of the rebates at issue to restrict competition relies on the method thereby defined. In that regard, it finds at the outset that the Commission erred in law in the contested decision in concluding that the AEC test, which it nevertheless carried out, was not necessary to enable it to establish that Intel's rebates at issue were abusive. That being the case, the General Court takes the view that it cannot agree with that finding. Since the judgment on the appeal states that the AEC test played an important role in the Commission's assessment as to whether the rebate scheme at issue was capable of having foreclosure effects, the General Court was required to examine Intel's arguments concerning that test.

In the third place, given that the analysis of the capacity of the rebates at issue to restrict competition forms part of demonstrating the existence of an infringement of competition law, in the present case an abuse of a dominant position, the General Court sets out the rules concerning the apportionment of the burden of proof and the standard of proof required. Accordingly, the principle of the presumption of innocence, which also applies in that field, requires the Commission to establish the existence of such an infringement, where necessary by means of a precise and consistent body of evidence, so as to leave no residual doubt in that regard. Where the Commission maintains that the established facts can be explained only by anticompetitive behaviour, it must be found that the infringement at issue has not been sufficiently demonstrated if the undertakings concerned put forward a separate plausible explanation of the facts. However, where the Commission relies on evidence which is, in principle, capable of demonstrating the existence of an infringement, it is for the undertakings concerned to demonstrate that the probative value of that evidence is insufficient.

In the fourth place, it is in the light of those rules that the General Court examines the arguments regarding the errors allegedly made by the Commission in its AEC analysis. In that regard, the General Court finds that the Commission has not established to the requisite legal standard the capacity of each of the rebates at issue to have a foreclosure effect, in the light of the arguments put forward by Intel regarding the Commission's assessment of the relevant analysis criteria.

Indeed, first, as regards the application of the AEC test to Dell, the General Court takes the view that, in the circumstances of the present case, the Commission could, admittedly, reasonably rely, for the purposes of assessing the 'contestable share', [16] on data known to economic operators other than the dominant undertakings. However, having examined the evidence put forward by Intel in that regard, the General Court concluded that that evidence is capable of giving rise to doubt in the mind of the Court as to the result of that assessment, finding, therefore, the evidence relied on by the Commission to conclude that the rebates granted to Dell were capable of having a foreclosure effect throughout the whole of the relevant period to be insufficient. Second, the same applies, according to the General Court, to the analysis of the rebate granted to HP, since the foreclosure effect found was not, in particular, demonstrated for the entire infringement period. Third, as regards the rebates granted on different terms to companies within the NEC group, the General Court finds two errors which vitiate the Commission's analysis: one affecting the value of the conditional rebates and the other relating to an extrapolation of the results for one single quarter-year period to the entire infringement period, which was not sufficiently substantiated. Fourth, the General Court also concludes that there was insufficient evidence regarding the capacity of the rebates granted to Lenovo to have a foreclosure effect, on account of errors made by the Commission in the quantified assessment of the non-cash advantages at issue. Fifth, the General Court makes the same finding regarding the AEC analysis for MSH, considering, in particular, that the Commission provided no explanation at all of the reasons which led it, in the analysis of the payments made to that retailer, to extrapolate the results obtained, for the purposes of analysing the rebates granted to NEC, for a one-quarter-year period to the entire infringement period.

In the fifth place, the General Court reviews whether the contested decision took proper account of all the criteria making it possible to determine the capacity of the pricing practices to have a foreclosure effect, in accordance with the case-law of the Court of Justice. In that regard, it finds that the Commission did not consider properly the criterion relating to the share of the market covered by the contested practice and also did not analyse correctly the duration of the rebates.

It follows, therefore, from all of the foregoing considerations that the analysis carried out by the Commission is incomplete and, in any event, does not make it possible to establish to the requisite legal standard that the rebates at issue were capable of having, or were likely to have, anticompetitive

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16 This term refers, in the present case, to the share of demand which Intel's customers were willing and able to switch to another supplier, which is necessarily limited given, in particular, the nature of the product and Intel's brand image and profile.

effects, which is why the General Court annuls the decision, in so far as it finds that those practices constitute an abuse within the meaning of Article 102 TFEU.

Finally, as regards the effect of such setting aside in part of the contested decision on the amount of the fine imposed by the Commission on Intel, the General Court consider that it is not in a position to identify the amount of the fine which relates solely to the naked restrictions. Accordingly, it annuls in its entirety the article of the contested decision which imposes on Intel a fine of €1.06 billion in respect of the infringement found.

2. STATE AID

Judgment of the Court (Grand Chamber) of 25 January 2022, Commission v European Food and Others, C-638/19 P

Link to the complete text of the judgment

Appeal – State aid – Articles 107 and 108 TFEU – Bilateral Investment Treaty – Arbitration clause – Romania – Accession to the European Union – Repeal of a tax incentives scheme prior to accession – Arbitral award granting payment of damages after accession – European Commission decision declaring that payment to be State aid incompatible with the internal market and ordering its recovery – Competence of the European Commission – Application *ratione temporis* of EU law – Determination of the date at which the right to receive aid is conferred on the beneficiary – Article 19 TEU – Articles 267 and 344 TFEU – Autonomy of EU law

On 29 May 2002, the Kingdom of Sweden and Romania concluded a bilateral investment treaty on the promotion and reciprocal protection of investments ('the BIT'), Article 2(3) of which provides that each contracting party would at all times ensure fair and equitable treatment of the investments by investors of the other contracting party. The BIT provides, in addition, that disputes between investors and the contracting countries are to be settled by an arbitral tribunal.

In 2005, in the context of the negotiations for Romania's accession to the European Union, the Romanian Government repealed a national tax incentives scheme for the benefit of certain investors in disadvantaged regions ('the tax incentives scheme').

Considering that, by repealing the tax incentives scheme, Romania had breached its obligation to ensure fair and equitable treatment of the investments in accordance with the BIT, several Swedish investors requested the establishment of an arbitral tribunal with a view to obtaining compensation for the damage caused. By arbitral award of 11 December 2013, that tribunal ordered Romania to pay those investors damages in the sum of approximately EUR 178 million.

Notwithstanding various warnings by the European Commission as to the necessity of complying in this case with the rules and procedures applicable to State aid, the Romanian authorities paid the compensation awarded by the arbitral tribunal in favour of the Swedish investors.

By decision of 30 March 2015 ('the decision at issue'), [17] the Commission classified the payment of that compensation as State aid incompatible with the internal market, prohibited its implementation and ordered the recovery of the sums already paid.

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17 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (OJ 2015 L 232, p. 43).

Hearing a number of actions, the General Court annulled that decision [18] on the ground, in essence, that the Commission had retroactively applied its competences to facts predating the accession of Romania to the European Union on 1 January 2007. The General Court started from the premiss that the aid referred to had been granted by Romania on the date of repeal of the tax incentives scheme, namely in 2005.

On appeal, the Court of Justice, sitting as the Grand Chamber, sets aside that judgment of the General Court and confirms the Commission's competence to adopt the decision at issue, whilst referring the case back to the General Court for it to rule on the pleas and arguments raised before it as regards the merits of that decision.

Findings of the Court

As the Commission had acquired competence to control, pursuant to Article 108 TFEU, aid measures granted by Romania with effect from its accession to the European Union, the Court of Justice recalls that State aids must be regarded as being granted, within the meaning of Article 107(1) TFEU, on the date on which the right to receive it is conferred on the beneficiary under the applicable national legislation. The decisive factor for establishing that date is acquisition by those beneficiaries of a definitive right to receive the aid in question and the corresponding commitment, by the State, to grant that aid. It is at that date that such a measure is liable to distort of competition and affect trade between Member States, within the meaning of Article 107(1) TFEU.

