COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
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I. FUNDAMENTAL RIGHTS

1. RIGHT TO AN EFFECTIVE REMEDY

Judgment of the Court (Grand Chamber) of 29 March 2022, Getin Noble Bank, C-132/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Admissibility – Article 267 TFEU – Concept of court – Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective judicial protection – Principle of judicial independence – Tribunal previously established by law – Judicial body, a member of which was appointed for the first time to the position of judge by a political body within the executive branch of an undemocratic regime – Way in which the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) operates – Unconstitutionality of the law on the basis of which that council was composed – Possibility of regarding that body as an impartial and independent court or tribunal within the meaning of EU law

In 2017, in Poland, several consumers had brought an action before the competent regional court concerning the allegedly unfair nature of a term in the loan agreement which they had concluded with Getin Noble Bank, a bank. Since they did not obtain full satisfaction either at first instance or on appeal, the appellants brought an appeal before the Sąd Najwyższy (Supreme Court, Poland), the referring court.

In order to examine the admissibility of the appeal brought before it, that court is required, in accordance with national law, to determine whether the composition of the panel of judges which delivered the judgment under appeal was lawful. In that context, sitting as a single judge, the referring court raises the question whether the composition of the appellate court is consistent with EU law. In its view, the independence and impartiality of the three appeal judges could be called into question by reason of the circumstances in which they were appointed to the office of judge.

In that regard, the referring court, first, refers to the circumstance that the initial appointment of one of the judges (FO) to such a position was by decision of a body of the undemocratic regime that was in Poland before its accession to the European Union and that that judge was kept in that position after the end of that regime, without having sworn a new oath and still benefiting from the length of service acquired when that regime was in place. [1] Second, the referring court claims that the judges concerned were appointed to the appellate court on a proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS'): one of them, in 1998, when the resolutions of the body were not substantiated and no legal remedy was available against them, and the other two, in 2012 and 2015, when, according to the Trybunał Konstytucyjny (Constitutional Court, Poland), the KRS did not operate transparently and its composition was contrary to the Constitution.

By its Grand Chamber judgment, the Court holds, in essence, that the principle of effective judicial protection of the rights which individuals derive from EU law [2] must be interpreted as meaning that the irregularities alleged by the referring court with regard to the appeal judges at issue are not in

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1 It will be referred to below as 'circumstances predating accession'.

2 Principle to which the second subparagraph of Article 19(1) TEU refers, according to which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', and which is affirmed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). The latter reaffirms, in Article 7(1) and (2), the right to an effective remedy to which consumers who consider themselves wronged by those terms are entitled.

themselves such as to give rise to reasonable and serious doubts, in the minds of individuals, as to the independence and impartiality of those judges, nor, therefore, to call into question the status of an independent and impartial tribunal, previously established by law, of the panel of judges in which they sit.

Findings of the Court

As a preliminary point, the Court rejects the plea of inadmissibility according to which the single judge of the Polish Supreme Court, called upon to examine the admissibility of the appeal brought before that court, was not entitled to refer questions to the Court for a preliminary ruling in view of the flaws in his own appointment, which call into question his independence and impartiality. In so far as a reference for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it meets the requirements laid down by the Court to constitute a 'court or tribunal' within the meaning of Article 267 TFEU. Such a presumption may nevertheless be rebutted where a final judicial decision handed down by a national or international court would lead to the conclusion that the court constituting the referring court is not an independent and impartial tribunal established by law. Since the Court has no information to rebut such a presumption, the request for a preliminary ruling is therefore admissible.

Next, the Court examines the two parts of the questions referred.

By the first part, the referring court asks whether the second subparagraph of Article 19(1) TEU and Article 47 of the Charter preclude a panel of judges in which a judge who, like FO, began their career under the communist regime and was kept in their post after the end of that regime from being considered to be an independent and impartial tribunal.

In that regard, after acknowledging that it has jurisdiction to rule on that question, [3] the Court states that, although the organisation of justice in the Member States falls within the competence of the latter, they are required, in the exercise of that competence, to comply with their obligations under EU law, including the obligation to ensure observance of the principle of effective judicial protection.

As regards the impact on a judge's independence and impartiality of the circumstances prior to accession, relied on by the referring court vis-à-vis judges such as FO, the Court points out that, at the time of Poland's accession to the European Union, it was considered that, in principle, its judicial system was consistent with EU law. In addition, the referring court has provided no specific explanation as to how the conditions for FO's initial appointment would enable undue influence to be exercised on him currently. Thus, the circumstances surrounding his initial appointment could not in themselves be considered to be such as to give rise to reasonable and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge, in the subsequent exercise of his judicial duties.

By their second part, the questions referred seek to ascertain, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 preclude a panel of judges connected with the court or tribunal of a Member State in which a judge sits whose initial appointment to a judicial position or subsequent appointment to a higher court occurred either upon selection as a candidate for the position of judge by a body composed on the basis of legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State ('the first circumstance at issue') or after selection as a candidate for the position of judge by a body lawfully composed but following a procedure that was neither transparent nor public and no legal remedy was available against it ('the second circumstance at issue') from being considered to be an independent and impartial tribunal previously established by law.

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3 According to settled case-law, the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union. In the present case, even though it relates to circumstances predating accession to the European Union by Poland, the question referred concerns a situation which did not produce all its effects before that date since FO, appointed as a judge before accession, is currently a judge and performs duties corresponding to that office.

In that regard, the Court observes that not every error that may take place during the procedure for the appointment of a judge is of such a nature as to cast doubts on the independence and impartiality of that judge.

In the present case, as regards the first circumstance at issue, the Court notes that the Constitutional Court did not rule on the independence of the KRS when it declared unconstitutional the composition of that body at the time of the appointment of the two judges other than FO in the panel of judges who delivered the judgment under appeal before the referring court. That declaration of unconstitutionality is therefore not capable, per se, of calling into question the independence of that body or raising doubts, in the minds of individuals, as to the independence of those judges, with regard to external factors. Moreover, no specific evidence capable of substantiating such doubts was put forward by the referring court to that effect.

The same conclusion must be drawn in the case of the second circumstance at issue. It is not apparent from the order for reference that the KRS, in its composition after the end of the Polish undemocratic regime, lacked independence from the executive and the legislature.

In those circumstances, those two circumstances do not establish an infringement of the fundamental rules applicable to the appointment of judges. Thus, provided that the irregularities relied on do not create a real risk that the executive could exercise undue discretion undermining the integrity of the outcome of the judicial appointment process, EU law does not preclude a panel of judges in which the judges concerned sit from being considered to be an independent and impartial tribunal established by law.

2. PRINCIPLE *NE BIS IN IDEM*

Judgment of the Court (Grand Chamber) of 22 March 2022, bpost, C-117/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Competition – Postal services – Tariff system adopted by a universal service provider – Fine imposed by a national postal regulator – Fine imposed by a national competition authority – Charter of Fundamental Rights of the European Union – Article 50 – *Non bis in idem* principle – Existence of the same offence – Article 52(1) – Limitations to the *non bis in idem* principle – Duplication of proceedings and penalties – Conditions – Pursuit of an objective of general interest – Proportionality

In 2010, the incumbent postal services provider in Belgium, bpost SA, established a new tariff system.

By decision of 20 July 2011, the Belgian postal regulator [4] imposed a fine of EUR 2.3 million on bpost for infringement of the applicable sectoral rules inasmuch as that new system was allegedly based on an unjustified difference in treatment as between consolidators and direct clients.

That decision was annulled by the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium), on the ground that the pricing practice at issue was not discriminatory. That judgment, which has become final, was delivered following a reference for a preliminary ruling which gave rise to the Court's judgment in *bpost*. [5]

In the meantime, by decision of 10 December 2012, the Belgian competition authority determined that bpost had committed an abuse of a dominant position prohibited by the Law on the protection

4 Institut belge des services postaux et des télécommunications (IBPT) (Belgian Institute for Postal Services and Telecommunications).

5 Judgment of 11 February 2015, *bpost* (C-340/13, EU:C:2015:77).

of competition [6] and by Article 102 TFEU. That abuse consisted in the adoption and implementation of the new tariff system in the period between January 2010 and July 2011. Accordingly, the Belgian competition authority fined bpost EUR 37 399 786, the fine previously imposed by the postal regulator having been taken into account in the calculation of that amount.

That decision was also annulled by the cour d'appel de Bruxelles (Court of Appeal, Brussels) because it was contrary to the *non bis in idem* principle. In that regard, that court found that the proceedings conducted by the postal regulator and by the competition authority concerned the same facts.

The Cour de cassation (Court of Cassation, Belgium), however, set aside that judgment and referred the case back to the cour d'appel de Bruxelles (Court of Appeal, Brussels).

In the subsequent proceedings, the cour d'appel de Bruxelles (Court of Appeal, Brussels) decided to refer two questions to the Court of Justice for a preliminary ruling to establish, in essence, whether the *non bis in idem* principle, as affirmed by Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') precludes a postal services provider from being fined for an infringement of EU competition law where, on the same facts, that provider has already been the subject of a final decision relating to an infringement of the rules governing the postal sector.

In answer to those questions, the Court, sitting as the Grand Chamber, specifies both the scope and the limits of the protection conferred by the *non bis in idem* principle guaranteed by Article 50 of the Charter.

Findings of the Court

The Court begins by recalling that the *non bis in idem* principle, as affirmed by Article 50 of the Charter, prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person.

The criminal nature of the proceedings instituted against bpost by the Belgian postal regulator and by the Belgian competition authority having been confirmed by the referring court, the Court goes on to note that the application of the *non bis in idem* principle is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the '*idem*' condition).

Since the Belgian postal regulator's decision was annulled by a judgment which has acquired the force of *res judicata* and according to which bpost was acquitted in the proceedings brought against it under rules governing the postal sector, it appears that the proceedings instituted by that regulator were disposed of by a final decision, meaning that the '*bis*' condition is satisfied in the present case.

As regards the '*idem*' condition, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, regardless of their legal classification under national law or the legal interest protected. In that regard, identity of the material facts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space.

Consequently, it is for the referring court to determine whether the facts in respect of which the two sets of proceedings were instituted against bpost on the basis, respectively, of rules governing the postal sector and of competition law are identical. Should that be the case, the duplication of the two sets of proceedings brought against bpost would constitute a limitation of the *non bis in idem* principle guaranteed by Article 50 of the Charter.

Such a limitation of the *non bis in idem* principle may nevertheless be justified on the basis of Article 52(1) of the Charter. In accordance with that provision, any limitation on the exercise of the

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6 Loi du 10 juin 2006 sur la protection de la concurrence économique (Law of 10 June 2006 on the protection of economic competition) (*Moniteur belge*, 29 June 2006, p. 32755), coordinated by the Royal Decree of 15 September 2006 (*Moniteur belge*, 29 September 2006, p. 50613).

rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. That provision also states that, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In that regard, the Court notes that the possibility, provided for by law, of duplication of the proceedings conducted by two different national authorities and the penalties imposed by them respects the essence of Article 50 of the Charter, provided that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation.

As regards the question whether such duplication can meet an objective of general interest recognised by the European Union, the Court finds that the two sets of legislation under which proceedings were brought against bpost have distinct legitimate objectives. While the object of the rules governing the postal sector is the liberalisation of the internal market for postal services, the rules relating to the protection of competition pursue the objective of ensuring that competition in the internal market is not distorted. It is thus legitimate, for the purposes of guaranteeing the ongoing liberalisation of the internal market for postal services, while ensuring the proper functioning of that market, for a Member State to punish infringements both under sectoral rules concerning the liberalisation of the relevant market and under national and EU competition rules.

As regards compliance with the principle of proportionality, this requires that the duplication of proceedings and penalties provided for by national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, its being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.

In that regard, the Court states that the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued.

With regard to the strict necessity of such duplication of proceedings and penalties, it is necessary to assess whether the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and whether the overall penalties imposed correspond to the seriousness of the offences committed. To that end, it is necessary to examine whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; whether the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and whether the overall penalties imposed correspond to the seriousness of the offences committed.

Accordingly, any justification for a duplication of penalties is subject to conditions which, when satisfied, are intended in particular to limit, albeit without calling into question the existence of '*bis*' as such, the functionally distinct character of the proceedings in question and therefore the actual impact on the persons concerned of the fact that those proceedings against them are brought cumulatively

Judgment of the Court (Grand Chamber) of 22 March 2022, Nordzucker and Others, C-151/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Competition – Article 101 TFEU – Cartel prosecuted by two national competition authorities – Charter of Fundamental Rights of the European Union – Article 50 – *Non bis in idem* principle – Existence of the same offence – Article 52(1) – Limitations to the *non bis in idem* principle – Conditions – Pursuit of an objective of general interest – Proportionality

Nordzucker AG and Südzucker AG are two German sugar producers which, together with a third major producer, dominate the German sugar market. That market was traditionally divided into three main geographical areas, each controlled by one of those three major producers.

Agrana Zucker GmbH ('Agrana'), which is a subsidiary of Südzucker, is the main sugar producer in Austria.

From no later than 2004, Nordzucker and Südzucker agreed not to compete with each other by penetrating their traditional core sales areas. It was in that context that, at the beginning of 2006, Südzucker's sales director called Nordzucker's sales director to complain about deliveries of sugar on the Austrian market by a Slovak subsidiary of Nordzucker, suggesting that this could have consequences on the German sugar market ('the 2006 telephone conversation').

In order to benefit from the national leniency programmes, Nordzucker subsequently warned both the Bundeskartellamt (Federal Competition Authority, Germany) and the Bundeswettbewerbsbehörde (Federal Competition Authority, Austria) of its participation in an agreement on the German and Austrian sugar markets. Those two authorities initiated investigation procedures at the same time.

In 2014, the German competition authority found, by a decision which has become final, that Nordzucker, Südzucker and the third German producer had participated in an anticompetitive agreement in breach of Article 101 TFEU and the corresponding provisions of German law, and, in particular, imposed a fine of EUR 195 500 000 on Südzucker. That decision also reproduces the content of the 2006 telephone conversation concerning the Austrian sugar market.

