COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

MONTHLY CASE-LAW DIGEST
April 2022

I. FUNDAMENTAL RIGHTS: FREEDOM OF EXPRESSION

Judgment of the Court (Grand Chamber) of 26 April 2022, Poland v Parliament and Council, C-401/19

Link to the complete text of the judgment

Action for annulment – Directive (EU) 2019/790 – Article 17(4), point (b), and point (c), *in fine* – Article 11 and Article 17(2) of the Charter of Fundamental Rights of the European Union – Freedom of expression and information – Protection of intellectual property – Obligations imposed on online content-sharing service providers – Prior automatic review (filtering) of content uploaded by users

Directive 2019/790 on copyright and related rights in the digital single market [1] established a new specific liability mechanism in respect online content-sharing service providers ('the providers'). Article 17 of that directive lays down the principle that the providers are directly liable where works and other protected subject matter are unlawfully uploaded by users of their services. The providers concerned may nevertheless be exempted from that liability. To that end, they are, inter alia, required, in accordance with the provisions of that article, [2] actively to monitor the content uploaded by users, in order to prevent the placing online of the protected subject matter which rightholders do not wish to make available on those services.

The Republic of Poland brought an action seeking, principally, the annulment of point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790 and, in the alternative, annulment of that article in its entirety. It submits, in essence, that those provisions require the providers to carry out – by means of IT tools for automatic filtering – preventive monitoring of all the content which their users wish to upload, without providing safeguards to ensure that the right to freedom of expression and information is respected. [3]

The Court of Justice, sitting as the Grand Chamber, gives a ruling for the first time on the interpretation of Directive 2019/790. It dismisses Poland's action, holding that the obligation of the providers, laid down by that directive, to carry out a prior automatic review of the content uploaded by users, is accompanied by appropriate safeguards in order to ensure respect for the right to freedom of expression and information of those users and a fair balance between that right and the right to intellectual property.

Findings of the Court

Examining, first of all, the admissibility of the action, the Court finds that point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790 are not severable from the remainder of Article 17 and that, consequently, the head of claim seeking annulment of point (b) and point (c), *in fine*, only is inadmissible. Article 17 of Directive 2019/790 establishes a new liability regime in respect of the providers, the various provisions of which form a whole and seek to strike a balance between the rights and interests of those providers, those of users of their services and those of rightholders. Consequently, such partial annulment would alter the substance of Article 17.

---

1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92).

2 See Article 17(4), point (b), and point (c), *in fine*, of Directive 2019/790.

3 As guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

As to the substance of the case itself, next, the Court examines Poland's single plea in law, alleging a limitation on the exercise of the right to freedom of expression and information, arising from the liability regime introduced by Article 17 of Directive 2019/790. First of all, the Court points out that the sharing of information on the internet via online content-sharing platforms falls within the scope of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the Charter. It observes that, in order to avoid liability where users upload unlawful content to the platforms of the providers for which the latter have no authorisation from the rightholders, those providers must demonstrate that they meet all the conditions for exemption from liability, laid down in Article 17(4), points (a), (b) and (c) of Directive 2019/790, namely that they have:

– made their best efforts to obtain such an authorisation (point (a)); and

– acted expeditiously to bring to an end, on their platforms, specific copyright infringements after they have occurred and after receiving a sufficiently substantiated notice from rightholders (point (c)); and

– made their best efforts, after receipt of such a notice or where those rightholders have provided them with the relevant and necessary information prior to the occurrence of a copyright infringement, 'in accordance with high industry standards of professional diligence' to prevent such infringements from occurring or reoccurring (points (b) and (c)).

Those obligations therefore require de facto the providers to carry out a prior review of the content that users wish to upload to their platforms, provided that they have received from the rightholders the information or notices provided for in points (b) and (c) of Article 17(4) of Directive 2019/790. In order to carry out such a review, the providers must use automatic recognition and filtering tools. Such a prior review and prior filtering are liable to restrict an important means of disseminating online content and thus to constitute a limitation on the right to freedom of expression and information guaranteed in Article 11 of the Charter. In addition, that limitation is attributable to the EU legislature, since it is the direct consequence of the specific liability regime. Accordingly, the Court concludes that that regime entails a limitation on the exercise of the right to freedom of expression and information of the users concerned.