In the present case, the Court finds that the right to compensation for the damage alleged by the Swedish investors, even though it was the result of the repeal by Romania, allegedly in breach of the BIT, of the tax incentives scheme, was only granted by the arbitral award of 11 December 2013, which not only upheld that right, but also quantified its amount. It was only upon the conclusion of that arbitration procedure that those investors were able to obtain actual payment of compensation, even if it was intended to make good, in part, the damage that they alleged they had suffered in a period before the accession of Romania to the European Union.

Thus, having regard to the fact that the aid measure in question was granted after Romania's accession to the European Union, the General Court erred in law in holding that the Commission lacked competence *ratione temporis* to adopt the decision at issue under Article 108 TFEU.

The Court states that the question of whether the compensation granted by the arbitral award is capable of constituting State aid, within the meaning of Article 107(1) TFEU, falls outside its jurisdiction on an appeal, in so far as it was not examined by the General Court. However, the Commission's competence under Article 108 TFEU cannot in any case depend on the outcome of the examination of that question as the prior control by the Commission pursuant to that article is intended to determine, inter alia, whether the compensation in question constitutes State aid.

Finally, the Court finds that the General Court also erred in law in finding that the judgment of the Court of Justice in *Achmea* [19] is irrelevant to the present case.

In the *Achmea* judgment, the Court of Justice held that Articles 267 and 344 TFEU preclude an international agreement concluded between two Member States which provides that an investor from one of those Member States, in the event of a dispute concerning investments in the other Member State, may bring proceedings against that other Member State before an arbitral tribunal whose jurisdiction that other Member State has undertaken to accept. By the conclusion of such an agreement, Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to

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18 Judgment of 18 June 2019, *European Food and Others* v *Commission*, (T-624/15, T-694/15 and T-704/15, EU:T:2019:423).

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

establish in the fields covered by EU law, disputes which may concern the application or interpretation of that law.

In the present case it is common ground that the compensation sought by the Swedish investors also related to alleged damage suffered after Romania's accession to the European Union, with effect from which EU law, including Articles 107 and 108 TFEU, applied to that Member State. To that extent, the dispute brought before the arbitral tribunal could not be regarded as being confined in all respects to a period during which Romania, having not yet acceded to the European Union, was not yet bound by the rules and principles stemming from the *Achmea* judgment. It is also common ground that the arbitral tribunal does not form part of the EU judicial system which the second subparagraph of Article 19(1) TEU requires the Member States to establish in fields covered by EU law.

Accordingly, Romania's consent to the arbitration system laid down in the BIT became inapplicable following the accession of that Member State to the European Union.

In the light of all those considerations, the Court sets aside the judgment under appeal and refers the case back to the General Court to adjudicate on the pleas and arguments raised before it concerning the merits of the decision at issue, in particular the question whether the measure referred to in that decision satisfies, from a substantive point of view, the conditions laid down in Article 107(1) TFEU.

IV. SOCIAL POLICY: PROTECTION OF FIXED-TERM WORKERS

Judgment of the Court (Second Chamber) of 13 January 2022, MIUR and Ufficio Scolastico Regionale per la Campania, C-282/19

Link to the complete text of the order

Reference for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clauses 4 and 5 – Fixed-term employment contracts in the public sector – Catholic religious education teachers – Concept of 'objective reasons' justifying the renewal of such contracts – Permanent need for replacement staff

YT and 17 other persons (together, 'the applicants'), who have been Catholic religious education teachers in public establishments for many years, were recruited by the Ministero dell'Istruzione dell'Università e della Ricerca – MIUR (Ministry of Education, Universities and Research, Italy) under successive fixed-term contracts. Having observed that they were not eligible for the tenure provided for under Italian law concerning teaching staff, on account of the fact that their contracts lasted one year, which precluded their inclusion on the permanent ranking lists, the applicants brought an action before the referring court, seeking primarily to obtain the transformation of their current contracts into contracts of indefinite duration.

The referring court, observing that the Italian legislation transposing the framework agreement on fixed-term work [20] excludes the transformation of successive fixed-term contracts into contracts of indefinite duration in the teaching sector, takes the view that the action cannot be upheld. According to that court, having regard to that exclusion and to the fact that the Catholic religious education teachers in question were not eligible for the tenure provided for under Italian law, that law does not

20 Framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

provide for any measure to prevent abuse arising from the use of successive fixed-term contracts for those teachers, within the meaning of Clause 5 of the framework agreement.

It therefore decided to make a reference to the Court of Justice regarding the compatibility of the Italian legislation with that provision and with the prohibition of discrimination on grounds of religion prohibited under EU law. [21] In addition, it asked the Court to specify whether the requirement to hold a suitability certificate issued by an ecclesiastical authority, which Catholic religious education teachers must hold in order to be able to teach, constitutes an 'objective reason' within the meaning of the framework agreement, justifying the renewal of such fixed-term contracts. Last, it was uncertain as to the consequences to be drawn, for the dispute in the main proceedings, from the Court's finding relating to the potential incompatibility of the legislation at issue.

In its judgment, the Court gives a ruling on, inter alia, the effectiveness of the measures that are intended to penalise, under national law, abuse arising from the use of successive fixed-term contracts.

Findings of the Court

As a preliminary point, observing, inter alia, that the national provisions at issue do not seek to organise the relations between a Member State and churches, but relate to the conditions of employment of Catholic religious education teachers in public establishments – the case thus not relating to the status enjoyed by the churches covered by Article 17(1) TFEU – the Court finds that it has jurisdiction to give a preliminary ruling on the reference made.

Regarding the substance, after having found that there is no discrimination on grounds of religion, as tenure could not be granted to the applicants on account of the length of their contracts, a matter entirely unrelated to their religion, the Court rules, first of all, that the fact that the applicants cannot benefit from the reclassification of their contract as a contract of indefinite duration, whereas teachers of other subjects in a similar situation could, constitutes a difference in treatment between two categories of fixed-term workers. Accordingly, such a situation is not covered by Clause 4 of the framework agreement, [22] as the latter prohibits differences in treatment between fixed-term workers and permanent workers. Thus, the referring court cannot refrain from applying the national rules at issue on the basis of that clause.

Next, regarding Clause 5 of the framework agreement, entitled 'Measures to prevent abuse', the Court rules that that provision precludes national legislation which excludes Catholic religious education teachers from the application of the rules intended to penalise abuse arising from the use of successive fixed-term contracts where there is no other effective measure in the domestic legal system penalising that abuse, which it is for the referring court to ascertain.

It is, admittedly, possible for the sector of public Catholic religious education to require the number of workers employed in that sector to be in constant keeping with the number of potential users, which leads to temporary recruitment needs for the employer, as the particular need for flexibility in that sector is capable of providing justification, in the light of Clause 5(1)(a) of the framework agreement, for recourse to successive fixed-term contracts. However, in order to comply with that provision, it must be specifically verified that the renewal of such contracts is intended to cover temporary needs and that such a possibility is not, in fact, being used to meet permanent staffing needs of the employer. In the present case, the various fixed-term employment contracts between the applicants and their employer have given rise to the performance of similar tasks over several years, with the

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21 That prohibition is provided for by Article 21 of the Charter of Fundamental Rights of the European Union and by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

22 Clause 4(1) of the framework agreement, that clause being entitled 'Principle of non-discrimination', provides that, in respect of employment conditions, fixed-term workers are not to be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract unless different treatment is justified on objective grounds.

result that that employment relationship can be regarded as having satisfied a long-term need, which it is for the referring court to verify.

In addition, finding, inter alia, that the suitability certificate which Catholic religious education teachers must hold in order to be able to teach is issued once, and not before every school year, giving rise to the conclusion of a fixed-term contract, irrespective of the length of the fixed-term contract given to them, and that the issuing of that certificate is not connected with measures pursuing social policy objectives, the Court rules that that certificate is not an 'objective reason' justifying the renewal of fixed-term contracts, within the meaning of Clause 5(1)(a) of the framework agreement.