By contrast, the Austrian competition authority's application seeking, first, a declaration that Nordzucker, Südzucker and Agrana had infringed Article 101 TFEU and the corresponding provisions of Austrian law and, secondly, the imposition of two fines on Südzucker, one of which to be imposed jointly and severally on Agrana, was dismissed by the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria).

The Austrian competition authority brought an appeal against that decision before the Oberster Gerichtshof (Supreme Court, Austria), the referring court. In that context, the referring court is unsure whether the *non bis in idem* principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), precludes it from taking account of the 2006 telephone conversation in the proceedings pending before it, since that conversation was expressly referred to in the German competition authority's decision of 2014. That court is also unsure whether, in the light of the Court of Justice's case-law, the *non bis in idem* principle applies in proceedings finding an infringement, which, owing to an undertaking's participation in a national leniency programme, do not result in the imposition of a fine.

In answer to those questions, the Court, sitting as the Grand Chamber, clarifies the relationship with the *non bis in idem* principle in parallel or successive proceedings under competition law in respect of the same anticompetitive conduct in several Member States.

Findings of the Court

The Court begins by recalling that the *non bis in idem* principle, as enshrined in Article 50 of the Charter, prohibits a duplication both of proceedings and of penalties of a criminal nature, for the purposes of that article, as regards the same acts and against the same person.

In competition law matters, that principle precludes, specifically, an undertaking's being found liable or the bringing of proceedings against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not to be liable by a prior decision that can no longer be challenged. The application of the *non bis in idem* principle in proceedings under competition law is, therefore, subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions concern the same conduct (the '*idem*' condition).

Since the German competition authority's decision of 2014 constitutes a prior final decision which had been given after a determination had been made as to the merits of the case, the '*bis*' condition is met as regards the proceedings conducted by the Austrian competition authority.

As regards the '*idem*' condition, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, whatever their legal classification under national law or the legal interest protected. The identity of anticompetitive practices must be examined in the light of the territory and the product market concerned and the period during which those practices had as their object or effect the prevention, restriction or distortion of competition.

Accordingly, it is for the referring court to ascertain, by assessing all the relevant circumstances, whether the German competition authority's decision of 2014 found that the cartel at issue existed, and penalised it, as a result of the cartel's anticompetitive object or effect not only in German territory, but also Austrian territory. If that were the case, further proceedings and, as the case may be, further penalties for infringement of Article 101 TFEU and the corresponding provisions of Austrian law, as a result of the cartel in Austrian territory, would constitute a limitation of the fundamental right guaranteed in Article 50 of the Charter.

Such a limitation could not, moreover, be justified under Article 52(1) of the Charter. Article 52(1) provides, inter alia, that any limitation on the exercise of the rights and freedoms recognised by the Charter must genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

Admittedly, since the prohibition of cartels laid down in Article 101 TFEU pursues the general interest objective of ensuring undistorted competition in the internal market, the limitation of the *non bis in idem* principle, guaranteed in Article 50 of the Charter, resulting from a duplication of proceedings and penalties of a criminal nature by two national competition authorities, may be justified under Article 52(1) of the Charter where those proceedings and penalties pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct. However, if two national competition authorities were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Article 101 TFEU and the corresponding provisions of their respective national law prohibiting agreements which may affect trade between Member States within the meaning of Article 101 TFEU, those two authorities would pursue the same objective of ensuring that competition in the internal market is not distorted. Such a duplication of proceedings and penalties would not meet an objective of general interest recognised by the European Union, with the result that it could not be justified under Article 52(1) of the Charter.

As regards the proceedings conducted by the Austrian competition authority with regard to Nordzucker, the Court confirms, ultimately, that such proceedings for the enforcement of competition law, in which, owing to Nordzucker's participation in the national leniency programme, only a declaration of the infringement of that law can be made, are also liable to be covered by the *non bis in idem* principle.

As a corollary to the *res judicata* principle, the *non bis in idem* principle aims to ensure legal certainty and fairness; in ensuring that once a natural or legal person has been tried and, as the case may be, punished, that person has the certainty of not being tried again for the same offence. It follows that the initiation of criminal proceedings is liable, as such, to fall within the scope of the *non bis in idem* principle, irrespective of whether those proceedings actually result in the imposition of a penalty.

II. EU LAW AND NATIONAL LAW

Judgment of the Court (Grand Chamber) of 22 March 2022, Grossmania, C-177/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Principles of EU law – Primacy – Direct effect – Sincere cooperation – Article 4(3) TEU – Article 63 TFEU – Obligations on a Member State as a result of a preliminary ruling – Interpretation of a provision of EU law given by the Court in a preliminary ruling – Obligation to give full effect to EU law – Obligation for a national court to disapply national legislation which contravenes EU law as interpreted by the Court – Administrative decision which became final in the absence of a challenge before the courts – Principles of equivalence and effectiveness – Liability of the Member State

In 2013, Hungary adopted legislation which, as of 1 May 2014, cancelled the rights of usufruct belonging to persons who do not have a family relationship with the owner of the agricultural land concerned, located in that Member State.

Grossmania, a company owned by natural persons who are nationals of Member States other than Hungary, held rights of usufruct which they had acquired over agricultural parcels in Hungary. Following the extinguishment by operation of law, on 1 May 2014, of those rights of usufruct in accordance with that legislation, those rights were deleted from the land register. Grossmania did not contest that deletion.

By its judgment of 6 March 2018 in the preliminary rulings, SEGRO and Horváth, [7] the Court of Justice held that such legislation constituted an unjustified restriction of the principle of the free movement of capital. Similarly, by its judgment of 21 May 2019, [8] the Court held that, by adopting the national legislation at issue, Hungary had infringed that principle and the right to property guaranteed by the Charter of Fundamental Rights of the European Union.

Following the first judgment, Grossmania applied to the Hungarian authorities to reinstate its rights of usufruct in the land register. That application was, however, rejected on the ground that the legislation at issue was still in force and prevented the reinstatement sought.

Grossmania brought an action against that administrative decision before the Győri Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Győr, Hungary). That court asks the Court of Justice whether, despite the fact that Grossmania did not contest the deletion of its rights of usufruct before the Courts, it must nevertheless disapply that legislation and require the Hungarian authorities to reinstate those rights.

By its judgment delivered on 10 March 2022, the Court points out first of all that, in a situation where it has already given a clear reply to a question referred for a preliminary ruling on the interpretation of EU law, as in the present case in the judgment in SEGRO and Horváth, the national court must do everything necessary to ensure that that interpretation is applied.

In particular, since the national legislation at issue is incompatible with the principle of the free movement of capital, the Hungarian court must disregard that legislation when it examines whether the request for reinstatement could be rejected.

Next, since at the time Grossmania had not contested the deletion of its rights of usufruct, the Court points out that EU law does not, in principle, require that an administrative body be placed under an

[7] Judgment of the Court of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16.

[8] Judgment of the Court of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)*, C-235/17.

obligation to reopen an administrative decision which has become final, even if that decision contravenes EU law. However, the Court emphasises that particular circumstances may require a national administrative body to review such a decision in order to strike a balance between legal certainty and legality under EU law. The national legislation at issue constitutes a manifest and serious infringement both of the principle of the free movement of capital and of the right to property guaranteed by the Charter, and appears to have far-reaching adverse economic repercussions. Thus, in the context of striking that balance, legality under EU law is of particular importance in the present case.

Furthermore, the Court observes that, even if Grossmania did not challenge the deletion of its rights of usufruct before the courts, the legislation at issue may mislead the former holders of those rights as to the need to contest the deletion measure in order to safeguard their rights of usufruct. Under the national legislation, those rights are extinguished 'by operation of law', that is to say without there being any need for subsequent measures in order to implement that extinguishment.

In those circumstances, the Court considers that, in an action relating to the rejection of an application for reinstatement of cancelled rights of usufruct, the Hungarian courts must disregard the deletion measure concerned, even if it has since become final.

Finally, the Court states that it is for the Hungarian authorities and courts to take all the measures necessary to nullify the unlawful consequences caused by the national legislation. Those measures may consist, primarily, in the reinstatement of the unlawfully cancelled rights in the land register. In the event that such reinstatement is impossible, in particular where it is prejudicial to the rights which third parties acquired in good faith following the deletion of the rights of usufruct concerned, it is appropriate to grant the former holders of the cancelled rights of usufruct the right to compensation, whether financial or other, the value of which would be capable of making reparation for the economic loss arising from the cancellation of those rights. Furthermore, the former holders of those rights also have a right to compensation for the harm suffered as a result of that cancellation if the conditions laid down in the case-law of the Court have been satisfied, which appears to be the case here.

III. PROCEEDINGS OF THE EUROPEAN UNION

1. REFERENCES FOR A PRELIMINARY RULING

Judgment of the Court (Grand Chamber Court) of 22 march 2022, Prokurator Generalny (Chambre disciplinaire de la Cour suprême – Nomination), C-508/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Article 267 TFEU – Interpretation sought by the referring court necessary to enable it to give judgment – Concept – Disciplinary proceedings brought against a judge of an ordinary court – Designation of the disciplinary court having jurisdiction to hear those proceedings by the President of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court, Poland) – Civil action for a declaration that a service relationship does not exist between the President of that disciplinary chamber and the Supreme Court – Lack of jurisdiction of the referring court to review the validity of the appointment of a Supreme Court judge and inadmissibility of such an action under national law – Inadmissibility of the request for a preliminary ruling

In January 2019, disciplinary proceedings were initiated against M.F., a judge at the Sąd Rejonowy w P. (Regional Court of P., Poland), for alleged delays in handling the cases on which that judge was called upon to rule. J.M., in his capacity as President of the Sąd Najwyższy (Supreme Court, Poland) responsible for the work of the disciplinary chamber of the latter court, designated the Sąd Dyscyplinarny przy Sądzie Apelacyjnym w … (Disciplinary Court at the Court of Appeal of …, Poland) to hear those disciplinary proceedings.

Being of the view that J.M.'s appointment in that disciplinary chamber was vitiated by several irregularities, M.F. brought an action before the Supreme Court for a declaration that a service relationship does not exist between J.M. and that court, while also asking the latter to stay the disciplinary proceedings brought against M.F.. One of the chambers of the Supreme Court, the Izba Pracy i Ubezpieczeń Społecznych (Labour and Social Insurance Chamber; 'the referring court') was then instructed to examine those requests.

The referring court, after observing that a judge's mandate reflects a legal relationship governed by public law, and not by civil law, and that an action such as that at issue in the main proceedings is, thus, not capable of falling within the scope of the Code of Civil Procedure, still wonders whether the principle of effective judicial protection, which is enshrined in EU law, and the Member States' duty, under the second subparagraph of Article 19(1) TEU, to ensure that the courts and tribunals in its legal system which may rule in the fields covered by EU law meet the requirements arising from that principle and, in particular, that relating to their independence, their impartiality and the fact that they must be established by law, have the effect of conferring on it the power, which it does not have under Polish law, to find, in the main proceedings, that the defendant concerned does not have a judge's mandate.

In its judgment, delivered by the Grand Chamber, the Court of Justice finds that the request for a preliminary ruling is inadmissible. It points out in that regard that, while, in the context of its duties under Article 267 TFEU, its role is to supply all courts or tribunals in the European Union with the information on the interpretation of EU law which is necessary to enable them to settle genuine disputes which are brought before them, the questions referred to the Court in the present reference for a preliminary ruling go beyond the scope of those duties.

Findings of the Court

The Court recalls that the questions referred by a national court or tribunal must meet an objective need for the purpose of settling disputes brought before it and that the cooperation between the Court and the national courts provided for in Article 267 TFEU thus presupposes, in principle, that the

referring court has jurisdiction to rule on the dispute in the main proceedings, so that it cannot be regarded as purely hypothetical. While the Court has recognised that this may be different in certain exceptional circumstances, such as solution cannot be adopted in the present case.

First, the referring court itself observes that when it is seised of a civil action for a declaration that a legal relationship does not exist, it lacks, under national law, the jurisdiction which would enable it to rule on the lawfulness of the instrument of appointment at issue.

Second, the civil action brought by M.F. seeks, in fact, to challenge not so much the existence of a service relationship between J.M. and the Supreme Court or that of rights and obligations deriving from such a relationship, but rather the decision by which J.M. designated the disciplinary court as having jurisdiction to hear the disciplinary proceedings brought against M.F., proceedings which, moreover, the latter requested the referring court to stay as an interim measure. Thus, the questions referred to the Court relate intrinsically to a dispute other than that in the main proceedings, to which the latter is merely incidental. In order to answer them, the Court would be obliged to have regard to the particulars of that other dispute rather than to confine itself to the configuration of the dispute in the main proceedings, as required by Article 267 TFEU.

Third, the Court notes that, in the absence of a direct right of action against J.M.'s appointment as President of the Disciplinary Chamber of the Supreme Court or against J.M.'s decision designating the disciplinary court in charge of examining that dispute, M.F. could have raised before that court an objection alleging a possible infringement, arising from the decision at issue, of her right to have the said dispute determined by an independent and impartial tribunal previously established by law. The Court recalls, moreover, in that respect, that it has held that the provisions of the Law on the ordinary courts, inasmuch as they confer on the President of the disciplinary chamber of the Supreme Court the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear disciplinary proceedings in respect of judges of the ordinary courts, do not meet the requirement derived from the second subparagraph of Article 19(1) TEU that such cases must be examined by a tribunal 'established by law'. [9] That provision, in that it lays down such a requirement, must also be regarded as having direct effect, with the result that the principle of primacy of EU law requires a disciplinary court so designated to disapply the national provisions pursuant to which that designation was made and, consequently, declare that it has no jurisdiction to hear the dispute before it.