Lastly, as regards the question whether the limitation at issue is justified in the light of Article 52(1) of the Charter, the Court notes, first, that that limitation is provided for by law, since it results from the obligations imposed on the providers of the abovementioned services by a provision of an EU act, namely point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790, and respects the essence of the right to freedom of expression and information of internet users. Secondly, in the context of the review of proportionality, the Court finds that that limitation meets the need to protect intellectual property guaranteed in Article 17(2) of the Charter, that it appears necessary to meet that need and that the obligations imposed on the providers do not disproportionately restrict the right to freedom of expression and information of users.

First, the EU legislature laid down a clear and precise limit on the measures that may be taken in implementing those obligations, by excluding, in particular, measures which filter and block lawful content when uploading. Secondly, Directive 2019/790 requires Member States to ensure that users are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. Furthermore, the providers must inform their users that they can use works and other protected subject matter under exceptions or limitations to copyright and related rights provided for in EU law. [4] Thirdly, the liability of the providers can be incurred only on condition that the rightholders concerned provide them with the relevant and necessary information with regard to that content at issue. Fourthly, Article 17 of that directive, the application of which does not lead to any general monitoring obligation, means that the providers cannot be required to prevent the uploading and making available to the public of content

4 Article 17(7) and (9) of Directive 2019/790.

which, in order to be found unlawful, would require an independent assessment of the content by them. [5] In that regard, it may be that availability of unauthorised content can only be avoided upon notification of rightholders. Fifthly, Directive 2019/790 introduces several procedural safeguards, in particular the possibility for users to submit a complaint where they consider that access to uploaded content has been wrongly disabled, as well as access to out-of-court redress mechanisms and to efficient judicial remedies. [6] Sixthly, that directive requires the European Commission to organise stakeholder dialogues to discuss best practices for cooperation between the providers and rightholders, and also to issue guidance on the application of that regime. [7]

Accordingly, the Court concludes that the obligation on the providers to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, resulting from the specific liability regime established in Article 17(4) of Directive 2019/790, has been accompanied by appropriate safeguards by the EU legislature in order to ensure respect for the right to freedom of expression and information of users, and a fair balance between that right, on the one hand, and the right to intellectual property, on the other. It is for the Member States, when transposing Article 17 of that directive, to take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter. Further, when implementing the measures transposing that article, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that article but also make sure that they do not act on the basis of an interpretation of the article which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality.

II. BORDER CONTROLS, ASYLUM AND IMMIGRATION: BORDER CONTROLS

Judgment of the Court (Grand Chamber) of 26 April 2022, Landespolizeidirektion Steiermark (Maximum duration of internal border control), C-368/20 and C-369/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Free movement of persons – Regulation (EU) 2016/399 – Schengen Borders Code – Article 25(4) – Temporary reintroduction of border control at internal borders for a maximum total duration of six months – National legislation providing for a number of successive periods of border control resulting in that duration being exceeded – Non-compliance of such legislation with Article 25(4) of the Schengen Borders Code where the successive periods are based on the same threat or threats – National legislation requiring, on pain of a penalty, a passport or identity card to be presented when the internal border control is carried out – Non-compliance of such an obligation with Article 25(4) of the Schengen Borders Code when the border control itself is contrary to that provision

From September 2015 to November 2021, the Republic of Austria reintroduced border control at its borders with Hungary and Slovenia a number of times. In order to justify the reintroduction of the

5 Article 17(8) of Directive 2019/790.

6 The first and second subparagraphs of Article 17(9) of Directive 2019/790.

7 Article 17(10) of Directive 2019/790.

border control, it relied upon various provisions of the Schengen Borders Code. [8] In particular, from 11 November 2017 it relied upon Article 25 of that code, headed 'General framework for the temporary reintroduction of border control at internal borders', which provides for the possibility for a Member State to reintroduce border control at its internal borders if there is a serious threat to public policy or internal security, and sets maximum periods in which such border control may be reintroduced.