Last, the Court recalls that, although that clause does not have direct effect and national courts are therefore not required to refrain from applying a national provision which conflicts with it, it is for the referring court to verify whether an interpretation of the national provisions at issue which is consistent with the framework agreement is possible, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law.

V. ENVIRONMENT

Judgment of the Court (Fifth Chamber) of 13 January 2022, Allemagne - Ville de Paris and Others v Commission, C-177/19 P to C-179/19 P

Link to the complete text of the judgment

Appeal – Action for annulment – Environment – Type approval of motor vehicles – Regulation (EU) 2016/646 – Emissions from light passenger and commercial vehicles (Euro 6) – Setting of the not-to-exceed (NTE) values for emissions of oxides of nitrogen during the real driving emission (RDE) tests – Fourth paragraph of Article 263 TFEU – Admissibility of an action – Infra-State entity with powers in the field of environmental protection to limit the circulation of certain vehicles – Condition that the applicant must be directly concerned

By adopting Directive 2007/46, [23] the EU legislature established a harmonised framework for the approval of motor vehicles in order to facilitate their registration, sale and entry into service in the European Union. In the context of the 'Dieselgate' scandal, the European Commission set up a procedure for testing the real driving emissions ('RDE') [24] of light passenger and commercial vehicles, approved in accordance with the applicable legislation, [25] in order better to reflect the emissions measured on the road. The requirements for the RDE tests were subsequently supplemented by Commission Regulation 2016/646, [26] which sets limit values for emissions of oxides of nitrogen which must not be exceeded during those tests ('the contested regulation').

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23 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1).

24 Commission Regulation (EU) 2016/427 of 10 March 2016 amending Regulation (EC) Nº 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 82, p. 1).

25 Regulation (EC) Nº 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

26 Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) Nº 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 109, p. 1).

The City of Paris, the City of Brussels and the Municipality of Madrid ('the respondents') each brought an action for annulment of the regulation at issue, in so far as it prevented them from imposing restrictions on the circulation of passenger vehicles in relation to their pollutant emissions. The Commission raised objections of inadmissibility against the abovementioned actions, alleging that the regulation at issue was not of direct concern to the applicant cities within the meaning of the fourth paragraph of Article 263 TFEU.

Those actions were nevertheless partially upheld by the General Court, which held that the regulation at issue was of direct concern to the applicant cities. [27] In interpreting Directive 2007/46, [28] in the context of which the regulation at issue was adopted, the General Court, in particular, considered that that regulation must be regarded as a regulatory act which does not entail implementing measures and which directly affects the exercise by those cities of their powers to regulate the circulation of motor vehicles.

Ruling on appeals brought by the Federal Republic of Germany (Case C-177/19 P), Hungary (Case C-178/19 P) and the Commission (Case C-179/19 P), the Court of Justice sets aside the judgment of the General Court and clarifies, in that context, the concept of 'direct concern' as a condition for the admissibility of an action for annulment brought by a regional entity of a Member State against an act of the European Union.

Findings of the Court

First of all, the Court notes that a regional or local entity with legal personality may, like any natural or legal person, institute proceedings against an act of EU law only if it comes within one of the situations referred to in the fourth paragraph of Article 263 TFEU, [29] which requires that the act at issue must be of direct concern to the person or entity in question. In order for an infra-State entity to be directly concerned by the measure in question, two cumulative criteria must be satisfied. First, the contested measure must directly affect the legal situation of those entities and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it.

Next, the Court examines whether the second subparagraph of Article 4(3) of Directive 2007/46, according to which Member States are not to 'prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles… if they satisfy the requirements of the [directive]', effectively prevents the applicant cities from exercising their powers to regulate the circulation of passenger vehicles in order to reduce pollution and, accordingly, whether, having regard to the relationship between that provision and the contested regulation, those cities must be regarded as being directly concerned by that regulation. To that end, the Court interprets the provision at issue in the light of its wording, its context, the objectives pursued by the legislation of which it forms part, and relevant information concerning its legislative history.

As regards the wording of the second subparagraph of Article 4(3) of Directive 2007/46 and, in particular, the prohibition laid down therein on restricting the 'circulation on the road' of certain vehicles, the Court states that that provision covers not only the circulation of vehicles in the territory of a Member State, but also other activities, such as the registration, sale and entry into service of vehicles. Such restrictions entail a general barrier to access to the vehicle market.

As regards the context of that provision, the Court notes that the obligations imposed on Member States under Directive 2007/46 concern the placing on the market of motor vehicles and not their subsequent use. It also notes that, although the second subparagraph of Article 4(3) of that directive

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27 Judgment in *Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid* v *Commission* (T-339/16, T-352/16 and T-391/16) (see also Press Release N° 198/18).

28 Article 4(3) of Directive 2007/46.

29 Article 263(4) TFEU provides that 'Any natural or legal person may, under the conditions laid down in 263(1) and (2), institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

lays down a negative obligation preventing Member States from prohibiting, restricting or impeding the circulation on the road of vehicles which comply with the requirements of the directive, its first subparagraph lays down a positive obligation allowing Member States to register and authorise the sale and entry into service of those vehicles, without any mention of circulation on the road. Thus, contrary to the interpretation adopted by the General Court, the scope of the negative obligation cannot be wider than the scope of the positive obligation, since the wording of those two subparagraphs is complementary. Finally, the Court notes that the applicant cities do not have powers in relation to vehicle type-approval.

As regards the objective pursued by Directive 2007/46, that objective consists in the establishment of a uniform procedure for the approval of new vehicles and, by extension, in the establishment and functioning of the internal market, while seeking to ensure a high level of road safety by means of the total harmonisation of technical requirements concerning, inter alia, the construction of vehicles.

Moreover, the legislative history of the second subparagraph of Article 4(3) of Directive 2007/46 shows that the purpose of the prohibition on preventing the 'circulation on the road' of certain vehicles was not to extend the scope of the legislation on vehicle type-approval, but only to prevent the circumvention, by the Member States, of the prohibition on opposing access to the market for vehicles which comply with the applicable legislation.

Therefore, according to the Court of Justice, the General Court's interpretation amounts to giving the second subparagraph of Article 4(3) of Directive 2007/46 a broad scope in order to support the conclusion that that provision precludes certain local restrictions on circulation which are intended, inter alia, to protect the environment. That interpretation is not consistent with the context of that provision, with the objectives of the legislation of which it forms part, or with the legislative history of that provision.

Consequently, the Court concludes that the General Court erred in law in holding that the regulation at issue is of direct concern to the applicant cities, within the meaning of the fourth paragraph of Article 263 TFEU.

As regards the applicant cities' concerns with regard to the possibility of infringement proceedings being brought against one of the Member States to which they belong for infringement of the regulation at issue, the Court points out that the adoption of legislation limiting the local circulation of certain vehicles for the purposes of protecting the environment is not liable to infringe the prohibition imposed by the contested regulation, with the result that it cannot have a direct effect on any action for failure to fulfil obligations.

In the light of the foregoing, the Court of Justice sets aside the judgment under appeal and, considering that the state of the proceedings so permits, gives final judgment in the matter, dismissing the actions for annulment brought by the applicant cities as inadmissible.

Judgment of the Court (Grand Chamber) of 25 January 2022, VYSOČINA WIND, C-181/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Environment – Directive 2012/19/EU – Waste electrical and electronic equipment – Obligation to finance the costs relating to the management of waste from photovoltaic panels – Retroactive effect – Principle of legal certainty – Incorrect transposition of a directive – Liability of the Member State

Vysočina Wind is a Czech company which operates a solar power plant equipped with photovoltaic panels that were placed on the market after 13 August 2005.

In accordance with the obligation laid down by Czech Law N° 185/2001 on waste ('the Law on waste'), [30] it participated in the financing of the costs relating to the management of waste from photovoltaic panels and, for that purpose, paid contributions in the course of 2015 and 2016.