Fourth, the Court has also stated that, here, the action in the main proceedings seeks, in essence, to obtain a form of *erga omnes* invalidation of J.M.'s appointment to the office of judge, even though national law does not authorise, and has never authorised, all subjects of the law to challenge the appointment of judges by means of a direct action for annulment or invalidation of such an appointment.

9 Judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 176).

2. CONTRACTUAL DISPUTES

Judgment of the General Court (Ninth Chamber) of 2 March 2022, VeriGraft v Eismea, T-688/19

Link to the complete text of the judgment

Arbitration clause – Grant agreement concluded in the context of the 'Horizon 2020' Framework Programme for Research and Innovation – Termination of the agreement – Misconduct – Capacity as beneficiary of the grant or as a natural person acting in its name or on its behalf

The applicant, VeriGraft AB, is a Swedish biotechnology company founded in 2005 by A and B, two professors of a Swedish university institute. It specialises in the development of personalised human-tissue-engineered transplants for use in regenerative medicine. A, who initially owned 41% of the applicant's capital, gradually relinquished her entire shareholding from 2014; she was also a member of the applicant's board of directors until July 2015, until her contract of employment was terminated on 1 October 2016.

In 2017, in the context of 'Horizon 2020 – the Framework Programme for Research and Innovation' [10] and of the implementation of the instrument to support innovation in small and medium-sized enterprises (SMEs), [11] the applicant was awarded a grant by the Executive Agency for Small and Medium-sized Enterprises (EASME). [12] Indeed, it had submitted a proposal concerning the commercialisation of an individualised cardio-vascular product corresponding to the project 'Personalised Tissue Engineered Veins as the first Cure for Patients with Chronic Venous Insufficiency – P-TEV'. The grant agreement signed between the applicant and EASME required compliance with the 'highest standards of research integrity' (Article 34.1) and specific ethical requirements for 'activities raising ethical issues' (Article 34.2).

Following an investigation by the University of Gothenburg, involving the Central Ethics Review Board of Sweden ('CEPN'), concerning allegations of misconduct in the scientific research carried out by A, her dismissal had been recommended. After having reviewed the progress of the P-TEV project and carried out several ethics checks in respect thereof, EASME had, for its part, informed the applicant by letters, further to the procedure set out in Article 50.3.2 of the grant agreement, and after having sought its observations in that respect, of its intention to terminate that agreement: first of all, in October 2018, on the ground that five unresolved ethical issues remained amounting, according to EASME, to a 'serious breach' by the applicant of its obligations under Article 50.3.1(l) of the agreement and, next, in February and April 2019, on the ground that the CEPN had found A, the applicant's co-founder, guilty of misconduct in the publications which had then been used to substantiate the scientific evaluation carried out by EASME for the award of the grant; that misconduct amounted, according to EASME, to a 'serious breach of obligations' by the applicant under Article 50.3.1(f) of the agreement. Before the Court, the applicant claimed, pursuant to Article 272 TFEU, that the termination of the grant agreement by EASME was invalid.

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10 Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ L 347, 20.12.2013, p. 104) ('the Horizon 2020 Framework Programme')

11 Council Decision 2013/743/EU of 3 December 2013 establishing the specific programme implementing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decisions 2006/971/EC, 2006/972/EC, 2006/973/EC, 2006/974/EC and 2006/975/EC (OJ 2013 L 347, p. 965).

12 Established by Commission Implementing Decision 2013/771/EU of 17 December 2013 establishing the 'Executive Agency for Small and Medium-sized Enterprises' and repealing Decisions 2004/20/EC and 2007/372/EC (OJ 2013 L 341, p. 73), that agency became, as from 1 April 2021, the European Innovation Council and SMEs Executive Agency (Eismea).

In its judgment, the Court first of all declares that it has jurisdiction to examine a plea alleging infringement of the rights of the defence in an action brought on the basis of Article 272 TFEU. In addition, the present case is, in substance, the first case in which the Court finds that an EU agency was wrong to terminate, on grounds of professional misconduct, a grant agreement concluded under the Horizon 2020 Framework Programme.

Findings of the Court

As regards the plea in law alleging infringement of the rights of the defence, the Court notes, as a preliminary point, that the fact that the law applicable to the contract does not ensure the same safeguards as those conferred by the Charter of Fundamental Rights of the European Union ('the Charter') and the general principles of EU law does not exempt EASME from ensuring that they are respected in relation to the parties. If the parties decide to confer on the EU judicature, by means of an arbitration clause, jurisdiction over disputes relating to that contract, that judicature will have jurisdiction, independently of the applicable law stipulated in that contract, to examine any infringement of the Charter and of the general principles of EU law. Consequently, the Court has jurisdiction to examine that plea. As to the substance, it observes that, in accordance with Article 41 of the Charter, the right to be heard is of general application. Where an individual measure is liable to affect adversely the person concerned, that right involves the person concerned being put in a position, prior to the decision affecting him or her, effectively to make known his or her views on the truth and relevance of the facts and circumstances of the case. In the present case, the Court observes that the reasons for the termination of the grant agreement were indicated to the applicant in the second pre-information letter of 18 February 2019 and that the applicant had an opportunity to comment on the matter, so that EASME did not infringe the applicant's right to be heard.

Next, as regards the plea alleging infringement of Article 50.3.1(f) of the grant agreement, the Court finds, as the pre-information letter indicates, that it was on the basis of that article that EASME based the termination of the grant agreement on the ground that A had been found guilty of professional misconduct. The Court notes, moreover, that EASME considered that it was A's professional misconduct that called into question the applicant's capacity to implement the P-TEV project, and not some misconduct on the part of the applicant itself. Moreover, since (i) A's employment contract was terminated by the applicant in December 2016, (ii) A had left the applicant's board of directors in July 2015 and (iii) A's shareholding in the applicant's capital was, at the time when the application for the grant for the P-TEV project was submitted and until all those shares were sold, inferior to the threshold allowing, under Swedish company law, decisions to be taken on behalf of the applicant, the Court finds that A did not fall within the category of persons referred to in Article 50.3.1(f) of the grant agreement. It concludes that the termination of the grant agreement by EASME under Article 50.3.1(f) of that agreement, on the ground relied on by that agency, was unfounded. In that regard, it notes, concerning the arguments put forward by EASME during the judicial proceedings, that they constitute a new ground for terminating the grant agreement which, if it were to be accepted, would necessarily undermine the effectiveness of the termination procedure provided for in Article 50.3.2 of that agreement. Finally, the Court also rejects the arguments put forward by EASME based on the incorrect premiss that the applicant knowingly concealed from it research misconduct affecting the work mentioned in the proposal relating to the P-TEV project.

In the light of those considerations, the Court rules that EASME's termination of the grant agreement concluded with VeriGraft is invalid.

IV. FREEDOM OF MOVEMENT : FREEDOM TO PROVIDE SERVICES AND POSTING OF WORKERS

Judgment of the Court (Grand Chamber) of 8 March 2022, Bezirkshauptmannschaft Hartberg-Fürstenfeld (Effet direct), C-205/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Freedom to provide services – Posting of workers – Directive 2014/67/EU – Article 20 – Penalties – Proportionality – Direct effect – Principle of primacy of EU law

The company CONVOI s. r. o., established in Slovakia and represented by NE, posted workers to a company established in Fürstenfeld (Austria). By a decision adopted in June 2018, on the basis of findings made during an inspection carried out on 24 January 2018, the Bezirkshauptmannschaft Hartberg-Fürstenfeld (administrative authority of the district of Hartberg-Fürstenfeld, Austria) imposed a fine of EUR 54 000 on NE, for failure to comply with a number of obligations laid down by Austrian employment law, relating, in particular, to the retention and making available of wage and social security records. NE brought an action against that decision before the referring court, the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria).

In October 2018, that court, questioning the conformity with EU law and, in particular, with the principle of proportionality set out inter alia in Article 20 of Directive 2014/67 [13] of penalties such as those imposed by the Austrian legislation at issue, had brought the matter before the Court for a preliminary ruling. In its order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, [14] the Court had held that the combination of various elements of the Austrian system of penalties imposed for non-compliance with obligations – essentially administrative – to retain documents concerning the posting of workers was disproportionate.

Noting that, following that order, the national legislature did not amend the legislation at issue, and having regard to the solution adopted by the Court in the judgment of 4 October 2018, *Link Logistik N&N*, [15] the referring court decided to ask the Court whether and, if so, to what extent that legislation may be disapplied. Indeed, in that judgment of 4 October 2018, *Link Logistik N&N*, the Court had considered that a provision of EU law similar to Article 20 of Directive 2014/67 [16] has no direct effect.

By its judgment, the Court, sitting as the Grand Chamber, rules, first, on whether the requirement of proportionality of penalties is directly effective. Second, it specifies the extent of the obligations

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13 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (OJ 2014 L 159, p. 11).

14 Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-645/18. More specifically, in that order, the Court held that Article 20 of Directive 2014/67, which requires the penalties provided for therein to be proportionate, precludes national legislation which provides, in respect of non-compliance with employment law obligations in relation to declaring workers and keeping records on wages, for the imposition of high fines which may not be lower than a predefined minimum amount, which apply cumulatively in respect of each worker concerned and without an upper limit, and to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed.

15 Judgment of 4 October 2018, *Link Logistik N&N*, C-384/17.

16 In that judgment of 4 October 2018, *Link Logistik N&N*, C-384/17, the Court was ruling on Article 9a of Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42), as amended by Directive 2011/76/EU of the European Parliament and of the Council of 27 September 2011 (OJ 2011 L 269, p. 1). That provision also provides for a requirement of proportionality of penalties imposed in the event of infringements of national provisions adopted pursuant to Directive 1999/62.

incumbent on a national court hearing a dispute in which it is called upon to apply national rules imposing disproportionate penalties.

Findings of the Court

As a first step, the Court holds that Article 20 of Directive 2014/67, in so far as it requires the penalties provided for therein to be proportionate, has direct effect and may those be relied on by individuals before national courts against a Member State which has transposed it incorrectly. In finding, first of all, that the requirement of proportionality of penalties laid down in that legislation is unconditional, the Court notes that the wording of that article sets out that requirement in absolute terms. Moreover, the prohibition on adopting disproportionate penalties, which is the consequence of that requirement, does not require the adoption of any measure of the EU institutions and that provision does not in any way confer on Member States the right to limit the scope of that prohibition. In that regard, the fact that Article 20 of that directive needs to be transposed is not such as to call into question the unconditional nature of the requirement of proportionality of penalties laid down in that article. Next, in finding that the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67 is sufficiently precise, the Court holds that the margin of discretion left by that provision to the Member States in defining the rules on penalties applicable in the event of infringements of the national provisions adopted pursuant to that directive is limited by the prohibition, laid down by that provision in a general manner and in unequivocal terms, on imposing disproportionate penalties. Thus, the existence of such a margin of discretion does not preclude judicial review from being carried out on the transposition of that provision.

As a second step, the Court finds that the principle of primacy of EU law imposes on national authorities the obligation to disapply national legislation of which a part is contrary to the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67 only to the extent necessary to enable the imposition of proportionate penalties. Recalling that, although national legislation such as that at issue in the main proceedings is appropriate for attaining the legitimate objectives pursued, the Court reiterates that that legislation goes beyond the limits of what is necessary to attain those objectives due to combination of its various characteristics. [17] However, taken in isolation, such characteristics do not necessarily breach that requirement. Therefore, in order to ensure the full effectiveness of the requirement of proportionality of penalties laid down in Article 20 of Directive 2014/67, it is for the national court hearing an action against a penalty such as that at issue in the main proceedings to disregard that part of the national legislation from which the disproportionate nature of the penalties stems in such a way as to result in the imposition of proportionate penalties, which are at the same time effective and dissuasive. The fact that the penalty imposed will be less severe than the penalty provided for by the applicable national legislation cannot be regard as infringing the principles of legal certainty, legality and proportionality of criminal offences and penalties and non-retroactivity of the criminal law, the penalty remaining adopted under the said legislation. Furthermore, since the requirement of proportionality provided for in Article 20 of Directive 2014/67 entails a limitation of penalties which must be observed by all the national authorities called upon within the exercise of their powers to apply that requirement, while allowing those authorities to impose different penalties depending on the seriousness of the offence on the basis of the applicable national legislation, such a requirement cannot be regarded as undermining the principle of equal treatment.

17 Order of 19 December 2019, *Bezirkshauptmannschaft Hartberg-Fürstenfeld*, C-645/18.

V. APPROXIMATION OF LAWS

1. INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the Court (Fifth Chamber) of 3 March 2022, Acacia, C-421/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Intellectual property – Community designs – Regulation (EC) No 6/2002 – Article 82(5) – Action brought before the courts of the Member State in which an act of infringement has been committed or threatened – Claims supplementary to the action for infringement – Applicable law – Article 88(2) – Article 89(1)(d) – Regulation (EC) No 864/2007 – Law applicable to non-contractual obligations (Rome II) – Article 8(2) – Country in which the intellectual property right was infringed

Acacia is a company incorporated under Italian law which produces, in Italy, wheel rims for motor vehicles and distributes them in a number of Member States. Taking the view that Acacia's distribution of certain wheel rims in Germany constituted an infringement of its registered Community design, Bayrische Motoren Werke AG brought an action for infringement before a Community design court designated by Germany.

That court held that Acacia had committed the acts of infringement alleged and ordered that the infringement be brought to an end. As regards the 'supplementary' claims seeking damages, the provision of information, the provision of documents, the surrender of accounts and the handing over of infringing products with a view to their being destroyed, it applied German law and upheld those claims.

On appeal, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) stated that the jurisdiction of the Community design courts designated by Germany arises, in the present case, from Article 82(5) of Regulation No 6/2002 [18] and that Acacia had committed the acts of infringement alleged. As regards the supplementary claims, Acacia submitted that the applicable law was Italian law. The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) therefore requested an interpretation of EU law from the Court of Justice, so that it could determine the law applicable to those supplementary claims.