In August 2019, NW, who was coming from Slovenia, was subject to a border check at the border crossing point at Spielfeld (Austria). Having refused to present his passport, he was declared guilty of having crossed the Austrian border without being in possession of a travel document and was ordered to pay a fine. In November 2019, NW was subject to another border check at the same border crossing point. He contested the legality of those two checks before the referring court.

The referring court questions whether the checks to which NW was subject and the penalty that was imposed upon him are compatible with EU law. When the contested border control measures were carried out, the reintroduction by Austria of border control at its border with Slovenia had already, through the cumulative effect of the application of successive periods of border control, exceeded the maximum total duration of six months laid down by Article 25 of the Schengen Borders Code.

By its judgment, the Court of Justice, sitting as the Grand Chamber, rules that the Schengen Borders Code precludes border control at internal borders from being temporarily reintroduced by a Member State on the basis of a serious threat to its public policy or internal security where the duration of its reintroduction exceeds the maximum total duration of six months and no new threat exists that would justify applying afresh the periods provided for by the code. The code precludes national legislation by which a Member State obliges a person, on pain of a penalty, to present a passport or identity card on entering the territory of that Member State via an internal border, when the reintroduction of the internal border control in relation to which that obligation is imposed is itself contrary to the code.

Findings of the Court

So far as concerns the temporary reintroduction of internal border control by a Member State on the basis of a serious threat to its public policy or internal security, [9] the Court recalls, first of all, that it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part.

As regards, first of all, the wording of Article 25 of the Schengen Borders Code, the Court observes that the words 'shall not exceed six months' would indicate that any possibility of that duration being exceeded is precluded.

So far as concerns, next, the context of Article 25 of the Schengen Borders Code, the Court notes, first, that that provision lays down clearly and precisely the maximum durations both for the initial reintroduction of internal border control and for any prolongation thereof, including the maximum total duration applicable to such border control. Second, that provision constitutes an exception to the principle that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. [10] Since exceptions to the free movement of persons are to be interpreted strictly, the reintroduction of internal border control should remain an

---

8 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), as amended by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 (OJ 2016 L 251, p. 1). That regulation replaced Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

9 More specifically, the Court examines Articles 25 and 27 of the Schengen Borders Code. Article 27 of that code lays down the procedure for the temporary reintroduction of border control at internal borders under Article 25.

10 See, to that effect, Article 22 of the Schengen Borders Code, as well as Article 3(2) TEU and Article 67(2) TFEU.

exception and should only be effected as a measure of last resort. Thus, that requirement for strict interpretation militates against an interpretation of Article 25 of the code under which the persistence of the threat initially identified [11] would be sufficient to justify such border control being reintroduced beyond the period of a maximum total duration of six months that is laid down in that provision. Such an interpretation would in practice effectively allow its reintroduction on account of the same threat for an unlimited period, thereby compromising the very principle that there is to be no internal border control. Third, to interpret Article 25 of the Schengen Borders Code as meaning that, where there is a serious threat, a Member State could exceed the maximum total duration of six months for internal border control would render pointless the distinction drawn by the EU legislature between, on the one hand, internal border control reintroduced under that article and, on the other, internal border control reintroduced under Article 29 of the code, [12] the maximum total duration of the reintroduction of which cannot exceed two years. [13]

Finally, the Court points out that the aim pursued by the rule relating to the maximum total duration of six months falls within the general objective consisting in reconciling the principle of free movement with the Member States' interest in safeguarding the security of their territories. Whilst it is true that in the area without internal border control a serious threat to public policy or internal security in a Member State is not necessarily limited in time, the EU legislature considered that a period of six months was sufficient for the Member State concerned to adopt measures enabling such a threat to be met while maintaining, after that six-month period, the principle of free movement.