Since Vysočina Wind took the view, however, that that obligation to pay contributions resulted from an incorrect transposition of Directive 2012/19 on waste electrical and electronic equipment (WEEE) [31] and that the payment of those contributions constituted harm, it brought before the Czech courts an action for damages against the Czech Republic. In that context, Vysočina Wind submitted that the provision of the Law on waste laying down the obligation on users of photovoltaic panels to pay contributions is contrary to Article 13(1) of the WEEE Directive, which makes producers of electrical and electronic equipment, and not its users, responsible for the financing of the costs relating to the management of waste from equipment placed on the market after 13 August 2005.

After the action brought by Vysočina Wind was upheld, both at first instance and on appeal, the Czech Republic brought an appeal on a point of law before the Nejvyšší soud (Supreme Court, Czech Republic).

Having been requested by that court to give a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, rules on the interpretation and validity of Article 13(1) of the WEEE Directive and also explains the conditions under which a Member State may be liable for infringement of EU law in the context of transposition of a directive.

Findings of the Court

On the basis of a literal interpretation of the WEEE Directive, the Court confirms, first, that photovoltaic panels constitute electrical and electronic equipment within the meaning of that directive, so that, in accordance with Article 13(1) of the directive, the financing of the costs relating to the management of waste from such panels placed on the market from 13 August 2012, the date on which the directive entered into force, must be borne by their producers and not, as the Czech legislation provides, their users.

Second, the Court examines the validity of Article 13(1) of the WEEE Directive, in so far as that provision applies to photovoltaic panels placed on the market after 13 August 2005, that is to say, on a date before the date on which the directive entered into force.

In that regard, the Court notes first of all that, whilst the principle of legal certainty precludes a new legal rule from applying to a situation established prior to its entry into force, it also follows from the Court's case-law that a new legal rule applies immediately to the future effects of a situation which arose under the old law, as well as to new legal situations.

Thus, the Court determines whether application of the legal rule laid down in Article 13(1) of the WEEE Directive, that producers, and not users, are required to provide for the financing of the costs relating to the management of waste from photovoltaic panels placed on the market after 13 August 2005, where those panels have, or will, become waste from the date of the directive's entry into force, is such as to affect adversely a situation established before the directive entered into force or whether its application serves, on the contrary, to govern the future effects of a situation which arose before the directive entered into force.

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30 Paragraph 37p of zákon č. 185/2001 Sb., o odpadech a o změně některých dalších zákonů (Law N° 185/2001 on waste and amending certain other laws).

31 Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (OJ 2012 L 197, p. 38), 'the WEEE Directive'.

Since the EU legislation which existed before the WEEE Directive was adopted left the Member States the choice of requiring the costs of management of waste from photovoltaic panels to be borne either by the current or previous waste holders or by the producer or distributor of the panels, the WEEE Directive affected situations established before it entered into force, in the Member States which had decided to impose those costs on the users of photovoltaic panels and not their producers, as was the case in the Czech Republic.

In this respect, the Court explains that a new legal rule which applies to previously established situations cannot be regarded as complying with the principle of the non-retroactivity of legal acts where it alters, subsequently and unforeseeably, the allocation of costs the incurring of which can no longer be avoided. In the present instance, producers of photovoltaic panels were unable to foresee, when designing the panels, that they would subsequently be required to provide for the financing of the costs relating to the management of waste from those panels.

In the light of those considerations, the Court declares Article 13(1) of the WEEE Directive invalid in so far as it imposes on producers the obligation to finance the costs relating to the management of waste from photovoltaic panels placed on the market between 13 August 2005 and 13 August 2012.

Third, the Court states that the insertion in the Law on waste of a provision obliging users of photovoltaic panels to pay contributions which is contrary to the WEEE Directive, more than a month before the directive was adopted, does not constitute, in itself, a breach of EU law by the Czech Republic, since the achievement of the result prescribed by the directive cannot be regarded as seriously compromised before the directive formed part of the EU legal order.

VI. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS

1.1 Access to documents

Judgment of the General Court (Tenth Chamber) of 15 December 2021, Breyer v REA, T-158/19

Access to documents – Regulation (EC) Nº 1049/2001 – Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) – Regulation (EU) Nº 1290/2013 – Documents concerning the research project 'iBorderCtrl: Intelligent Portable Border Control System' – Exception relating to the protection of the commercial interests of a third party – Partial refusal to grant access – Overriding public interest

In 2016, the European Research Executive Agency (REA) concluded a grant agreement with a consortium concerning a research project under the EU Framework Programme for Research and Innovation 'Horizon 2020', seeking to contribute to the management of the European Union's external borders. The applicant, who is a natural person, requested, on the basis of Regulation Nº 1049/2001, [32] access to several documents relating to the various stages of development of that project which had been sent to the REA by the members of that consortium. The REA granted only partial access to the documents requested and justified the refusal to grant full access by the

[32] 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).

application of the exceptions provided for by Regulation Nº 1049/2001, in particular that relating to the protection of the commercial interests of the members of the consortium concerned. [33]

Hearing an action against the REA's decision [34] to grant partial access to the documents requested, the General Court annulled that decision in so far as the REA, first, had failed to carry out a full examination of the application for access and, secondly, had not granted access to the information contained in the documents at issue which was not covered by the exception in question.

This case has allowed the Court to develop and supplement its case-law on access to documents in the context of the EU-funded research project, as well as its case-law on the requirement for a full examination of an application for access at the initial application stage. Moreover, it has given the Court the opportunity to answer questions not previously addressed concerning, in particular, the effect of Regulation Nº 1290/2013 [35] in the context of an application for access to documents made under Regulation Nº 1049/2001 and the consequences of conduct by an applicant consisting in obtaining, by his or her own efforts and before the Court rules on the action, access to the redacted parts of a document to which he had been granted only partial access.

Findings of the Court

First of all, the Court finds that, in this case, the REA infringed its obligation to carry out a full examination of all the documents referred to in the application for access, since that obligation applies, in principle, not only when dealing with a confirmatory application for access, but also when dealing with an initial application for access. Specifically, the REA failed to give a decision in respect of the initial application for access in so far as that application concerned access to documents relating to the authorisation of the project at issue, thereby clearly undermining the objectives pursued by Regulation Nº 1049/2001.

In that context, the Court notes that, first, the applicant expressly stated in his confirmatory application for access that that application was a follow up to his initial application for access, which, inter alia, concerned documents relating to the authorisation of the project at issue. Accordingly, there were no circumstances which would allow the REA to presume that the applicant had withdrawn that part of his application in his confirmatory application. Secondly, the applicant was not obliged, in his confirmatory application, expressly to challenge the REA's failure, in its initial decision, to give a decision in respect of a part of the applicant's original application. That failure had the consequence that the second stage of the procedure concerning the documents to which that failure relates was not initiated. Moreover, even though, in the event of a refusal of access, a person may submit a new application for access, a failure to give a decision in respect of part of an application for access cannot be equated with a refusal of access. Therefore, a possibility of submitting a new application cannot serve to remedy a failure by the institution concerned to examine fully the first application for access or constitute an argument for depriving the applicant of the possibility of bringing proceedings.

Next, the Court rules on the consistent application of Regulations Nº 1290/2013 and Nº 1049/2001 in this case. In that regard, it states that the rule laid down in Regulation Nº 1290/2013, according to which documents communicated as confidential in the framework of an action such as the project at issue are to be kept confidential, [36] must be taken into account when examining a third party's application for access to those documents. The fact that, in this case, the parties to the agreement

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33 Article 4(2), first indent, of Regulation Nº 1049/2001.

34 REA's Decision of 17 January 2019 (ARES (2019) 266593) concerning partial access to documents.

35 Regulation (EU) Nº 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in 'Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020)' and repealing Regulation (EC) Nº 1906/2006 (OJ 2013 L 347, p. 81).