The Court finds that the court before which an action for infringement of a Community design pursuant to Article 82(5) of Regulation No 6/2022 is brought concerning acts of infringement committed within a single Member State, must examine claims supplementary to that action on the basis of the law of that Member State.

Findings of the Court

First of all, the Court states that the Community design court before which a case has been brought pursuant to Article 82(5) of Regulation No 6/2022 is to have jurisdiction only in respect of acts of infringement committed or threatened within the territory of the Member State in which that court is situated. [19] That provision enables the proprietor of a Community design to bring one or more

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18 Article 82(5) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) provides that proceedings in respect of the actions for infringement may be brought in the courts of the Member State in which the act of infringement has been committed or threatened.

19 Unlike an action for infringement brought pursuant to the other paragraphs of that article, which enables the court before which the case is brought to give a ruling on acts committed within the territory of any Member State.

targeted actions, each relating specifically to the acts of infringement committed or threatened within a single Member State.

Next, the Court holds that the Rome II Regulation [20] applies, as it is included in the rules of private international law of the Member State concerned. [21] That regulation provides that in the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable is, for any question that is not governed by the relevant Community instrument, to be 'the law of the country in which the act of infringement was committed'. [22]

In a situation where the infringement which may be examined is located within a single Member State, the applicable law, according to the Rome II Regulation, is the law which is in force at the place of such infringement. Accordingly, the applicable law is the same, in the case of an action for infringement brought pursuant to Article 82(5) of Regulation No 6/2002 and which therefore relates to acts of infringement committed within a single Member State, as the law of that Member State.

Possible infringements of the Community design in question in other Member States or in third countries are not the subject of the action brought pursuant to Article 82(5) of Regulation No 6/2002. The words 'country in which the act of infringement [of the Community design relied on] was committed' cannot be interpreted as designating a country in which acts of infringement which are not the subject of action in question took place. Furthermore, interpreting those words as designating the country on whose sole territory the applicant invokes, in support of his action for infringement, the Community design at issue makes it possible to preserve the principle of '*lex loci protectionis*', [23] which is particularly important in the area of intellectual property. [24]

Finally, the Court adds that the holder of the Community design cannot, in relation to the same acts of infringement, bring actions based on Article 82(5) of Regulation No 6/2002 simultaneously with those based the other paragraphs of that article. There is therefore no risk of a situation occurring in which claims supplementary to an infringement action with the same subject matter would be examined in a number of different proceedings on the basis of different laws.

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20 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

21 In accordance with Article 88(2) and Article 89(1)(d) of Regulation No 6/2002.

22 Article 8(2) of the Rome II regulation.

23 Law of the country for which protection is claimed.

24 Recital 26 of the Rome II regulation.

Judgment of the Court (Second Chamber) of 24 March 2022, Austro-Mechana, C-433/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2 – Reproduction – Article 5(2)(b) – Private copying exception – Concept of 'any medium' – Servers owned by third parties made available to natural persons for private use – Fair compensation – National legislation that does not make the providers of cloud computing services subject to the private copying levy

Austro-Mechana [25] is a copyright collecting society which exercises the legal rights to the remuneration that is due under the private copying exception. [26] It brought a claim for payment of that remuneration before the Handelsgericht Wien (Commercial Court, Vienna, Austria) that was directed against Strato AG, a provider of cloud storage services. That court dismissed the claim on the ground that Strato does not supply storage media to its customers, but provides them with an online storage service.

Hearing the case on appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) asked the Court of Justice whether the storage of content in the context of cloud computing comes within the scope of the private copying exception provided for in Article 5(2)(b) of Directive 2001/29. [27]

The Court of Justice holds that the private copying exception applies to copies of works on a server in storage space made available to a user by the provider of a cloud computing service. However, Member States are not obliged to make the providers of cloud storage services subject to the payment of fair compensation under that exception, in so far as the payment of fair compensation to rightholders is provided for in some other way.

Findings of the Court

In the first place, Directive 2001/29 provides that the private copying exception applies to reproductions on any medium. [28] The Court rules on the applicability of that exception to copies of works in the cloud.

As regards the concept of 'reproduction', the Court states that the saving of a copy of a work in storage space in the cloud constitutes a reproduction of that work. The upload of a work to the cloud consists in storing a copy of it.

As regards the words 'any medium', the Court observes that these refer to all of the media on which a protected work may be reproduced, including the servers used in cloud computing. In that regard, the fact that the server belongs to a third party is not decisive. Accordingly, the private copying exception may apply to reproductions made by a natural person with the aid of a device belonging to a third party. In addition, one of the objectives of Directive 2001/29 is to prevent copyright protection in the European Union from becoming outdated or obsolete as a result of technological developments. That objective would be undermined if the exceptions and limitations to copyright protection were interpreted in such a way as to exclude digital media and cloud computing services.

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25 Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH.

26 The private copying exception is an exception to the exclusive right of authors to authorise or prohibit the reproduction of their works. It concerns reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.

27 Member States have the option to provide for such an exception under Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10). In that case, those States must ensure that rightholders receive fair compensation.

28 Article 5(2)(b) of Directive 2001/29.

Consequently, the concept of 'any medium' covers a server on which storage space is made available to a user by the provider of a cloud computing service.

In the second place, the Court rules on the subjection of providers of cloud storage services to the payment of fair compensation and takes the view, in essence, that, as EU law currently stands, such an imposition is within the discretion conferred on the national legislature to determine the various elements of the system of fair compensation.

In that regard, it points out that Member States which implement the private copying exception are required to provide for a system of fair compensation intended to compensate rightholders.

As regards the person liable to pay the fair compensation, it is in principle for the person carrying out the private copying, namely the user of cloud computing storage services, to finance that compensation.

However, in the event of practical difficulties related to the identification of end users, Member States may introduce a private copying levy chargeable to the producer or importer of the servers by means of which the cloud computing services are offered to natural persons. That levy will be passed on economically to the purchaser of such servers and will ultimately be borne by the private user who uses that equipment or to whom a reproduction service is provided.

When setting the private copying levy, Member States may take account of the fact that certain devices and media may be used for private copying in connection with cloud computing. However, they must ensure that the levy thus paid, in so far as it affects several devices and media in the single process of private copying, does not exceed the possible harm to the rightholders.

Consequently, Directive 2001/29 does not preclude national legislation that does not make the providers of cloud storage services subject to the payment of fair compensation, in so far as that legislation provides for the payment of fair compensation in some other way.

2. FINANCIAL SERVICES

Judgment of the Court (Grand Chamber) of 15 March 2022, Autorité des marchés financiers, C-302/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Single Market for financial services – Market abuse – Directives 2003/6/EC and 2003/124/EC – 'Inside information' – Concept – Information 'of a precise nature' – Information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments – Unlawfulness of the disclosure of inside information – Exceptions – Regulation (EU) No 596/2014 – Article 10 – Disclosure of inside information in the normal exercise of a profession – Article 21 – Disclosure of inside information for the purpose of journalism – Freedom of the press and freedom of expression – Disclosure by a journalist, to a usual source, of information relating to the forthcoming publication of a press article

A journalist published two articles on the *Daily Mail* website reporting rumours about takeover bids for the shares of the companies Hermès (by LVMH) and Maurel & Prom. The prices indicated in that article were significantly higher than the prices of those shares on Euronext. That publication resulted in a considerable increase in the price of those shares. Shortly before the publication of those articles, purchase orders were made for the shares in question by certain British residents, who sold those shares once that publication had taken place. The Autorité des marchés financiers française (AMF) (Financial Markets Authority, France) imposed a fine of EUR 40 000 on the journalist because he had told those British residents about the forthcoming publication of his articles and had thus disclosed 'inside information' to them.

Hearing an action brought against that decision, the cour d'appel de Paris (Court of Appeal, Paris, France) made a request for a preliminary ruling to the Court of Justice concerning the interpretation of the provisions of EU law on insider dealing. First, it asks whether information relating to the forthcoming publication of a press article reporting a market rumour may be regarded as inside information, the disclosure of which is prohibited. Secondly, it questions the Court regarding the exceptions to that prohibition in the particular context of journalistic activity.

According to the Court of Justice, information relating to the forthcoming publication of a press article reporting a market rumour concerning an issuer of financial instruments is capable of constituting information 'of a precise nature' and, therefore, of falling within the scope of the concept of 'inside information', where it mentions, inter alia, the price at which the securities will be purchased, the name of the journalist who authored the article and the media organisation which will publish it.

The disclosure of inside information for the purpose of journalism may be justified, under EU law, by virtue of the freedom of the press and the freedom of expression. The 'purposes of journalism' may cover investigative work carried out by the journalist in preparation for publication, in order to verify rumours.

However, the disclosure of inside information by a journalist is lawful only where it is regarded as being necessary for the exercise of his or her profession and as complying with the principle of proportionality. The national court must therefore examine the following questions: first, was it necessary for the journalist seeking to seek to verify a market rumour to disclose to a third party, not only the content of that rumour, but the fact that an article reporting that rumour would soon be published? Secondly, is the restriction on the freedom of the press which the prohibition of such disclosure would entail excessive – taking into account the potentially dissuasive effect on the exercise of journalistic activity and the rules and codes to which journalists are subject – by comparison with the harm which such a disclosure is liable to cause, not only to the private interests of certain investors but also to the integrity of the financial markets?

VI. ENERGY

Judgment of the General Court (Second Chamber, Extended Composition) of 16 March 2022, MEKH and FGSZ v ACER, T-684/19 and T-704/19

Link to the complete text of the judgment

Energy – Regulation (EU) 2017/459 – Network code adopted by the Commission including an 'incremental capacity process' – ACER decision approving the implementation of an incremental capacity project – Plea of illegality – Lack of competence of the Commission – Article 6(11), Article 7(3) and Article 8(6) of Regulation (EC) No 715/2009

In 2015, FGSZ Földgázszállító Zrt. (FGSZ), the Hungarian gas transmission system operator, and its Bulgarian, Romanian and Austrian counterparts engaged in a regional cooperation project to increase energy independence by bringing Black Sea gas to markets. Entitled 'ROHUAT/BRUA', that project provided for the creation of incremental capacity, inter alia between Hungary and Austria.

In May 2017, the project was split into two separate projects, one relating to the transmission infrastructure connecting Hungary to Austria ('the HUAT project'). In accordance with Regulation

2017/459 ('the Network Code Regulation'), [29] FGSZ and the Austrian gas transmission system operator (GCA) carried out an assessment of market demand for the HUAT project.

On 6 April 2018, FGSZ submitted to Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH), the Hungarian energy and public utility regulatory authority, the proposal for the HUAT project, stating that it was not in favour of the implementation of that project. On 9 April 2018, GCA submitted the HUAT project proposal to the regulatory authority for the Austrian electricity and natural gas sectors (E-Control). On 27 April 2018, E-Control adopted a decision approving the HUAT project proposal, whereas, on 5 October 2018, MEKH adopted a decision rejecting that proposal.

On 10 October 2018, the European Union Agency for the Cooperation of Energy Regulators (ACER) informed MEKH and E-Control that, as those national regulatory authorities had failed to adopt a coordinated decision, it was empowered, under the Network Code Regulation and the ACER Regulation, [30] to decide on the HUAT project proposal. By decision of 6 August 2019, ACER approved that proposal.

MEKH and FGSZ each brought an action against the decision of ACER before the General Court of the European Union. In its action, MEKH pleads, in particular, that the provisions of the Network Code Regulation pursuant to which the decision of ACER was adopted [31] are unlawful. According to MEKH, the basic regulation, [32] which served as the basis for the adoption of the Network Code Regulation, does not allow the Commission to adopt a network code providing for a process for the creation of incremental capacity that may lead to the obligation being imposed on the operator to make the necessary investments for the creation of such capacity.

By its judgment delivered today, the General Court finds that the Network Code Regulation does in fact establish a process that could lead to an obligation on the part of transmission system operators to make the investments necessary for the creation of incremental capacity.

As regards the lawfulness of the provisions of the Network Code Regulation providing for that process, the Court states that, pursuant to the basic regulation, it is, in the first place, for the European Network of Transmission System Operators for Gas ('ENTSOG'), which is the structure for cooperation at EU level of gas transmission system operators, to develop network codes in certain areas which are exhaustively listed by that regulation. It is thus only where the ENTSOG has failed to develop a network code that the Commission may adopt one or more codes in those same areas. In that regard, the Court finds that, pursuant to the very wording of the basic regulation, the only area in respect of which the establishment of a network code in the matter of creation of incremental capacity might be conceivable is the one relating to capacity allocation and congestion management rules.

The Court states that, within the meaning of the basic regulation, the concept of 'capacity' refers only to current capacity on the network and that congestion management is conceived only on the basis of existing capacity.

In addition, the basic regulation draws a clear distinction between, on the one hand, the abovementioned exhaustively listed areas, for which the ENTSOG is competent to develop relevant rules in the context of network codes, and, on the other hand, the framework for the investments

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29 Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ 2017 L 72, p. 1).

30 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1; 'the ACER Regulation'). That regulation was replaced by Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22), which entered into force on 4 July 2019.

31 Chapter V of the Network Code Regulation.

32 Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36; 'the basic regulation').

necessary for the creation of incremental capacity on the network, in respect of which the ENTSOG plays only a role of support and coordination. The EU-wide network development comes primarily within the competence of the Member States, with the role of the ENTSOG relating solely to coordinating the exercise of that competence and identifying potential investment gaps, notably with respect to cross-border capacities.

Consequently, the basic regulation does not confer any regulatory competence on either the ENTSOG or the Commission as regards the adoption of rules governing the creation of incremental capacity on the network. In that regard, the Court points out that it is under the Gas Directive [33] that a transmission system operator is subject to the obligation to make the investments necessary for the proper functioning of the network and, as the case may be, for the creation of incremental capacity. Pursuant to that directive, it is for the Member States alone to ensure, via their respective national regulatory authorities, compliance with those obligations.