Consequently, the Court holds that that period of a maximum total duration of six months is mandatory, with the result that any internal border control reintroduced under Article 25 after it has elapsed is incompatible with the Schengen Borders Code. Such a period may be applied afresh only where the Member State concerned demonstrates the existence of a new serious threat affecting its public policy or internal security. In order to assess whether a given threat is new in relation to the threat identified initially, reference should be made to the circumstances giving rise to the need to reintroduce border control at internal borders and to the circumstances and events that constitute a serious threat to the public policy or internal security of the Member State concerned. [14]

Furthermore, the Court holds that Article 72 TFEU [15] does not permit a Member State to reintroduce, in order to meet such a threat, temporary internal border control founded on Articles 25 and 27 of the Schengen Borders Code for a period exceeding the maximum total duration of six months. In the light of the fundamental importance that the free movement of persons possesses among the objectives of the European Union and of the detailed way in which the EU legislature circumscribed the Member States' ability to interfere with that freedom by temporarily reintroducing internal border control, the EU legislature, in laying down that rule relating to the maximum total duration of six months, took due account of the exercise of the responsibilities incumbent upon the Member States in relation to public policy and internal security.

---

11 Even when assessed in the light of new elements, or of a reappraisal of the necessity and proportionality of the border control established to respond to it.

12 Where exceptional circumstances put at risk the overall functioning of the area without internal border control, Article 29 of the code provides for the possibility for the Member States to reintroduce internal border control on the basis of a Council recommendation.

13 That said, the Court explains that the reintroduction of internal border control under Article 29 of the code for a maximum total duration of two years does not prevent the Member State concerned, in the event of a new serious threat to its public policy or internal security arising, from reintroducing, directly after those two years have come to an end, border control under Article 25 of the code for a maximum total duration of six months, provided that the conditions imposed in the latter provision are met.

14 Article 27(1)(a) of the Schengen Borders Code.

15 That provision states that Title V of the FEU Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

III. COMPETITION: STATE AID

Judgment of the General Court (Second Chamber, Extended Composition) of 6 April 2022, Mead Johnson Nutrition (Asia Pacific) and Others v Commission, T-508/19

Link to the complete text of the judgment

State aid – Aid scheme implemented by the Government of Gibraltar concerning corporation tax – Tax exemption for interest income and royalties – Advance tax rulings benefiting multinationals – Commission decision declaring the aid incompatible with the internal market – Obligation to state reasons – Manifest error of assessment – Selective advantage – Right to submit comments

Between 1 January 2011 and 31 December 2013, under the Income Tax Act 2010 ('ITA 2010'), [16] royalty income was not included in the categories of income taxable in Gibraltar.

MJN Holdings (Gibraltar) Ltd ('MJN GibCo') was a company of the group MeadJohnson established in Gibraltar holding a 99.99% interest in the capital of the limited partnership under Dutch law Mead Johnson Three CV ('MJT CV'), which granted sub-licenses to another company in the group in return for royalties. [17] In 2012, the Gibraltar tax authorities granted MJN GibCo an advance tax ruling confirming, under the Gibraltar corporate tax regime resulting from the ITA 2010, the non-taxation in respect of MJN GibCo of MJT CV's income generated by the royalties.

In October 2013, the European Commission initiated formal investigation proceedings, in order, in particular, to verify the compatibility of the regime for the taxation of royalty income, provided for by the ITA 2010, with the European Union's State aid rules. In October 2014, it decided to extend those proceedings to include the practice of advance tax rulings in Gibraltar ('the decision to extend proceedings').

By its decision of 19 December 2018 ('the contested decision'), [18] the Commission, first, classified the non-inclusion of royalty income in the tax base between 1 January 2011 and 31 December 2013 as an 'implicit exemption' and considered that that measure constituted an unlawful aid scheme that was incompatible with the internal market. In the Commission's view, the exemptions introduced a reduction in the tax that the companies concerned would otherwise have had to pay, given the objective of the ITA 2010 to tax income accruing in or derived from Gibraltar.

Secondly, the Commission considered that the tax treatment granted by the Gibraltar Government in advance tax rulings to five Gibraltar-based companies holding shares in limited partnerships incorporated under Dutch law, some of which received royalty income, constituted unlawful individual State aid incompatible with the internal market. Those decisions, which confirmed the non-taxation of the royalty income of those companies, continued to apply after the 2013 amendment of the ITA 2010, under which royalties were included among the categories of taxable income. MJN GibCo was one of the five companies concerned.