36 Article 3 of Regulation Nº 1290/2013.

classified the documents communicated to the REA as confidential is an indication that the content of those documents is sensitive from the point of view of the interests of the members of the consortium. However, the classification of documents as confidential in the context of a project is not sufficient to justify application of the exception relating to the protection of commercial interests provided for by Regulation Nº 1049/2001. Accordingly, that classification does not release the REA, in the context of the specific and individual examination of the application for access to those documents, from its obligation to examine whether they fall partially or entirely within that exception.

Next, after verifying that the REA carried out a specific and individual examination of the documents requested, the Court concluded that the REA's refusal to grant access to certain information contained in several of those documents was not justified by the protection of the commercial interests of the members of the consortium. The information in question is concerned, in particular, with general questions likely to arise irrespective of the specific design of the system and project developed by the members of the consortium and not with assessments relating to the specific legal and ethical implications of the project in question or to the solutions envisaged in developing the technologies or features of that project.

As regards the documents requested, or the parts of those documents in respect of which the REA correctly concluded that they were covered by the exception relating to the protection of the commercial interests of the members of the consortium, the Court finds that the applicant has not established the existence of an overriding public interest which would justify disclosure to the public of the information covered by that exception. [37]

In that context, in ruling in particular on the public interest in dissemination of the results of projects financed by EU funds, the Court notes that that interest is ensured by the introduction of legislative and contractual provisions for the dissemination of the results of projects funded under the Horizon 2020 programme and that the need to disclose the information covered by the exception concerned has not been demonstrated by the applicant. As regards legislative provisions, the Court points out that Regulation Nº 1290/2013 lays down both an obligation for participants in an action to disseminate the results of the project subject to certain restrictions and a right for EU institutions, bodies, offices and agencies and for Member States to access information concerning results generated by those participants. [38]

Finally, the Court notes that the fact that the applicant obtained, by his own efforts, access to the full version of a document which, in a partially redacted version, had been communicated to him by the REA and that he disseminated that full version on the internet does not call into question his interest in having the contested decision annulled in so far as the REA had refused access to the redacted parts of that document. That conduct has no bearing on the lawfulness of the contested decision in that respect or on the Court's judicial review of it.

Nevertheless, the Court considers that the applicant, by acting in that way, failed to comply with the procedures laid down by EU law relating to access to documents and did not await the outcome of the dispute in order to ascertain whether or not he could lawfully obtain access to the full version of the document in question. Accordingly, the Court takes that conduct of the applicant into account in the allocation of costs, by ordering him to pay the costs he unreasonably caused the REA to incur.

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37 Under Article 4(2) of Regulation Nº 1049/2001, the institutions are to refuse access to a document where disclosure would undermine, in particular, the protection of commercial interests of a natural or legal person 'unless there is an overriding public interest in disclosure'.

38 Articles 4, 43 and 49 of Regulation Nº 1290/2013.

1.2 Action to establish non-contractual liability of the European Union

Judgment of the General Court (Ninth Chamber) of 21 December 2021, Apostolopoulou and Apostolopoulou-Chrysanthaki v Commission, T-721/18 and T-81/19

Non-contractual liability – Grant agreements concluded in the context of various EU programmes – Breach of contractual terms by the beneficiary company – Eligible costs – OLAF investigation – Liquidation of the company – Recovery from the partners in the company – Enforcement – Allegations made by the representatives of the Commission before the national courts – Identification of the defendant – Failure to have regard to procedural requirements – Partial inadmissibility – Sufficiently serious breach of a rule of law intended to confer rights on individuals

The applicants are the only two partners in Koinonia Tis Pliroforias Anoichti Stis Eidikes Anagkes – Isotis ('Isotis'), a Greek civil non-profit company incorporated in January 2004. At the time of its incorporation Isotis had a legal personality under national legislation. Thus, its creditors could seek payment of their claim from the partners only after the winding-up and liquidation of the company, and on condition that the company's assets were not sufficient to satisfy them.

Isotis had concluded several contracts with the European Community, represented by the Commission of the European Communities, for the implementation of certain projects within the framework of various EU programmes. Some of those contracts were the subject of a financial audit carried out by the Commission in February 2010. The final audit report concluded that all the costs incurred by Isotis in the course of the performance of the contracts covered by the audit were non-eligible, and that all relevant amounts paid to Isotis were to be recovered. In December 2010, Isotis was put into liquidation. Subsequently, in April and June 2011, the Commission issued several debit notes in respect of the contracts covered by the audit of February 2010. Following its investigation into potential fraud affecting the European Union's financial interests by, among others, Isotis, the European Anti-Fraud Office (OLAF) recommended the adoption of appropriate measures and the provision of information to the Greek judicial authorities on account of suspicions concerning the existence of fraud affecting those interests.

The action brought by Isotis, on the basis of Article 272 TFEU, was dismissed by the General Court, [39] which ordered Isotis, inter alia, to reimburse the financial contributions from which it had benefitted under the contracts covered by the audit of February 2010. The appeal brought against that judgment was dismissed by the Court of Justice. [40]

Alongside the contracts covered by the audit of February 2010, the Community had also concluded a contract for the implementation of the REACH112 project with a number of contracting parties established in various EU Member States, including Isotis. In September 2013, the Commission issued a debit note for recovery of a certain amount on account of the termination of Isotis' participation in that project. The Court upheld the action brought by Isotis as regards the costs it had declared for the

39 Judgment of 16 July 2014, *Isotis* v *Commission* (T-59/11, EU:T:2014:679).

40 Order of 31 May 2016, *Isotis* v *Commission* (C-450/14 P, not published, EU:C:2016:477).

first reference period of the REACH112 project, and ordered it to pay the Commission the remainder of the amount in respect of which that institution had sought recovery, [41] plus default interest.

In September 2017, the Commission notified to the applicants three enforcement orders issued by the Monomeles Protodikeio Athinon (Court of First Instance (single judge), Athens, Greece). The judgment by which that court partially upheld the objection to enforcement lodged by the applicants was overturned by the Efeteio Athinon (Court of Appeal, Athens, Greece). The latter court upheld the objection in view of the fact that it was not permissible, under the applicable Greek law, to proceed to enforcement against the applicants, even though they were the only two partners in Isotis, and that such enforcement could be sought only against Isotis as a legal person.

In December 2018 and February 2019, the applicants brought two actions seeking, inter alia, compensation for the damage which they allegedly suffered as a result of their reputation and dignity being adversely affected, first, by the representatives of the Commission and an OLAF official in the procedure for objecting to enforcement ('Case T-721/18') and, secondly, by the representatives of the Commission in the appeal proceedings ('Case T-81/19').

The Court dismissed those actions as, in part, inadmissible and, in part, unfounded. Those cases gave the Court the opportunity to examine the difficult question as to the extent to which the applicants, which are the only partners in Isotis, may obtain compensation for the non-material damage which they claim to have suffered as a result of various allegations made by the Commission's legal representatives before the Greek courts.

Findings of the Court

As regards the admissibility of the actions, the Court considers, in the first place, the alleged lack of precision in the applications. The Court points out, first, that the applicants' claim that the Commission should be ordered to refrain in future from any attack on their character must be regarded as an application for a prohibitory injunction. Such an injunction is one of the forms of compensation in kind granted by the EU judicature, which can be obtained only if the non-contractual liability of the European Union is already established. Accordingly, the Court finds that that claim by the applicants is admissible, in so far as it is directly linked to the subject matter of the ongoing dispute and the applicants are seeking compensation for non-material damage, consisting of damage to their reputation, for which they hold the Commission liable.