In those circumstances, the Court concludes that, as the basic regulation does not empower the ENTSOG to include in a network code rules capable of imposing on a gas transmission operator the obligation to create incremental capacity, the Commission, in substituting itself for the ENTSOG, was not competent to adopt the provisions of the Network Code Regulation governing a process that could lead to the imposition of such an obligation. Accordingly, the Court declares inapplicable those provisions of the Network Code Regulation and annuls the decision of ACER, which was adopted on the basis of those provisions.

VII. INTERNATIONAL AGREEMENTS

Judgment of the Court (Grand Chamber) of 1 March 2022, Commission v Council (Agreement with the Republic of Korea), C-275/20

Link to the complete text of the judgment

Action for annulment – Decision (EU) 2020/470 – Extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part – Procedural legal basis – Article 218(7) TFEU – Applicable procedure and voting rule

Council Decision 2020/470 ('the contested decision') [34] extended, until 30 June 2023, the period of entitlement for audiovisual co-productions as provided for in the Protocol on Cultural Cooperation [35] to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part. [36]

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

34 Council Decision (EU) 2020/470 of 25 March 2020 as regards the extension of the period of entitlement for audiovisual co-productions as provided for in Article 5 of the Protocol on Cultural Cooperation to the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (OJ 2020 L 101, p. 1).

35 In Article 5 of the Protocol on Cultural Cooperation (OJ 2011 L 127, p. 1418; 'the Protocol').

36 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (OJ 2011 L 127, p. 6; 'the Agreement').

The Protocol provides for the entitlement for audiovisual co-productions to benefit from the respective schemes for the promotion of local/regional cultural content ('the entitlement at issue'), an entitlement which, after the initial three-year period, is renewed for three years and thereafter automatically renewed for further successive periods of the same duration, unless a party terminates the entitlement by giving notice in writing at least three months before the expiry of the initial or any subsequent period. [37]

The contested decision was adopted on the basis of Article 3(1) of Decision 2015/2169 by which the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, was concluded. [38] Pursuant to that provision, the European Commission is to provide notice to the Republic of Korea of the European Union's intention not to extend the period of the entitlement at issue unless, on a proposal from the Commission, the Council of the European Union unanimously agrees four months before the end of the period of entitlement to continue the entitlement.

The Commission brought an action for annulment of the contested decision. It put forward a single plea in law, alleging that the Council, by founding the contested decision on Article 3(1) of Decision 2015/2169, unlawfully used a 'secondary legal basis'.

Giving judgment as the Grand Chamber, the Court rules, for the first time, on the procedure and voting rule applicable to the simplified procedure, established in Article 218(7) TFEU, for modifying an agreement concluded by the European Union. [39] It annuls the contested decision, holding that the procedure established in Article 3(1) of Decision 2015/2169 and applied by the contested decision does not comply with Article 218 TFEU, in so far as that procedure requires a vote by unanimity in the Council even though the rule of qualified majority voting would be applicable for the adoption of an internal rule in the field covered by that decision.

Findings of the Court

The Court begins by observing that, according to recital 6 of Decision 2015/2169, [40] the legal basis of the decision-making procedure laid down in Article 3(1) of that decision is Article 218(7) TFEU. It then examines whether that decision-making procedure, applied by the contested decision, falls within the scope of Article 218(7) TFEU and whether it complies with Article 218 TFEU.

In the first place, the Court states that it is clear from Article 5(8)(a) and (b) of the Protocol that every three years the parties to the Agreement and, by extension, to the Protocol must, following an assessment conducted by the Committee on Cultural Cooperation, determine whether or not they propose to renew the entitlement at issue for a further period of three years. Article 3(1) of Decision 2015/2169 lays down, in that regard, an internal EU procedure in that it empowers the Commission to terminate the entitlement at issue at the end of each three-year period or, if it considers that that entitlement must be renewed, to submit a proposal to that effect to the Council before the expiry of each period. Failure to renew that entitlement amounts to removing an entitlement which was established by the Protocol and is in principle renewed tacitly and automatically every three years. That procedure thus authorises the Commission to adopt decisions relating to the modification of the Protocol. Consequently, Article 3(1) of Decision 2015/2169 constitutes an authorisation, given to the

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37 Article 5(8)(a) and (b) of the Protocol.

38 Council Decision (EU) 2015/2169 of 1 October 2015 (OJ 2015 L 307, p. 2).

39 Article 218(7) TFEU provides that, when concluding an agreement, the Council may, by way of derogation from Article 218(5), (6) and (9) TFEU, authorise the negotiator to approve on the European Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

40 Recital 6 of Decision 2015/2169 states that, pursuant to Article 218(7) TFEU, it is appropriate for the Council to authorise the Commission to approve certain limited modifications to the Agreement and that the Commission should be authorised to bring about the termination of the entitlement at issue unless it determines that the entitlement should be continued and this is approved by the Council pursuant to a specific procedure necessitated both by the sensitive nature of this element of the Agreement and by the fact that the Agreement is to be concluded by the European Union and its Member States.

Commission by the Council when the Agreement and, by extension, the Protocol, was concluded, to approve on behalf of the European Union 'modifications to the agreement' within the meaning of Article 218(7) TFEU.

In addition, Article 5(8)(a) and (b) of the Protocol lays down a simplified procedure in that it is sufficient, to terminate the entitlement at issue, for a party to the Agreement to do so by giving notice in writing three months before the expiry of the period concerned, failing which the entitlement is renewed automatically.

Furthermore, the rules laid down in Article 3(1) of Decision 2015/2169 may be regarded as making use of the possibility, provided for in Article 218(7) TFEU, for the Council to attach specific conditions to the authorisation given to the Commission, since that provision of Decision 2015/2169 requires the Commission, if it considers that the entitlement at issue should be renewed for a period of three years, to submit a proposal to that effect to the Council four months before the end of the ongoing period.

It follows that the procedure established in Article 3(1) of Decision 2015/2169 and applied by the contested decision falls within the scope of Article 218(7) TFEU, with the result that that decision did not have to be adopted in accordance with the ordinary procedure laid down in Article 218(6)(a) TFEU.

In the second place, the Court holds that, since Article 218(7) TFEU does not lay down any voting rule for the purpose of the adoption by the Council of the decisions in respect of which, in the context of the authorisation that it has given to the Commission on the basis of that provision, it has retained its competence, the applicable voting rule must be determined in each individual case by reference to Article 218(8) TFEU. [41] It is apparent from that provision that, as a general rule, the Council acts by a qualified majority and that it is only in the situations set out in its second subparagraph that the Council acts by unanimity. The first case in which the second subparagraph of Article 218(8) TFEU requires the Council to act unanimously, which is the only case relevant here, concerns the situation where the agreement covers a field for which unanimity is required for the adoption of an EU act. Since the entitlement at issue does not fall within such a field, the procedure established in Article 3(1) of Decision 2015/2169 does not comply with Article 218 TFEU in so far as it requires a vote by unanimity. Indeed, the applicable voting rule for the adoption of decisions such as the contested decision must accordingly be that laid down in the first subparagraph of Article 218(8) TFEU, namely qualified majority voting in the Council.

Therefore, the Court annuls the contested decision. It nevertheless decides, on grounds of legal certainty, to maintain its effects until the grounds for annulment established have been remedied.

41 Article 218(8) TFEU provides in its first paragraph: 'The Council shall act by a qualified majority throughout the procedure.' The second paragraph states: 'However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. …'

VIII. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Fourth Chamber) of 16 March 2022, Sabra v Council, T-249/20

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds – Errors of assessment – Criterion of a leading businessperson operating in Syria – Presumption of a link with the Syrian regime – Rebuttal of the presumption

The applicant, Mr Abdelkader Sabra, is a Syrian and Lebanese businessman with, inter alia, economic interests in the shipping and tourism sectors.

His name had been included in 2020 on the lists of persons and entities covered by the restrictive measures against the Syrian Arab Republic by the Council, [42] then maintained there, [43] on the grounds that he was, according to the Council, a leading businessman operating in Syria, that he had benefited from his links with the Syrian regime in order to expand his activities in the real estate sector and that he provided financial and economic support to the regime, as a shipping magnate and close business associate of Mr Rami Makhlouf, regime supporter and cousin of Bashar Al-Assad, through his shareholding in Cham Holding. Mr Abdelkader Sabra had also been regarded by the Council as having been involved in money laundering and commercial activities in support of the Syrian regime. Those grounds were based on the one hand on the criterion of classification as a leading businessperson operating in Syria, laid down in Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255, [44] as amended by Decision 2015/1836, and Article 15(1a)(a) of Regulation No 36/2012, [45] as amended by Regulation 2015/1828, and, on the other hand, on the criterion of classification as a person associated with the Syrian regime laid down in Article 27(1) and Article 28(1) of that decision and in Article 15(1)(a) of that regulation.

The General Court upholds the action for annulment brought by the applicant in finding, for the first time, that the presumption of a link between leading businesspersons operating in Syria and the Syrian regime has been rebutted, while specifying, with regard to the criterion of association with the Syrian regime, the standard of proof required for recognising that a person or entity supports or benefits from that regime.

Findings of the Court

As regards, in the first place, the rebuttable presumption of a link with the Syrian regime that applies to leading businesspersons operating in Syria, the Court examines first of all the evidence provided by the Council in order to determine the links between the applicant's economic activities and the Syrian regime. It observes that the only evidence put forward by the Council in that regard, in addition to the presumption of a link with the Syrian regime, concerns, first, the conclusion of a contract by Phoenicia

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42 Council Implementing Decision (CFSP) 2020/212 of 17 February 2020 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 431, p. 6) and Council Implementing Regulation (EU) 2020/211 of 17 February 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 43 I, p. 1).

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

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

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

Tourism Company, belonging to the applicant, with the Syrian Ministry of Tourism, relating to the implementation of a tourism project. Secondly, it relates to the fact that Cham Holding, belonging to Mr Rami Makhlouf, in which the applicant had been a shareholder but had shown that he left the board of directors, has links with the Syrian regime. As regards Phoenicia Tourism Company, the Court holds that, in order to demonstrate the link with the Syrian regime, as defined in recital 6 of Decision 2015/1836, the Council cannot rely on a contract, although concluded with a Syrian ministry, if the circumstances surrounding the conclusion of that contract and its implementation are not clear. The Court notes that the Council did not state how the applicant, despite having distanced himself from Cham Holding, maintains special links with Cham Holding and Mr Rami Makhlouf, and, more broadly, with the Syrian regime. The Court finds that the Council relies only on the presumption of a link with the Syrian regime in order to establish the link between the applicant and that regime and that the Council must therefore assess whether or not the evidence adduced by the applicant is capable of rebutting the presumption of a link with the Syrian regime.

As regards the various statements produced by the applicant in that regard, the Court notes that they must be assessed in the light of the principles of the freedom as to the form of evidence adduced and of the unfettered assessment of evidence, as enshrined in the case-law. As regards the four witness statements that are favourable to the applicant, which were provided by him and were prepared by third persons, the Court finds that the persons who made the statements in question did so for the Court's express attention in the context of the present proceedings, without it being possible to presume that the persons making them acted in concert to do so; the Court further finds that the statements are consistent in describing the applicant as openly critical of the Syrian regime and as having provided financial support to humanitarian and civil organisations supporting Syrian refugees. Since objective evidence in the file corroborates their content, the Court acknowledges that those statements are sound and reliable. Moreover, since the Council has not put forward any evidence to discredit the content of those statements, the Court concludes that they show that the applicant distanced himself from the Syrian regime and finances humanitarian missions assisting Syrian refugees.

Since the applicant has, moreover, effectively cast doubt on the assertion that he is a close business associate of Mr Rami Makhlouf, the Court considers that it is unlikely that the applicant will have links with the Syrian regime, as a result of which it is not clear that the applicant, as a result of the restrictive measures adopted against him, is able to exercise the influence on the Syrian regime necessary to increase pressure on it to change its policy of repression. Since one of the possibilities for an applicant to rebut the presumption of a link with the Syrian regime is to provide a body of evidence of the absence of influence over the Syrian regime, the Court finds that the applicant has succeeded in rebutting that presumption and that the first ground for including the applicant's name, linked to the status of 'leading' businessperson operating in Syria, has therefore not been established to the requisite legal standard.

As regards, in the second place, the second ground for listing relating to the association with the Syrian regime, the Court states that it is necessary, in order to substantiate that ground, for the Council to have demonstrated to the requisite legal standard that it was indeed because of links with the Syrian regime that the applicant obtained the contract with the Syrian Ministry of Tourism. It cannot be accepted that the mere fact of being successful in a call for tenders, even if it led to the conclusion of a contract with a ministry of the Syrian regime, is sufficient to permit the conclusion that there are links enabling the person concerned to take advantage of that regime, within the meaning of Article 27(1) and Article 28(1) of Decision 2013/255, as amended by Decision 2015/1836. The Court finds that the Council has not demonstrated to the requisite legal standard that the applicant benefited from his links with the Syrian regime in order to obtain that contract and thus to further his activities in the tourism sector.

It therefore annuls the contested measures in so far as they concern the applicant.

IX. FINANCIAL PROVISIONS: COMBATTING FRAUD

Judgment of the Court (Grand Chamber) of 8 March 2022, Commission v United Kingdom (Lutte contre la fraude à la sous-évaluation), C-213/19

Link to the complete text of the judgment

Failure of a Member State to fulfil obligations – Article 4(3) TEU – Article 310(6) and Article 325 TFEU – Own resources – Customs duties – Value added tax (VAT) – Protection of the financial interests of the European Union – Combating fraud – Principle of effectiveness – Obligation for Member States to make own resources available to the European Commission – Financial liability of Member States in the event of losses of own resources – Imports of textiles and footwear from China – Large-scale and systematic fraud – Organised crime – Missing importers – Customs value – Undervaluation – Taxable amount for VAT purposes – Lack of systematic customs controls based on risk analysis and carried out prior to the release of the goods concerned – No systematic provision of security – Method used to estimate the amount of traditional own resources losses in respect of imports presenting a significant risk of undervaluation – Statistical method based on the average price determined at EU level – Whether permissible

The European Union has abolished all quotas on imports of textiles and clothing including from China since 1 January 2005.