The General Court, hearing an action brought by various companies in the MJN group, upheld the action in part. It dismissed the action in so far as it sought to challenge the part of the contested

---

16 Gibraltar Income Tax Act 2010.

17 MJT CV held licenses to intellectual property rights, which it sub-licensed to Mead Johnson BV, another company incorporated under Dutch law within the MJN group, in return for royalties. Prior to its dissolution in 2018, MJN GibCo was part of the international Mead Johnson Nutrition group ('the MJN group'). Mead Johnson Nutrition (Asia Pacific) Pte Ltd, based in Singapore, was the wholly owned parent company of MJN GibCo.

18 Commission Decision (EU) 2019/700 of 19 December 2018 on the State Aid SA.34914 (2013/C) implemented by the United Kingdom as regards the Gibraltar Corporate Income Tax Regime (OJ 2019 L 119, p. 151).

decision relating to the aid scheme. In that context, the Court endorses the Commission's approach according to which the 'non-taxation' and 'exemption' have the same effect and the absence of an explicit rule providing for the taxation of royalty income does not prevent a measure from conferring an advantage. The Court annuls the contested decision in so far as it relates to the individual aid granted to MJN GibCo. In that context, it clarifies the scope of the right of interested parties to be involved in the formal State aid investigation procedure and the impact of a breach of that right on the legality of the final decision adopted at the end of such a procedure.

The Court's assessment

In the first place, as regards the aid scheme, the Court notes, first of all, that interventions by Member States in areas which have not been harmonised within the European Union, such as direct taxation, are not excluded from the scope of the rules on the control of State aid. Consequently, since the Commission is competent to ensure compliance with Article 107 TFEU, it did not exceed its powers when it examined the non-taxation of royalty income in order to verify whether that measure constituted an aid scheme and, if so, whether it was compatible with the internal market. In the present case, the Court notes that, by referring to the provisions of tax law applicable to Gibraltar and by basing its assessment of those provisions on the information communicated by the United Kingdom and Gibraltar authorities, the Commission did not define autonomously the so-called normal taxation of the tax provisions applicable to Gibraltar in the context of its examination of the non-taxation of royalty income. Furthermore, it does not appear from the contested decision that the Commission sought to align the tax law applicable in Gibraltar with the laws applicable in the various Member States.

The Court next rejects the pleas alleging, in essence, errors of assessment and of law in identifying the normal rules of taxation in Gibraltar and in identifying a selective advantage.

As a preliminary point, the Court observes that, in the context of the analysis of tax measures from the point of view of EU State aid law, the examination of both the criterion of advantage and selectivity implies, in the first place, determining the normal rules of taxation which form the relevant frame of reference for that examination.

As regards the normal rules for taxation in Gibraltar, the Court recognises that the Commission was right to consider that the Gibraltar tax system was a territorial tax regime, according to which all income accrued in or derived from Gibraltar should be taxed there, and that, under that system, royalty income received by a Gibraltar company was necessarily regarded as accrued in or derived from that territory. Those conclusions were based on information directly from the Member State concerned and were consistent with the content of the relevant provisions of the ITA 2010.

As regards the existence of an economic advantage, the Court considers that the Commission has shown that the system of non-taxation of royalty income led to a reduction in the amount of tax which would normally have been payable by undertakings established in Gibraltar receiving royalties and that that was in accordance with the guiding principles of the ITA 2010, namely the principle of territoriality and the principle that all of the taxpayers' accounting income was taxable.

In that context, the Court rejects the applicants' argument that, in the absence of an explicit rule in the ITA 2010 providing for the taxation of royalty income, the tax authorities could not have waived the taxation of that income and had therefore not conferred any advantage on the applicants. The Court notes, in that regard, that the fact that a tax measure is designed according to a certain regulatory technique is irrelevant for the purposes of its analysis under Article 107 TFEU and that the fact that, in the present case, royalty income was not subject to income tax, because it was not included in the categories of income subject to tax in Gibraltar, had the same effect as if that category of income formally benefited from a tax exemption.