Secondly, the Court points out that the applicants' claim that the Commission should be ordered to restore their reputation by means of a public declaration constitutes an application for a mandatory injunction. Nonetheless, it states that although, in accordance with the case-law, compensation in kind may take the form of such an injunction imposed on the Commission by the EU judicature, the application for an injunction must meet the requirements of clarity and precision. [42] In the present case, the Court considers that the applicants' claim is inadmissible in so far as, first, they failed to specify in their applications either the form the declaration to restore their reputation should take or the manner in which it should be made and, secondly, they failed to provide sufficient explanations as to the exact scope of their claim.

In the second place, the Court finds that, in so far as the subject matter of the two actions is not strictly identical, there is no *lis pendens*, and therefore the action in Case T-81/19 is admissible. Indeed, although the two actions were brought on the same legal basis, [43] involve the same parties and seek compensation for non-material damage allegedly caused to each of the applicants by the Commission, the damage for which compensation is sought is not the same in each case, in so far as it arises from different facts. First, the repetition of allegedly false and defamatory allegations in the

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41 Judgment of 4 February 2016, *Isotis* v *Commission* (T-562/13, not published, EU:T:2016:63).

42 Article 76(d) of the Rules of Procedure of the General Court.

43 Article 268 and Article 340, second paragraph, TFEU.

appeal proceedings could, in itself, give rise to damage distinct from that initially caused. Secondly, in those same proceedings, the Commission made new allegations which, if harmful, could give rise to non-material damage distinct from that alleged by the applicants in Case T-721/18.

As to the substance, the Court analyses, in the first place, the conduct alleged against the Commission. The Court notes that, in the written pleadings lodged at first instance and on appeal, the representatives of the Commission complained not that the applicants were guilty of fraudulent acts, but that they played an active role in the management of Isotis. Accordingly, the mere assertion, in Case T-721/18, that the applicants played an active role in the management of Isotis, including as regards the management of EU financing, cannot be regarded as an accusation of fraud against them. Similarly, in Case T-81/19, the allegations made by the representatives of the Commission in the appeal proceedings, which sought to call into question the existence of Isotis' legal personality, do not in themselves imply an accusation of fraud affecting the financial interests of the European Union made against the applicants.

In the second place, the Court ascertains whether the fact that the representatives of the Commission claimed, wrongly, that the applicants had played an active role in the management of Isotis and made a number of factual claims seeking to call into question the existence of Isotis' legal personality in the proceedings at first instance and on appeal constitutes unlawful conduct capable of giving rise to non-contractual liability on the part of the European Union. The Court rejects the applicants' line of argument alleging infringement of their right to human dignity, [44] according to which the Commission infringed that right by portraying them, in the proceedings at first instance and on appeal, as having defrauded the Commission and the European Union, in so far as that line of argument is based on a false premiss. Furthermore, it observes that, in any event, the ability to assert one's rights through the courts, and the judicial review which that entails, constitutes the expression of a general principle of law common to the Member States. [45] It states that the applicants' line of argument implies that any assertion by the Commission, in the procedure for objecting to enforcement, of fraudulent conduct on the part of the applicants necessarily entails an infringement of their right to dignity capable of giving rise to non-contractual liability on the part of the European Union, in so far as the assertion in question has been rejected by the national courts. If that line of argument were to be upheld, it would be tantamount to restricting the Commission's right to bring proceedings before the national courts in order to obtain enforcement of a judgment of the Court recognising its claim, [46] in accordance with its obligations to ensure the sound management of EU resources and to combat fraud and any other illegal activities affecting the financial interests of the European Union. [47]

Lastly, in the third place, the Court rejects the applicants' assertion, in Case T-81/19, that the Commission's conduct is unlawful inasmuch as it infringed the principle of procedural fairness. It points out, first of all, that the applicants do not allege infringement of a rule of EU law intended to confer rights on individuals, which is one of the conditions giving rise to the non-contractual liability of the European Union, but infringement of a principle enshrined in national law which has not been enshrined in EU law. Next, the Court observes that the national courts have jurisdiction over complaints that enforcement is being carried out in an irregular manner, [48] and notes that it was for the Efeteio Athinon (Court of Appeal, Athens) to satisfy itself that, in the procedure for objecting to enforcement which took place before it, the conduct of the Commission representatives was compliant with the principle of procedural fairness. Lastly, the Court states that, despite the fact that it has exclusive jurisdiction to hear actions to establish non-contractual liability of the European Union

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44 As provided for in Article 1 of the Charter of Fundamental Rights of the European Union.

45 Enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

46 On the basis of Article 299 TFEU.

47 Provided for in Articles 317 and 325 TFEU.

48 Article 299, fourth paragraph, TFEU.

or its servants, [49] it cannot rule, in such actions, on the alleged infringement by the Commission of a rule of national procedural law, in the context of a dispute concerning the enforcement of a judgment of the Court before a national court, without undermining the prerogatives expressly reserved to the latter and, therefore, the division of powers between the EU judicature and the national courts established by the TFEU.

1.3 Public procurement by the institutions of the European Union

Judgment of the General Court (Fifth Chamber) of 1 December 2021, Sopra Steria Benelux and Unisys Belgium v Commission, T-546/20

Public service contracts – Tendering procedure – Specification, Development, Maintenance and Support of DG Taxation and Customs Union (TAXUD) IT Platforms – Rejection of the tender submitted by a tenderer and decision to award the contract to another tenderer – Obligation to state reasons – Abnormally low tender

On 6 December 2019, the European Commission published a contract notice for the procurement of services to cover the specification, development, maintenance and third level support of Directorate General (DG) Taxation and Customs Union (TAXUD) IT platforms, divided into two lots. [50]

On 27 February 2020, the applicants, Sopra Steria Benelux SA and Unisys Belgium SA, submitted a joint tender as a consortium.

By decision of 2 July 2020, the Commission informed the applicants of the rejection of their tender submitted for Lot A, on the ground that it was not the most economically advantageous tender, and of the award of the contract to another tenderer. The applicants brought an action before the General Court for annulment of that decision.

By its judgment, the Court upheld the action brought by the applicants and annulled the decision of 2 July 2020 relating to Lot A on the ground that it was not supported by a sufficient statement of reasons, in so far as it did not state the reasons for considering that the successful tender did not appear to be abnormally low. In addition, it provides details on the scope of the obligation to state reasons with regard to unsuccessful tenderers who make an express request, where the contracting authority considered that the successful bid did not appear abnormally low.

Findings of the Court

After having recalled the settled case-law concerning the obligation to state reasons for the administration and the right to effective judicial protection, the Court finds, in the first place, that EU rules on public procurement provide for reasoning in two stages in respect of unsuccessful tenderers. [51] First of all, the contracting authority informs all unsuccessful tenderers of the rejection

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49 Article 268 TFEU.

50 Lot A, entitled 'Evolution services for the CCN/CSI Platform', and Lot B, entitled 'Evolution services for the CCN2(ng), SPEED 2(ng), CDCO/TSOAP and SSV Platforms'

51 Article 170 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) N° 1296/2013, (EU) N° 1301/2013, (EU) N° 1303/2013, (EU) N° 1304/2013, (EU) N° 1309/2013, (EU) N° 1316/2013, (EU) N° 223/2014, (EU) N° 283/2014, and Decision N° 541/2014/EU and repealing Regulation (EU, Euratom) N° 966/2012 (OJ 2018 L 193, p. 1 ; 'the Financial Regulation') and paragraph 31 of Annex 1 thereto.

of their tender and of the grounds on which the decision was taken. Next, where an unsuccessful tenderer who is not in an exclusion situation and satisfies the selection criteria and makes a request in writing, the contracting authority communicates, as soon as possible and in any case within 15 days of receipt of that request, information on the characteristics and the relative advantages of the successful tender, the price paid or contract value and the name of the successful tenderer. [52] Disclosure of reasons in two stages is consistent with the purpose of the duty to state reasons, which, on the one hand, consists in making the persons concerned aware of the reasons for the measure and, thereby, enabling them to defend their rights and, on the other, enabling the EU judicature to exercise its power of review.