In 2007, 2009 and 2015, the European Anti-Fraud Office (OLAF) sent mutual assistance messages to Member States, informing them in particular of the risk of extreme undervaluation of imports of textiles and footwear from China by shell companies registered for the sole purpose of giving fraudulent transactions the appearance of legitimacy. OLAF asked all Member States to monitor their imports of such products, to carry out appropriate customs checks and to take adequate safeguard measures if there was any suspicion of artificially low invoiced prices.

To that end, OLAF developed a risk assessment tool based on EU-wide data. That tool, involving the calculation of an average derived from 'cleaned average prices', produces a 'lowest acceptable price' that is used as a risk profile or threshold enabling Member States' customs authorities to detect values declared on importation that are particularly low, and thus imports presenting a significant risk of undervaluation.

In 2011 and 2014, the United Kingdom participated in monitoring operations conducted by the Commission and OLAF to counteract certain risks of undervaluation fraud, without however applying the lowest acceptable prices calculated in accordance with OLAF's method or enforcing the additional payment demands issued by the United Kingdom authorities following such operations.

In several bilateral meetings, OLAF recommended that the competent United Kingdom authorities use EU-wide risk indicators, namely the lowest acceptable prices. According to OLAF, fraudulent imports were increasing significantly in the United Kingdom on account of the inadequate nature of the checks carried out by the United Kingdom customs authorities, encouraging the shift of fraudulent operations from other Member States to the United Kingdom. However, according to OLAF, the United Kingdom did not follow its recommendations, instead releasing the products concerned for free circulation in the internal market without conducting appropriate customs controls, with the result that a substantial proportion of the customs duties due were not collected or made available to the European Commission.

Consequently, taking the view that the United Kingdom had failed to enter in the accounts the correct amounts of customs duties and to make available to the Commission the correct amount of traditional own resources and own resources accruing from value added tax ('VAT') in respect of certain imports of textiles and footwear from China, the Commission brought an action for a declaration that the United Kingdom had failed to fulfil its obligations under EU legislation on control and supervision in relation to the recovery of own resources and under EU legislation on customs duty and on VAT.

By its judgment, the Grand Chamber of the Court of Justice upholds the Commission's action in part, ruling, in essence, that the United Kingdom has failed to fulfil its obligations under EU law by failing to apply effective customs control measures or to enter in the accounts the correct amounts of customs duties and accordingly to make available to the Commission the correct amount of traditional own resources in respect of certain imports of textiles and footwear from China, [46] and by failing to provide the Commission with all the information necessary to calculate the amounts of duty and own resources remaining due. [47]

Regarding the quantification of own resources losses, the Court makes clear that where the fact that it is impossible to carry out checks is the consequence of the failure of the customs authorities to carry out checks to verify the actual value of the goods, a method based on statistical data, rather than a method intended to determine the customs value of the goods concerned on the basis of direct evidence, is permitted. The Court's examination in the present proceedings must essentially aim to verify, first, that that method was justified in the light of the particular circumstances of the case and, secondly, that it was sufficiently precise and reliable. In that regard, the Court partly rejects the Commission's calculation, finding that, because of an inconsistency between the form of order sought in the application and the grounds set out in it, as well as the considerable uncertainty, as a result, regarding the accuracy of the amounts of own resources claimed by the Commission, the Commission has not established the full amounts to the requisite legal standard. In the light of the particular circumstances of the case, the Court approves, however, the method used by the Commission to estimate the amount of traditional own resources losses for part of the infringement period, since that method has proved to be sufficiently precise, reliable and prudent to ensure that it does not lead to a clear overestimate of the amount of those losses. The Court also makes clear that it is not for the Court to take the place of the Commission by calculating the precise amounts of traditional own resources payable by the United Kingdom. It can either grant or reject, in whole or in part, the claims set out in the form of order sought in the Commission's application, without modifying the scope of those claims. It is, however, for the Commission to recalculate the losses of EU own resources remaining due by taking account of the findings of the Court regarding the quantum of the losses and the value to be attributed to them.

46 This failure to fulfil obligations concerns the United Kingdom's obligations under, in particular, Article 310(6) and Article 325 TFEU, Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1), Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), and Council Directive 2006/112/EC of 28 November 2006 on the common system of [VAT] (OJ 2006 L 347, p. 1, and corrigendum OJ 2007 L 335, p. 60).

47 Specifically, the United Kingdom has failed to fulfil its obligations under Article 4(3) TEU (principle of sincere cooperation) by failing to provide the Commission with all the information necessary to determine the amount of traditional own resources losses and by not providing as requested the reasons for the decisions cancelling the customs debts established.

X. JUDGMENTS PREVIOUSLY DELIVERED

1. VALUES OF THE UNION

Judgment of the Court (Grand Chamber) 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

Link to the complete text of the judgment

Reference for a preliminary ruling – Decision 2006/928/EC – Mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption – Legal nature and effects – Binding on Romania – Rule of law – Judicial independence – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Fight against corruption – Protection of the European Union's financial interests – Article 325(1) TFEU – 'PFI' Convention – Criminal proceedings – Decisions of the Curtea Constituțională (Constitutional Court, Romania) concerning the legality of the taking of certain evidence and the composition of judicial panels in cases of serious corruption – Duty on national courts to give full effect to the decisions of the Curtea Constituțională (Constitutional Court) – Disciplinary liability of judges in case of non-compliance with such decisions – Power to disapply decisions of the Curtea Constituțională (Constitutional Court) that conflict with EU law – Principle of primacy of EU law

The present cases follow on from the reform of the judicial system with regard to combating corruption in Romania, which has already formed the subject matter of a previous judgment of the Court of Justice. [48] That reform has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 [49] on the occasion of Romania's accession to the European Union ('the CVM').

In those cases, the question arises as to whether the application of the case-law arising from various decisions of the Curtea Constituțională a României (Constitutional Court, Romania; 'the Constitutional Court') on the rules of criminal procedure applicable to fraud and corruption proceedings is liable to infringe EU law, in particular the provisions of EU law intended to protect the financial interests of the European Union, the guarantee of judicial independence and the value of the rule of law, as well as the principle of the primacy of EU law.

In Cases C-357/19, C-547/19, C-811/19 and C-840/19, the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania; 'the HCCJ') had convicted several persons, including former Members of Parliament and Ministers, of offences of VAT fraud, corruption and influence peddling, inter alia in connection with the management of European funds. The Constitutional Court set aside those decisions on the grounds of the unlawful composition of the panel of judges, stating, first, that the cases on which the HCCJ had ruled at first instance should have been heard by a panel specialised in corruption [50] and, second, that, in the cases on which the HCCJ had ruled on appeal, all the judges of the panel of judges should have been selected by drawing lots. [51]

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48 Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393).

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

50 Judgment of 3 July 2019, No 417/2019.

51 Judgment of 7 November 2018, No 685/2018.

In Case C-379/19, criminal proceedings were brought before the Tribunalul Bihor (Regional Court, Bihor, Romania) against several persons accused of corruption offences and influence peddling. In the context of a request for the exclusion of evidence, that court is faced with the application of case-law of the Constitutional Court which declared the gathering of evidence in criminal proceedings with the participation of the Romanian intelligence service to be unconstitutional, resulting in the retroactive exclusion of the evidence concerned from the criminal proceedings. [52]

In those contexts, the HCCJ and the Tribunalul Bihor (Regional Court, Bihor) referred questions for a preliminary ruling to the Court concerning the compliance of those decisions of the Constitutional Court with EU law. [53] First of all, the Tribunalul Bihor (Regional Court, Bihor) raises the issue of whether the CVM and the reports prepared by the Commission in accordance with that mechanism [54] are binding. Next, the HCCJ raises the issue of a possible systemic risk of impunity in the field of the fight against fraud and corruption. Lastly, those courts also ask whether the principles of the primacy of EU law and of judicial independence allow them to disapply a decision of the Constitutional Court, whereas under Romanian law the judges' failure to comply with a decision of the Constitutional Court constitutes a disciplinary offence.

Findings of the Court

The binding nature of the CVM

The Court, sitting as the Grand Chamber, confirmed its case-law following from an earlier judgment, according to which **the CVM is, in its entirety, binding on Romania**. [55] Thus, the measures adopted, prior to accession, by the EU institutions, are binding on Romania since the date of its accession. That is the case with Decision 2006/928, which is binding in its entirety on Romania as long as it has not been repealed. The benchmarks which seek to ensure compliance with the rule of law are also binding. Romania is thus required to take the appropriate measures to meet those benchmarks, taking due account of the recommendations made in the reports drawn up by the Commission. [56]

The obligation to provide for effective and dissuasive penalties for offences of fraud affecting the financial interests of the European Union or offences of corruption

EU law precludes the application of the case-law of the Constitutional Court leading to the setting aside of judgments delivered by improperly composed panels of judges, in so far as that case-law, in conjunction with the national provisions on limitation periods, creates a systemic risk of impunity in respect of acts constituting serious offences of fraud affecting the financial interests of the European Union or offences of corruption

First of all, even though the rules governing the organisation of the judicial system in the Member States, in particular that relating to the composition of the panels of judges in matters of fraud and corruption, fall, in principle, within the jurisdiction of those States, the Court points out that they are nevertheless required to comply with their obligations under EU law.

Such obligations include the fight against any illegal activities, which include corruption offences, affecting the financial interest of the European Union by means effective measures which act as a

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52 Judgments of 16 February 2016, No 51/2016, of 4 May 2017, No 302/2017 and of 16 January 2019, No 26/2019.

53 Article 2 and the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU, Article 2 of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 49), and Decision 2006/928.

54 According to the judgment of the Constitutional Court of 6 March 2018, No 104/2018, Decision 2006/928 cannot constitute a benchmark in the context of a review of constitutionality.

55 Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393).

56 Under the principle of sincere cooperation laid down in Article 4(3) TEU.

deterrent. [57] In respect of Romania, that obligation is supplemented by that Member State's obligation, stemming from Decision 2006/928, to combat corruption and, in particular, high-level corruption effectively.

The ensuing requirement of effectiveness necessarily extends both to proceedings and penalties for those offences and to the application of the penalties imposed in so far as, unless the penalties for fraud offences affecting those interests and for corruption offences in general are enforced effectively, those penalties cannot be effective and act as a deterrent. Next, the Court notes that it is primarily for the national legislature to take the measures necessary to ensure that the procedural rules applicable to those offences do not present a systemic risk of impunity. National courts, for their part, must disapply domestic provisions which prevent the application of effective penalties that act as a deterrent.

In the present case, the application of the case-law of the Constitutional Court in question has the consequence that the cases of fraud and corruption concerned must be re-examined, if necessary on several occasions, at first instance and/or on appeal. In view of its complexity and duration, such a re-examination necessarily has the effect of extending the duration of the corresponding criminal proceedings. Besides the fact that Romania has undertaken to reduce the duration of proceedings in corruption cases, the Court recalls that, in the light of the specific obligations on Romania under Decision 2006/928, the national rules and the national practice in this field cannot result in the duration of investigations into corruption offences being extended or the fight against corruption being in any way weakened. [58] Moreover, given the national rules on limitation, the re-examination of the cases at issue might lead to prosecution of the offences being time-barred and to the prevention of persons occupying the highest positions in the Romanian State, who have been convicted for committing, in the exercise of their duties, serious acts of fraud and/or corruption, from being penalised in a manner which is effective and acts as a deterrent. Therefore, the risk of impunity would become systemic for that category of persons and would call into question the objective of combating high-level corruption.

Lastly, the Court recalls that the obligation to ensure that such offences are subject to penalties which are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union, but does not allow that court to apply a national standard of protection of fundamental rights entailing such a systemic risk of impunity. The requirements arising from that article do not preclude the possible disapplication of the case-law of the Constitutional Court on specialisation and composition of panels of judges in corruption cases.

The guarantee of judicial independence

EU law does not preclude decisions of the Constitutional Court from binding the ordinary courts, provided that the independence of the Constitutional Court in relation, in particular, to the legislative and executive is guaranteed. However, that law precludes national judges from incurring disciplinary liability due to any disapplication of such decisions

First, since the existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law, any court called upon to apply or interpret EU law must satisfy the requirements of effective judicial protection. For this to be the case, maintaining the independence of the courts is essential. In that regard, it is necessary that judges are protected against external intervention or pressure liable to impair their independence. In addition, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the

57 In accordance with Article 325(1) TFEU.

58 Point I., (5) of Annex IX to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203).

independence of the judiciary must in particular be ensured in relation to the legislature and the executive.

Second, even though EU law does not require the Member States to adopt a particular constitutional model governing the relationship between the various branches of the State, the Court notes that the Member States must nevertheless comply, inter alia, with the requirements of judicial independence stemming from EU law. In those circumstances, decisions of the Constitutional Court may bind the ordinary courts provided that national law guarantees the independence of the Constitutional Court in relation, in particular, to the legislative and executive. On the other hand, if national law does not guarantee that independence, EU law precludes such national rules or national practice, since such a constitutional court is not in a position to ensure the effective judicial protection required by EU law.

Third, for the purposes of safeguarding judicial independence, the disciplinary regime must provide the necessary guarantees in order to prevent any risk of that regime being used as a system of political control of the content of judicial decisions. In that regard, the fact that a judicial decision contains a possible error in the interpretation and application of the rules of national and EU law, or in the assessment of facts and the appraisal of the evidence, cannot, in itself, trigger the disciplinary liability of the judge concerned. The triggering of the disciplinary liability of a judge as a result of a judicial decision should be limited to entirely exceptional cases and governed by guarantees designed to avoid any risk of external pressure on the content of judicial decisions. National legislation under which any failure to apply the decisions of the Constitutional Court by national judges of the ordinary courts is such as to give rise to their disciplinary liability does not comply with those conditions.