As regards the selective nature of the non-taxation of royalty income, the Court considers that the Commission was entitled to consider that it constituted a derogation from the general principle of territoriality, in that it had the effect of applying to Gibraltar undertakings receiving royalty income a tax treatment distinct from that applied to undertakings taxable in Gibraltar receiving income accrued in or derived from that territory, even though those two categories of undertakings were in comparable situations in the light of the objective pursued by the ITA 2010.

In the second place, as regards the individual aid measure granted on the basis of the advance tax ruling granted to MJN GibCo, the Court considers that the discrepancies between the analysis contained in the decision to extend the procedure and the contested decision, in so far as they related to decisive elements of assessment for the purposes of classifying the advance tax ruling adopted in favour of MJN GibCo as individual State aid, were such that the Commission should have adopted an amending decision or a second decision to extend the procedure in order to enable the applicants to participate effectively in the procedure.

The reasoning on the basis of which the Commission considered, in the contested decision, that the continuity of that advance tax ruling, subsequent to the 2013 amendment of the ITA 2010, constituted individual State aid incompatible with the internal market, was based on decisive factors which were not present in the decision to extend the procedure, namely the transparent nature of the limited partnerships under Dutch law for the purposes of the application of Gibraltar tax law and the finding that the partner companies would normally have been subject to income tax in Gibraltar to the extent of their share in the profits of their limited partnerships under Dutch law.

Therefore, the Court notes that, where the Commission changes its reasoning, between the decision to initiate the procedure and the final decision, on matters which are decisive in its assessment of the existence of aid, the obligation on the Commission to extend the formal investigation procedure, in order to give the persons concerned the opportunity to submit their comments, is an essential procedural requirement, the breach of which entails the annulment of the defective act, irrespective of whether that breach has caused damage to the person invoking it or whether the procedure could have led to a different result. On the basis of those findings, the Court annuls the contested decision in so far as it relates to the individual State aid granted on the basis of the advance tax ruling granted to MJN GibCo.

IV. FISCAL PROVISIONS: EXEMPTIONS FROM VAT FOR CERTAIN ACTIVITIES IN THE PUBLIC INTEREST

Judgment of the Court (Second Chamber) of 7 April 2022, I (VAT exemption for hospital services), C-228/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 132(1)(b) – Exemptions for certain activities in the public interest – Exemption for hospital and medical care – Private hospital – Duly recognised establishment – Comparable social conditions

I GmbH is a company incorporated under German private law whose corporate purpose is, inter alia, the operation of a hospital in the field of neurology. With the approval of the State, it supplies hospital services, within the meaning of German law, to patients covered by various systems for the purpose of meeting their medical expenses, including private or statutory health insurance schemes. Those patients are each treated following confirmation that their expenses would be covered by the '*Beihilfe*' services (aid paid to public servants in the event of illness), a health insurance fund, a substitute fund or private insurance.

In its tax returns for the 2009 to 2012 financial years, I treated the hospital services invoiced on the basis of fixed-rate fees and the user fees charged to non-resident doctors as transactions exempt from value added tax (VAT).

Under EU law, [19] hospital services supplied by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals and other duly recognised establishments of a similar nature are exempt from VAT. [20] The German law transposing the VAT Directive provides that hospital services supplied by bodies governed by public law are exempt from VAT and that hospitals other than bodies governed by public law may also qualify for that exemption, in respect of the same services, if they are approved under national law either because they are included in a *Land*-level hospital plan or because they have concluded care supply contracts with the statutory health insurance or substitute funds.

In the present case, prior to 1 July 2012, I was not regarded as an approved hospital within the meaning of German law. However, since it had concluded a framework agreement with an accident insurance fund which entered into force on that date, I could rely on the exemption for hospital services provided after that date.

Before the referring court, I challenged the decision of the tax office, which took the view that most of the services supplied before 1 July 2012 should not be exempt from VAT. According to I, those services are exempt from VAT under the VAT Directive.

The referring court considers that the system applicable in Germany to services supplied by hospitals other than bodies governed by public law may lead to similar services being treated differently. In those circumstances, it asks the Court of Justice whether it is compatible with the VAT Directive to subject the exemption of medical care provided by a private hospital to that hospital being approved in accordance with the national provisions relating to the general health insurance regime and, if not, what factors determine whether the services provided by such private hospitals are supplied under 'social conditions comparable with those applicable to bodies governed by public law', within the meaning of the VAT Directive.