In the second place, with regard to the scope of the obligation to state reasons on the part of the contracting authority where it considers that the successful tender does not appear to be abnormally low, the Court points out, first, that the assessment of the existence of abnormally low tenders is made in two stages. In the first stage, the contracting authority determines whether the price or costs proposed in a tender appears to be abnormally low. [53] Thus, the contracting authority need only determine whether the tenders submitted contain evidence such as to arouse suspicion that they might be abnormally low. If the tenders submitted do not appear to be abnormally low, the contracting authority may continue with the evaluation of the tenders and the contract award procedure. By contrast, if there is evidence which arouses suspicion that a tender might be abnormally low, the contracting authority must, in the second stage, check the constituent elements of the tender in order to satisfy itself that it is not abnormally low. Where it carries out such a check, the contracting authority must give the tenderer which submitted that tender the opportunity to set out the reasons why it considers that its tender is not abnormally low. The contracting authority must then assess the explanations provided and determine whether the tender concerned is abnormally low and, if that is the case, it must reject the tender.

Lastly, the Court finds that the obligation to state reasons on the part of the contracting authority, where it considers that the successful tender does not appear to be abnormally low, is limited. This is explained, in particular, by the fact that the contracting authority carries out, in the first stage, only a prima facie assessment as to whether the tender is abnormally low. To require the contracting authority to set out in detail the reasons why a tender does not appear to be abnormally low would amount to not taking into account the distinction between the two stages of the assessment. In particular, where a contracting authority selects a tender, it is not required to expressly indicate, in response to a request for a statement of reasons, [54] the reasons why the successful tender did not appear to be abnormally low. It results implicitly but necessarily from the fact that it accepted a tender that the contracting authority considered there to be no evidence that the tender was abnormally low. By contrast, those reasons must be brought to the attention of the unsuccessful tenderer who made an express request, since a statement of reasons in that regard informs the unsuccessful tenderer of an essential aspect of the characteristics and relative merits of the tender accepted. In addition, it is not sufficient for the contracting authority merely to state that the successful tender in the course of a contract award procedure is not abnormally low, nor for it merely to maintain that that was considered not to be the case.

Lastly, the Court notes that, where, first, there is a substantial difference between the price proposed by the unsuccessful tenderer and that proposed by the successful tenderer – the only tenders submitted – and, secondly, the price of the unsuccessful tender is the only point of comparison establishing evidence that the tender accepted may be considered abnormally low, the contracting authority must provide the unsuccessful tenderer which so requests with sufficient information to

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52 Article 170(3) of the Financial Regulation and paragraph 31.2 of the Annex thereto.

53 Paragraph 23.1 of Annex I to the Financial Regulation.

54 The request for a statement of reasons is submitted pursuant to Article 170(3) of the Financial Regulation.

make it possible to understand the reasons why the successful tender did not appear abnormally low and to potentially challenge the merits of that assessment.

2. ENVIRONMENT: AARHUS CONVENTION

Judgment of the General Court (Second Chamber) of 15 December 2021, Stichting Comité N 65 Ondergronds Helvoirt v Commission, T-569/20

Environment – Regulation (EC) Nº 1367/2006 – Obligation of the Member States to protect and improve ambient air quality – Request for internal review – Refusal of the request as inadmissible

Stichting Comité N 65 Ondergronds Helvoirt is an action committee that was founded in 2011 when certain Netherlands municipalities presented their vision for the N 65 regional road and its environs.

On 29 August 2019, that committee lodged a complaint with the European Commission against the Kingdom of the Netherlands, seeking a declaration establishing an infringement of Directive 2008/50 on ambient air quality [55] in connection with the Netherlands' authorities quality control as regards the air around the regional road in question. The Commission, however, taking the view that it was not in possession of any relevant new evidence such as to warrant the initiation of proceedings against the Kingdom of the Netherlands for failure to fulfil obligations, informed the committee, by letter of 30 January 2020, of its decision to close the file on the complaint without taking further action.

The action committee consequently submitted a request to the Commission under Article 10 of the Aarhus Regulation [56] for internal review of the decision to close the file on the complaint. The Commission rejected that request as inadmissible ('the contested decision') on the ground that the decision in question was neither an 'administrative act' [57] nor an 'administrative omission' [58] capable of forming the subject matter of an internal review pursuant to the Aarhus Regulation, having been adopted within the framework of the procedure for failure to fulfil obligations provided for in Article 258 TFEU.

An action for annulment of the contested decision was brought before the General Court, which dismissed it after considering, in particular, the novel question of whether or not a review procedure, initiated with regard to a decision to close the file as regards a complaint made against a Member State, may be distinct from the procedure for failure to fulfil obligations under Articles 258 et 260 TFEU.

Findings of the Court

In the first place, the General Court points out that Article 10(1) of the Aarhus Regulation confers on non-governmental organisations the right to make a request for internal review to the EU institution that has adopted an 'administrative act' under environmental law. However, Article 2(2)(b) of that regulation excludes from the concept of administrative act measures or omissions on the part of an

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

56 Regulation (EC) Nº 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13, 'the Aarhus Regulation').

57 Article 2(1)(g) of the Aarhus Regulation.

58 Article 2(1)(h) of the Aarhus Regulation.

EU institution or body acting in its capacity as an administrative review body in infringement proceedings under Articles 258 and 260 TFEU.

The General Court takes the view that, in this case, the Commission's decision to close the file on the committee's complaint without taking further action expresses its refusal to bring infringement proceedings under Article 258 TFEU against the Kingdom of the Netherlands, for want of sufficient evidence of the alleged infringement of EU law. That decision closed a 'CHAP' procedure, designed to handle investigation requests and complaints received by the Commission concerning infringements of EU law by Member States.

In the second place, the General Court states that, contrary to the arguments put forward by the committee, a CHAP procedure, like the EU Pilot procedure which is regarded as its precursor, is inextricably linked to infringement proceedings. It points out in that regard that the CHAP complaint submitted by the committee constituted a first stage of a procedure which could have led to the initiation of infringement proceedings. The only favourable outcome to that complaint would have been precisely the commencement of proceedings against the Kingdom of the Netherlands for failure to fulfil its obligations. In addition, while the CHAP procedure can result in other informal problem-solving mechanisms which, like the EU Pilot procedure, enable the initiation of infringement proceedings to be avoided, recourse to such mechanisms remains at the discretion of the Commission, which may always resume the official procedure.

The General Court thus concludes that the decision to close the file on the complaint in question without taking further action was adopted by the Commission in its capacity as administrative review body in infringement proceedings under Article 258 TFEU, and could not therefore constitute an administrative act amenable to internal review pursuant to Article 10 of the Aarhus Regulation.

With regard to the committee's argument that, by rejecting its request for internal review, the Commission hindered the effective access to justice of environmental protection organisations, the General Court points out that the aim of the internal review procedure is to facilitate for such organisations access to justice which they would not have under Article 263 TFEU, relating to actions for annulment, for lack of standing. Nevertheless, in this instance, the Commission adhered to the restriction laid down by the Aarhus Regulation itself, which in particular excludes from the concept of administrative act acts adopted pursuant to Article 258 TFEU. The General Court infers from that that the internal review procedure is not intended to enable actions to be brought against measures, like the Commission's refusal to bring infringement proceedings, which, for reasons unrelated to the lack of standing of the organisations in question, cannot be challenged pursuant to Article 263 TFEU.

Lastly, the General Court dismisses the plea of illegality directed against Article 2(2)(b) and Article 10 of the Aarhus Regulation, in the light of Article 9(3) of the Aarhus Convention. [59] In that regard, the General Court recalls the case-law of the Court of Justice according to which the provisions of an international agreement to which the European Union is a party can be relied upon in support of an action for the annulment of an act of secondary EU legislation or a plea based on the illegality of such an act only where, first, the nature and the broad logic of the agreement do not preclude that and, second, those provisions appear, as regards their content, to be unconditional and sufficiently precise. The Court of Justice has previously held that Article 9(3) of the Aarhus Convention, on which Article 10 of the Aarhus Regulation is based, does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals, with the result that it cannot be relied on for the purposes of assessing the legality of Article 10(1) of the Aarhus Regulation.