The primacy of EU law

The principle of the primacy of EU law precludes national courts from being prohibited, subject to disciplinary penalties, from disapplying decisions of the Constitutional Court that are contrary to EU law

The Court points out that, in its case-law on the EEC Treaty, it laid down the principle of the primacy of Community law, understood to enshrine the precedence of Community law over the law of the Member States. In that regard, the Court has held that the establishment by the EEC Treaty of the Community's own legal system, accepted by the Member States on a basis of reciprocity, means, as a corollary that they cannot accord precedence to a unilateral and subsequent measure over that legal system or rely on rules of national law of any kind against the law stemming from the EEC Treaty, without depriving the latter law of its character as Community law and without the legal basis of the Community itself being called into question. In addition, the executive force of Community law cannot vary from one Member State to another in deference to subsequent domestic laws without jeopardising the attainment of the objectives of the EEC Treaty or giving rise to discrimination on grounds of nationality prohibited by that treaty. The Court has thus held that the EEC Treaty, albeit concluded in the form of an international agreement, constitutes the constitutional charter of a Community based on the rule of law and that the essential characteristics of the Community legal order thus established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

The Court notes that those essential characteristics of the legal order of the European Union and the importance of compliance with that legal order have been confirmed by the ratification, without reservation, of the Treaties amending the EEC Treaty and, in particular, the Treaty of Lisbon. When that treaty was adopted, the conference of representatives of the governments of the Member States was keen to state expressly, in its Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, that, in accordance with the settled case-law of the Court, the Treaties and the law adopted by the European Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by that case-law.

The Court adds that, since Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties, the European Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature. In that context, the Court also notes that, in the exercise of its exclusive jurisdiction to give a definitive interpretation of EU law, it is for it to clarify the

scope of the principle of the primacy of EU law in the light of the relevant provisions of EU law, since that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with the interpretation given by the Court.

The Court recalls that the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without provisions of domestic law, including constitutional provisions, being able to prevent that. National courts are required to disapply, on their own authority, any national rule or practice contrary to a provision of EU law which has direct effect, without having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means.

Moreover, for national judges, not being exposed to disciplinary proceedings or penalties for having exercised the discretion to make a reference for a preliminary ruling under Article 267 TFEU, which is exclusively within their jurisdiction, constitutes a guarantee that is essential to their independence. Thus, if a national judge of an ordinary court were to find, in the light of a judgment of the Court, that the case-law of the national constitutional court is contrary to EU law, that national judge's disapplication of that constitutional case-law cannot trigger his or her disciplinary liability.

2. FREEDOM OF MOVEMENT: FREE MOVEMENT OF CAPITAL

Judgment of the Court (Fifth Chamber) of 24 February 2022, Viva Telecom Bulgaria, C-257/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Taxation – Withholding tax on notional interest on an interest-free loan granted to a resident subsidiary by a non-resident parent company – Directive 2003/49/EC – Payments of interest between associated companies of different Member States – Article 1(1) – Exemption from withholding tax – Article 4(1)(d) – Exclusion of certain payments – Directive 2011/96/EU – Corporation tax – Article 1(1)(b) – Distribution of profits by a resident subsidiary to its non-resident parent company – Article 5 – Exemption from withholding tax – Directive 2008/7/EC – Raising of capital – Article 3 – Contributions of capital – Article 5(1)(a) – Indirect tax exemption – Articles 63 and 65 TFEU – Free movement of capital – Taxation of the gross amount of notional interest – Recovery procedure for the purposes of the deduction of expenses related to the grant of the loan and a possible refund – Difference in treatment – Justification – Balanced allocation of the power to impose taxes between the Member States – Effective collection of tax – Combating of tax avoidance

In 2013, 'Viva Telecom Bulgaria' concluded, as borrower, a loan agreement with its sole shareholder, InterV Investment Sàrl, a company established in Luxembourg, in which the latter, as lender, granted it an interest-free convertible loan. Having established, in 2017, that the loan in question had not been converted into capital and that Viva Telecom Bulgaria had neither repaid that loan nor paid interest, the Bulgarian tax authorities concluded that there was a transaction giving rise to tax avoidance, within the meaning of the Bulgarian Law on Corporation Tax, [59] and made a tax adjustment by requiring Viva Telecom Bulgaria, pursuant to Article 195 of that law, to pay withholding tax for the period from 2014 to 2015. To that end, it established the market interest rate to be applied to that

[59] Zakon za korporativnoto podohodno oblagane ('the ZKPO'), Article 16(2), point 3.

loan in order to calculate the interest not paid by the borrower before making a deduction at source of 10% on that interest.

The Bulgarian tax authorities having rejected the objection lodged by Viva Telecom Bulgaria against that decision, Viva Telecom brought an action before the Administrativen sad Sofia (Administrative Court, Sofia, Bulgaria) challenging the legality of that decision. That action having been dismissed, by judgment of 29 March 2019, Viva Telecom Bulgaria brought an appeal on a point of law against that judgment before the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), on the basis of EU law.

The Varhoven administrativen sad then referred six questions to the Court for a preliminary ruling concerning the interpretation of several directives adopted by the EU legislature in the field of taxation [60] and, in particular, Articles 49 and 63 TFEU, seeking, in essence, to ascertain whether those various EU law rules preclude such national legislation.

Findings of the Court

Having found that none of the directives relied on by the referring court precludes the Bulgarian legislation at issue concerning tax avoidance, the Court examined, more specifically, whether Articles 49 and 63 TFEU preclude such legislation, where the withholding tax laid down in the national legislation applies to the gross amount of that interest established by the tax authorities, without it being possible to deduct, at that stage, expenses related to that loan since a subsequent application to that effect is necessary for the purpose of recalculating that tax and making a possible refund.

Having found that the Bulgarian legislation on tax avoidance falls predominantly within the scope of the free movement of capital, the Court concludes that the Bulgarian legislation at issue is compatible, in principle, with Article 63 TFEU, read in the light of the principle of proportionality.

As regards the existence of a restriction on the free movement of capital, the Court states at the outset that, even if the Bulgarian legislation at issue establishes an irrebuttable presumption of tax avoidance, without allowing the interested parties, particularly in the context of a legal challenge, to produce information relating to possible commercial reasons justifying the conclusion of interest-free loans, that rule applies in the same way to all interest-free loans, whether or not they involve non-resident companies. Therefore, as regards that rule, the Court considers that that national legislation does not entail any restriction on the free movement of capital falling within Article 63 TFEU.

By contrast, the Court has already held that national legislation under which a non-resident company is taxed, by means of tax withheld at source by a resident company, on the interest which it is paid by the latter without it being possible to deduct expenses, such as interest expenditure, that are directly related to the lending at issue, whereas such a possibility of deduction is accorded to resident companies receiving interest from another resident company, constitutes a restriction on the free movement of capital. It observes in that regard that the differences in treatment between resident and non-resident companies caused by the tax adjustment mechanisms provided for by the Bulgarian legislation are such as to confer an advantage on resident companies by means of a cash-flow advantage. Such an adjustment of the tax situation of a non-resident company necessarily occurs late in relation to the time when a resident company must pay tax on the net amount of the interest. To that extent, that national legislation constitutes a restriction which is, in principle, prohibited by Article 63 TFEU.

As regards the question whether that restriction may be regarded as objectively justified under Article 65(1) and (3) TFEU, the Court notes that it is necessary to distinguish between unequal

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60 These are Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49), Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8), as amended by Council Directive (EU) 2015/121 of 27 January 2015 (OJ 2015 L 21, p. 1), and Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11).

treatment that is permitted under Article 65(1)(a) TFEU and arbitrary discrimination that is prohibited under Article 65(3) TFEU. National tax legislation is compatible with the provisions of the FEU Treaty only if the difference in treatment concerns situations that are not objectively comparable or must be justified by an overriding reason in the public interest.

In that regard, the Court states that as soon as a Member State imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from income which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers. Since Bulgaria has chosen to exercise its tax jurisdiction over interest-free loans concluded between resident borrowing companies and non-resident lending companies, non-resident companies must be considered to be, as regards the expenses directly related to those loans, in a situation comparable to that of resident companies.

As regards the question whether the Bulgarian legislation may be justified by overriding reasons in the public interest, the Court finds that that national legislation allows the Member State of residence to exercise its tax jurisdiction in relation to activities carried out on its territory, by seeking to prevent that the grant of interest-free loans by non-resident companies to resident companies have for sole purpose the avoidance of tax which would normally be payable on income generated by activities carried out on the national territory. Such legislation must therefore be regarded as capable of safeguarding a balanced allocation between the Member States of the power to impose taxes and ensuring the effective collection of tax in order to prevent tax avoidance, objectives which are overriding reasons in the public interest recognised by the Court.

As regards, lastly, the question whether the Bulgarian legislation in question does not go beyond what is necessary to achieve those various objectives, the Court observes, subject to the checks to be carried out by the referring court, that that does not appear to be the case as long as, however, first, the length of the procedure laid down for the purpose of recalculating the withholding tax paid on the gross amount of the interest and making a possible refund of the excess tax withheld is not excessive and, second, interest is owed on the amounts refunded. In those circumstances, that national legislation appears to be capable of being justified by the objectives which it pursues.

3. COMPETITION: ARTICLE 102 TFEU

Judgment of the General Court (Ninth Chamber, Extended Composition) of 10 November 2021, Google and Alphabet v Commission (Google Shopping), T-612/17

Link to the complete text of the judgment

Competition – Abuse of dominant position – Online general search services and specialised product search services – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Leveraging abuse – Competition on the merits or anticompetitive practice – Conditions of access by competitors to a dominant undertaking's service the use of which cannot be effectively replaced – Dominant undertaking favouring the display of results from its own specialised search service – Effects – Need to establish a counterfactual scenario – None – Objective justifications – None – Possibility of imposing a fine having regard to certain circumstances – Guidelines on the method of setting fines – Unlimited jurisdiction

By decision of 27 June 2017, [61] the European Commission found that Google LLC had abused its dominant position on the market for online general search services in 13 countries in the European Economic Area (EEA), [62] by favouring its own comparison shopping service, a specialised search service, over competing comparison shopping services.

The Commission found that the results of product searches made using Google's general search engine were positioned and displayed in a more eye-catching manner when the results came from Google's own comparison shopping service than when they came from competing comparison shopping services. Moreover, the latter results, which appeared as simple generic results (displayed in the form of blue links), were, as a result, prone to being demoted by adjustment algorithms in the general results pages, unlike results from Google's comparison shopping service. In that way, Google had, in essence, reduced the traffic from its general results pages to competing comparison shopping services while increasing such traffic to its own comparison shopping service ('the practice at issue').

According to the Commission, that practice had produced anticompetitive effects both on the 13 national markets for specialised comparison shopping search services and on the 13 national markets for general search services.

Concluding therefore that the prohibition of abuse of a dominant position under Article 102 TFEU and Article 54 of the EEA Agreement had been infringed, the Commission imposed a fine on Google of EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet, Inc., its parent company.

The action brought by Google and Alphabet against that decision is largely dismissed by the Court, which also confirms the amount of the fine imposed by the Commission.

Findings of the Court

As regards, in the first place, the anticompetitive nature of the practice at issue, the Court considers that a mere finding that an undertaking has a dominant position, even one on the scale of Google's, is not in itself a ground of criticism of the undertaking concerned, even if that undertaking is planning to expand into a neighbouring market. It is the 'abuse' of a dominant position that is prohibited by

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61 Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)).

62 Belgium, Czech Republic, Denmark, Germany, Spain, France, Italy, Netherlands, Austria, Poland, Sweden, United Kingdom and Norway.

Article 102 TFEU. The special responsibility imposed, in that context, on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened.

Having regard to the importance of traffic generated by Google's general search engine for comparison shopping services, the behaviour of users, who typically focus on the first few results, the significant proportion of 'diverted' traffic and the fact that such traffic cannot be effectively replaced, the Court rules that the practice at issue constitutes a difference in treatment that deviates from competition on the merits and is liable to lead to a weakening of competition on the market that may be contrary to Article 102 TFEU.

Against that background, the Court points out that, given the universal vocation of Google's general search engine, which is designed to index results containing any possible content, the promotion on Google's general results pages of a single type of specialised result – its own – involves a certain form of abnormality.

The Court also notes that while Google's general results page has characteristics akin to those of an 'essential facility', in the sense of an indispensable service for which there is no actual or potential substitute, the practice at issue can be distinguished, in its constituent elements, from a refusal to supply an essential facility. As a result, the analysis set out by the Court of Justice in its judgment in *Bronner* [63] in relation to such a refusal cannot be applied in the present case.

Lastly, the Court observes that, since the differentiated treatment applied by Google is based on the origin of the results, that is, whether they come from its own or from competing comparison shopping services, it follows that the results from competing comparison shopping services can never receive the same treatment as results from Google's comparison shopping service as regards their positioning and their display. Thus, Google favours its own comparison shopping service over competing comparison shopping services rather than the best results.

As regards, in the second place, the anticompetitive effects generated by the practice at issue, the Court recalls that an abuse of a dominant position exists where, through recourse to methods different from those governing normal competition, the dominant undertaking hinders the maintenance of the degree of competition or the growth of that competition. In that context, in order to establish an infringement of Article 102 TFEU, the Commission is not required to show that the practices concerned have had actual exclusionary effects, proof of potential effects being sufficient.

In that regard, the Court confirms the Commission's conclusion that the practice at issue could give rise to potentially anticompetitive effects on the market for specialised comparison shopping search services. The Commission had, more specifically, established that there were actual effects on traffic from Google's general results pages to the detriment of competing comparison shopping services and to the benefit of Google's comparison shopping service and, moreover, that competing comparison shopping services' traffic from those pages accounted for a large proportion of their total traffic and could not be effectively replaced by other sources, such as advertising (AdWords) or mobile applications, and therefore that the practice at issue could result in the disappearance of competitors, less innovation in the market and less choice for consumers, features which are characteristic of a weakening of competition.