In the light of those findings, the General Court confirms the Commission's decision rejecting the committee's request for internal review as inadmissible.

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[59] Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

3. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Fifth Chamber) of 21 December 2021, Klymenko v Council, T-195/21

Common foreign and security policy – Restrictive measures taken having regard to the situation in Ukraine – Freezing of funds – List of the persons, entities and bodies covered by the freezing of funds and economic resources – Maintenance of the applicant's name on the list – Council's obligation to verify that the decision of an authority of a third State was taken in accordance with the rights of the defence and the right to effective judicial protection

Following the suppression of demonstrations in Independence Square in Kiev (Ukraine) in February 2014, the Council of the European Union adopted, on 5 March 2014, Decision 2014/119/CFSP [60] and Regulation Nº 208/2014. [61] The purpose of those acts is, inter alia, to freeze the funds of persons identified as responsible for the misappropriation of public funds. The applicant had been included on the list of persons and entities covered by those measures on 14 April 2014, on the ground that he was the subject of preliminary investigations in Ukraine for offences related to the misappropriation of public funds and their illegal transfer outside Ukraine. The Council had subsequently extended that listing on several occasions, [62] on the ground that the applicant was the subject of criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.

Following the adoption of Decision 2021/394 [63] and Regulation 2021/391, [64] by which the Council had extended the inclusion of his name on the list at issue on the same grounds against him, the applicant brought an action for annulment of those acts.

By its judgment, the General Court annuls those two acts in so far as they concern the applicant and recalls that it is for the Council, when it bases restrictive measures on decisions of a non-Member State, to satisfy itself that, when those decisions by the authorities of the non-Member State in question were adopted, the fundamental rights recognised by the Charter of Fundamental Rights of the European Union ('the Charter') and, more particularly, the rights of the defence and the right to effective judicial protection of the person concerned by those measures, were observed.

Findings of the Court

The Court notes, first of all, that the Courts of the European Union must review the lawfulness of all Union acts in the light of those fundamental rights. The EU courts must ensure, in particular, that the contested act has a sufficiently solid factual basis. In that regard, although the Council may base the

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60 Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26).

61 Regulation (EU) Nº 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 1).

62 See order of 10 June 2016, *Klymenko* v *Council* (T-494/14, EU:T:2016:360) ; judgments of 8 November 2017, *Klymenko* v *Council* (T-245/15, not published, EU:T:2017:792) ; of 11 July 2019, *Klymenko* v *Council* (T-274/18, EU:T:2019:509) ; of 26 September 2019, *Klymenko* v *Council* (C-11/18 P, not published, EU:C:2019:786) ; of 25 June 2020, *Klymenko* v *Council* (T-295/19, EU:T:2020:287) ; and of 3 February 2021, *Klymenko* v *Council* (T-258/20, EU:T:2021:52).

63 Council Decision (CFSP) 2021/394 of 4 March 2021 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2021 L 77, p. 29).

64 Council Implementing Regulation (EU) 2021/391 of 4 March 2021 implementing Regulation (EU) Nº 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2021 L 77, p. 2).

adoption or the maintenance of restrictive measures on the decision of an authority of a non-Member State to initiate and conduct criminal investigation proceedings concerning an offence of misappropriation of public funds, it must verify that that decision was taken in accordance with the rights of the defence and the right to effective judicial protection. That obligation is all the more imperative given that the decisions adopted by the Council having regard to the situation in Ukraine were adopted as part of a policy to strengthen and support the rule of law and respect for human rights in that country.

Moreover, while the fact that a non-Member State is among the States which have acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') entails review, by the European Court of Human Rights of the fundamental rights guaranteed by the ECHR, that fact cannot render superfluous the verification requirement on the part of the Council.

In the present case, the Court finds, in the first place, that the decisions of the investigating judge of the Petchersk District Court in Kiev of 1 March 2017 and 5 October 2018, which have already been the subject of judgments of the Court in *Klymenko* v *Council* (T-295/19) and *Klymenko* v *Council* (T-258/20), are not, in themselves, capable of establishing that the decision of the Ukrainian authorities to conduct the criminal proceedings, on which the maintenance of the restrictive measures is based, was taken in accordance with the rights of the defence and the right to effective judicial protection. Those decisions were taken, respectively, more than two and a half years and more than four years before the adoption of the contested acts. The Court then observes that, given that those decisions are procedural in nature, they are merely incidental in the light of the criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list. Lastly, the mere reference made by the Council to repeated statements made by the Ukrainian authorities concerning the applicant's fundamental rights and the mere possibility of the applicant invoking an infringement of his rights before the Ukrainian courts cannot suffice in that regard.

The Court considers, in the second place, that the Council has also failed to demonstrate to what extent the information available to it concerning, in particular, the process of familiarisation of the defence in criminal proceedings and the judicial decisions relating thereto, led it to conclude that the protection of the rights in question was guaranteed. The Court notes that the Council merely accepted the laconic explanations given by the Ukrainian Prosecutor General's Office, when the Ukrainian criminal proceedings were still at the preliminary investigation stage and the cases in question, concerning acts allegedly committed between 2011 and 2014, had not yet been brought before a court on the merits. In that regard, the Court refers to the ECHR [65] and the Charter, [66] according to which the principle of the right to effective judicial protection includes, inter alia, the right to a hearing with a reasonable time. The Court states that the European Court of Human Rights has already pointed out that the infringement of that principle may be established, in particular, where the investigation phase of criminal proceedings is characterised by a certain number of stages of inactivity attributable to the authorities responsible for that investigation or there is a lack of progress in the preliminary investigations. In that regard, where a person has been subject to the restrictive measures at issue for several years, on account of the same criminal proceedings brought in the relevant non-Member State, the Council is required to satisfy itself, prior to the adoption of the contested acts, that the right of that person to be heard within a reasonable time was respected. In view of the precautionary nature of the freezing of the applicant's assets and the case-law of the Court on this subject, [67] it falls to the Council to ensure that such a measure is not extended unnecessarily, to the detriment of the applicant's rights and freedoms, merely because the criminal proceedings on which it is based and which are still at the preliminary investigation stage have been

65 Article 6(1) ECHR.

66 Article 47 of the Charter.

67 See to that effect, judgment of 19 December 2018, *Azarov* v *Council* (C-530/17 P, EU:C:2018:1031).

left open, in essence, indefinitely. Therefore, the Council should, at the very least, have set out the reasons why, following an independent and thorough analysis of the evidence provided by the Ukrainian Prosecutor General's Office and by the applicant, it took the view that those rights had been observed with regard to whether the applicant's case had been heard within a reasonable time.

The Court concludes that it has not been established that the Council satisfied itself that the Ukrainian authorities complied with the applicant's rights of defence and his right to effective judicial protection in the criminal proceedings on which the Council based its decision-making and, consequently, annuls Decision 2021/394 and Regulation 2021/391 in so far as they concern the applicant.

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 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034
- Judgment of 20 October 2021, JMS Sports v EUIPO – Inter-Vion (Élastique pour cheveux en spirale), T-823/19, ECLI:EU:T:2021:718
- Judgment of 10 November 2021, Google et Alphabet v Commission (Google Shopping), T-612/17, ECLI:EU:T:2021:763
- Judgment of 15 December 2021, Oltchim v Commission, T-565/19, ECLI:EU:T:2021:904
- Judgment of 12 January 2022, Verelst v Council, T-647/20, ECLI:EU:T:2022:5
- Judgment of 26 January 2022, Leonardo v Frontex, T-849/19, ECLI:EU:T:2022:28