By contrast, the Court finds that the Commission did not establish that Google's disputed conduct had had anticompetitive effects, even potential effects, on the market for general search services, and consequently annuls the finding of an infringement in respect of that market alone.

As regards potentially anticompetitive effects on the market for specialised comparison shopping search services, the Court also rejects Google's argument that competition remains strong because of

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63 Judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569).

the presence of merchant platforms on that market, and confirms the Commission's assessment that those platforms are not active in the same market.

The justifications on which Google relied in denying that its conduct was abusive are also rejected by the Court. In that regard, it notes that, while the algorithms ranking generic results or the criteria for the positioning and display of Google's specialised product results may as such represent pro-competitive service improvements, that does not justify the practice at issue, namely the unequal treatment of results from Google's comparison shopping service and results from competing comparison shopping services. Furthermore, Google had failed to show any efficiency gains linked to that practice that would counteract its negative effects for competition.

Following a fresh assessment of the infringement, the Court ultimately confirms the amount of the fine imposed by the Commission, rejecting Google's arguments as to the fact that the conduct at issue had been analysed for the first time by the Commission in the light of the competition rules and that, at one stage of the procedure, it had been willing to try to resolve the case by means of commitments.

Making its own assessment of the facts with a view to determining the level of the penalty, the Court finds, first, that the annulment in part of the contested decision in regard to the market for general search services has no impact on the amount of the fine, since the Commission did not take the value of sales on that market into account in order to determine the basic amount of the fine imposed. Secondly, the Court points out that while it takes account of the fact that the abuse has not been demonstrated on the market for general search services, it also takes into consideration the fact that the conduct at issue constitutes a particularly serious infringement and that it was adopted intentionally, not negligently.

Following that analysis, the Court confirms the amount of the pecuniary penalty imposed on Google.

4. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Tenth Chamber) of 20 October 2021, JMS Sports v EUIPO – Inter-Vion (Spiral hair elastic), T-823/19

Community design – Invalidity proceedings – Registered Community design representing a spiral hair elastic – Disclosure of prior designs – Disclosure via the Internet – Article 7(1) of Regulation (EC) No 6/2002 – Equality of arms – Evidence produced for the first time before the General Court

JMS Sports sp. z o.o. is the proprietor of the Community design representing a spiral hair elastic, filed on 24 June 2010 with the European Union Intellectual Property Office (EUIPO).

Inter-Vion S.A. filed an application for a declaration of invalidity of that design, on the ground, inter alia, that it lacked novelty. In order to prove disclosure of the prior designs, it produced website screen captures, dated 2009.

The Board of Appeal of EUIPO considered that disclosure of the prior designs, identical to the contested design, had been proved. Accordingly, it concluded that the contested design lacked novelty.

The General Court dismisses the action brought by JMS Sports and specifies the probative value of the evidence taken from websites, relied on to demonstrate the date of disclosure of a design. [64]

64 Within the meaning of Article 7(1) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

Findings of the Court

First of all, the Court declares inadmissible the evidence, produced for the first time before it, obtained through the use of free access tools such as the Google search engine and the Wayback Machine. After all, they do not fall within the factual context of the dispute as it existed before the Board of Appeal and cannot therefore be taken into account for the purposes of the review of the legality of the contested decision.

Next, after having recalled that the applicant for a declaration of invalidity is free to choose the evidence, the Court notes that the appearance of the image of a design on the Internet constitutes an event which may be classified as 'publication' and which is therefore tantamount to 'disclosure to the public'. It indicates that the probative value of the screen captures is not limited.

In the case at hand, it finds that the screen captures from websites clearly showed designs identical to the contested design, the complete URL [65] addresses of those websites as well as the dates of disclosure to the public, prior to the date on which the application for registration of the contested design was filed. In addition, a screen capture showed other timestamp information, consisting of comments from Internet users and demonstrating disclosure to the public on 1 November 2009.

Furthermore, the Court emphasises that the mere abstract possibility of the content or date of a website being manipulated is not a sufficient ground for calling into question the credibility of the evidence consisting of the screen capture of that website. That credibility can be called into question only by the adducing of facts that concretely suggest a manipulation. Furthermore, even though the screen capture produced by the Wayback Machine does not contain an image of the product, it is a relevant source of information corroborating the reliability of the screen capture of one of the websites in question. Accordingly, the Court holds that disclosure has been proved.

Last, as regards the allocation of the burden of proof, the Court states that, given that Inter-Vion submitted evidence taken from the Internet demonstrating disclosure of prior designs, it was for JMS Sports to demonstrate the lack of credibility of that evidence. In that regard, it was not required to demonstrate the manipulation of a website but to indicate specific circumstances that would be credible evidence of manipulation, such as obvious signs of falsification, indisputable contradictions in the information submitted or clear inconsistencies justifying the existence of doubts as to the authenticity of the screen captures.

65 Uniform Resource Locator.

5. ECONOMIC AND MONETARY POLICY

Judgment of the General Court (Third Chamber) of 9 February 2022 (Extracts), QI and Others v Commission and ECB, T-868/16

Link to the complete text of the judgment

Non-contractual liability – Economic and monetary policy – Restructuring of Greek public debt – Bond exchange agreement for the sole benefit of the Eurosystem central banks – Private sector involvement – Collective action clauses – Private creditors – Official sector creditors – Attributability – Sufficiently serious infringement of a rule of law conferring rights on individuals – Article 63(1) TFEU – Articles 120 to 127 and Article 352(1) TFEU – Right to property – Equal treatment

In their application seeking compensation for the damage they allegedly suffered as a result of the implementation of a mandatory exchange of State bonds in the context of the restructuring of the Greek public debt in 2012, QI and the other applicants ('the applicants') claimed that the European Union and the European Central Bank (ECB) were liable.

On 2 February 2012, the Hellenic Republic submitted to the ECB a request for an opinion [66] on a draft law introducing rules amending the terms applicable to marketable securities issued or guaranteed by the Greek State under agreements with their holders for the purpose of restructuring Greek public debt, based, in particular, on the application of 'collective action clauses' ('the CACs').

On 23 February 2012, after having received a positive opinion from the ECB, [67] the Greek Parliament adopted Law No 4050/2012 [68] on the amendment of bonds issued or guaranteed by the Greek State with the consent of their holders and introducing the CACs mechanism. Under that mechanism, the proposed amendments to the bonds concerned would become legally binding on any holders of bonds governed by Greek law issued before 31 December 2011, as identified in the act of the Greek Ministerial Council approving invitations to Private Sector Involvement (PSI), if the proposed amendments were approved by a quorum of bondholders representing at least two thirds by face value of those bonds. Since the quorum and the majority required for the planned bond exchange to go ahead were reached, all holders of Greek bonds, including those who opposed the exchange, had their bonds exchanged pursuant to that law, with the result that the value of those bonds fell.

After refusing the offer to exchange their bonds, the applicants, as holders of Greek bonds, were involved in the restructuring of Greek public debt, under the PSI and the CACs implemented pursuant to Law No 4050/2012. By their action, the applicants claimed that the European Union or the ECB were liable for the damage the applicants allegedly suffered as a result, first, of their forced involvement in that restructuring and, second, of the absence of involvement by the Eurosystem and the Hellenic Republic's official sector creditors in that restructuring.

The General Court dismisses the action for damages brought by the applicants in its entirety.

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66 Pursuant to Article 127(4) TFEU, read in conjunction with Article 282(5) TFEU.

67 Opinion of the ECB of 17 February 2012 on the terms of securities issued or guaranteed by the Greek State (CON/2012/12).

68 Nomos 4050/2012, Kanones tropopoiiseos titlon, ekdoseos i engyiseos tou Ellinikou Dimosiou me symfonia ton Omologiouchon of 23 February 2012 (FEK A' 36, p. 1075; 'Law No 4050/2012').

Findings of the Court

In the first place, the Court declares that it has no jurisdiction to rule on the lawfulness of the measures, conduct or failures to act of the Eurogroup and the Heads of State or Government of the euro area, emphasising, with regard to the Eurogroup statements of 20 June 2011 and 21 February 2012, that the Eurogroup was created as an intergovernmental body, outside the institutional framework of the European Union, which cannot be treated as a configuration of the Council, or be classified as a body, office or agency of the European Union. The Court notes that, because of the intergovernmental nature, those findings apply *mutatis mutandis* to the joint statement by the Heads of State or Government of the euro area at their summit of 26 October 2011. Accordingly, those statements cannot be treated as an EU measure or as a measure attributable to it.

The Court notes, on the other hand, that the conclusions of the European Council of 23 and 24 June 2011 and the ECB's opinion of 17 February 2012, although non-binding in nature in the sense of obliging the Hellenic Republic to implement the contested measures, are capable of giving rise to non-contractual liability on the part of the European Union or the ECB under the second and third paragraphs of Article 340 TFEU. As regards the potential liability of the European Union for breach of the European Commission's duty to oversee under Article 17(1) TEU, the Court notes that that institution retains, in the context of its participation in the activities of the Eurogroup, its role as guardian of the Treaties. It follows that any failure on its part to check that the political agreements concluded within the Eurogroup are in conformity with EU law is liable to result in non-contractual liability of the European Union being invoked under the second paragraph of Article 340 TFEU. In the second place, the Court finds that the ECB's conduct to which the applicants take exception, in particular the conclusion and implementation of the exchange agreement of 15 February 2012 with the aim of avoiding the application of the CACs to Greek bonds held by the Eurosystem central banks, formed part of the exercise of the powers and basic tasks conferred on it for the purposes of defining and implementing the EU monetary policy. In that regard, the Court notes that none of the provisions relied on by the applicants under Articles 120 to 127, Article 282(2) and Article 352(1) TFEU in support of the complaint alleging that the institutions acted ultra vires confers on them specific rights the infringement of which is such as to give rise to non-contractual liability on the part of either the European Union or the ECB.

In the third place, the Court rejects the argument alleging a sufficiently serious breach of the right to property guaranteed by Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), finding that, although the adoption and implementation of Law No 4050/2012 gave rise to an interference with the applicants' right to property, that law met general interest objectives, including that of ensuring the stability of the banking system of the euro area as a whole. Furthermore, according to the Court, given the nature of the property title in question, the scale and severe and virulent nature of the Greek public debt crisis, the endorsement by the Greek State and by the majority of holders of Greek bonds of an exchange incorporating devaluation of those bonds, and the magnitude of the losses sustained, neither the reduction in the value of the Greek bonds at issue implemented by the contested measures, nor the exclusion of Eurosystem involvement in the restructuring of Greek public debt constituted, in the light of the aim pursued, a disproportionate and intolerable interference which would undermine the very substance of the applicants' right to property under that provision of the Charter.

In the fourth place, as regards the argument alleging a sufficiently serious breach of the applicants' rights under Article 63(1) TFEU, which prohibits all restrictions on the movement of capital between Member States and between Member States and third countries, the Court finds that the applicants have not established that the contested measures and the exclusion of Eurosystem involvement in the restructuring of the Greek public debt were disproportionate. Those measures served to restore the stability of the banking system of the euro area as a whole and it has not been demonstrated that they went beyond what was necessary to restore that stability.

In the fifth and last place, the Court rejects the argument alleging a sufficiently serious breach of the right to equal treatment laid down in Article 20 of the Charter, stating that, in the light of the objective of the contested measures, namely that of ensuring the restructuring of the Greek public debt in order to make it viable, the applicants failed to establish to the requisite legal standard that they were in a situation different from that of other private holders of Greek bonds, including institutional or professional investors. For the purposes of that objective, those persons were, a priori, in identical or

comparable situations, given that they had acquired Greek bonds solely in their private pecuniary interest, or even for profit or speculative purposes, and given that they had accepted the associated risk of loss while being aware of the financial crisis that the Hellenic Republic was facing at that time. Furthermore, according to the Court, the applicants are not justified in claiming that the private holders who invested in Greek bonds solely in their private pecuniary interests were in a situation comparable to that of the Eurosystem, including the ECB, the European Investment Bank and European Union, as holders of Greek bonds for the sole purpose of implementing their policies and tasks in the public interest.

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 the Court (Second Chamber) of 24 February 2022, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto', C-262/20
- Judgment of the Court (Fifth Chamber) of 10 March 2022, Landkreis Gifhorn, C-519/20
- Judgment of the Court (Second Chamber) of 17 March 2022, AllianzGI-Fonds AEVN, C-545/19
- Judgment of the Court (Fifth Chamber) of 24 March 2022, Galapagos BidCo., C-723/20
- Judgment of the Court (Third Chamber) of 24 March 2022, PJ and PC v EUIPO, C-529/18 P and C-531/18 P
- Judgment of the General Court (Tenth Chamber, Extended Composition) of 15 December 2021, Oltchim v Commission, T-565/19
- Judgment of the General Court (Ninth Chamber) of 12 January 2022, Verelst v Council, T-647/20
- Judgment of the General Court (Fifth Chamber) of 23 February 2022, Ancor Group v EUIPO – Cody's Drinks International (CODE-X), T-198/21
- Order of the General Court (Fourth Chamber, Extended Composition) of 9 March 2022, Kirimova v EUIPO, T-727/20
- Order of the General Court (Fourth Chamber, Extended Composition) of 14 March 2022, Bulgarian Energy Holding and Others v Commission, T-136/19
- Judgment of the General Court (Third Chamber) of 16 March 2022, Nowhere v EUIPO – Ye (APE TEES), T-281/21
- Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, SAS Cargo Group and Others v Commission, T-324/17
- Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022 (Extracts), Air France-KLM v Commission, T-337/17
- Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, Japan Airlines v Commission, T-340/17
- Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022 (Extracts), British Airways v Commission, T-341/17
- Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022 (Extracts), Singapore Airlines and Singapore Airlines Cargo v Commission, T-350/17