In its judgment, the Court rules that the VAT Directive precludes national legislation which results in private hospitals that supply similar services under social conditions comparable with those applicable to bodies governed by public law being treated differently as regards the exemption laid down by that directive. In that context, the Court sets out the conditions which the competent authorities of a Member State may take into consideration in order to determine whether the services provided by hospitals governed by private law are supplied under 'social conditions comparable with those applicable to bodies governed by public law', within the meaning of the VAT Directive, which include conditions intended to reduce the cost of medical care and to make that care more accessible to individuals, as well as hospital performance indicators.

Findings of the Court

One of the two cumulative conditions required by the VAT Directive in order for hospital services offered by a body other than a body governed by public law to be exempt from VAT relates to the status of the establishment supplying those services and requires the operator to be a hospital, a centre for medical treatment or diagnosis or another duly recognised establishment of a similar nature. In that regard, the Court observes, first of all, that the requirement to be 'duly recognised' relates to all the entities referred to in Article 132(1)(b) of the VAT Directive and is not limited to 'other establishments of a similar nature'. Consequently, a Member State may, in the exercise of its discretion, subject a private hospital to the condition that it be 'duly recognised' in order for the provision of medical care by that hospital under social conditions comparable with those applicable to bodies governed by public law to be exempted under the VAT Directive.

---

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

20 Article 132(1)(b) of that directive provides that Member States are to exempt hospital and medical care and closely related activities undertaken by bodies governed by public law or, under social conditions comparable with those applicable to bodies governed by public law, by hospitals, centres for medical treatment or diagnosis and other duly recognised establishments of a similar nature.

Next, the Court examines the factors to be taken into account for the purpose of recognition of establishments that are eligible for the exemption at issue. In the implementation of that exemption, compliance with fiscal neutrality requires that all organisations other than those governed by public law should be placed on an equal footing for the purpose of their recognition for the supply of similar services. The exercise of a discretion with regard to the conclusion of an agreement with a hospital and the absence of any obligation on the part of the public authorities to include in their hospital plan establishments governed by private law that carry on their activities under social conditions comparable with those applicable to bodies governed by public law may, contrary to the principle of fiscal neutrality, result in similar private hospitals being treated differently as regards the exemption.

Lastly, concerning the other condition required by the VAT Directive for the exemption of hospital services offered by a body other than a body governed by public law, which relates to the services supplied and requires that they be undertaken under 'social conditions comparable with those applicable to bodies governed by public law', the Court states that, in order to determine whether the services of a private hospital are supplied under those conditions, it is necessary to take into consideration, first, the regulatory conditions applicable to the services supplied by hospitals governed by public law with the aim of reducing medical costs and making high-quality care more accessible to individuals and, secondly, the costs of services supplied by the private hospital that remain payable by patients. [21] The private hospital's performance in terms of staff, premises and equipment and the cost-efficiency of its management may also be taken into consideration, in so far as hospitals governed by public law are subject to comparable management indicators and such indicators contribute to achieving the objective of reducing medical costs and making high-quality care more accessible to individuals.

21 The Court states, in that regard, that it may be relevant to assess whether fixed-rate daily fees are calculated in a comparable way in a private hospital and in a hospital governed by public law and that it will be for the referring court to examine whether the services supplied by private hospitals are covered by the social security scheme or under contracts concluded with the national public authorities, so that the costs borne by patients are comparable to those borne by patients of public establishments.

V. APPROXIMATION OF LAWS: PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 5 April 2022, Commissioner of the Garda Síochána and Others, C-140/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Confidentiality of the communications – Providers of electronic communications services – General and indiscriminate retention of traffic and location data – Access to data – Subsequent court supervision – Directive 2002/58/EC – Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 11 and Article 52(1) – Possibility for a national court to restrict the temporal effect of a declaration of the invalidity of national legislation that is incompatible with EU law – Excluded

In recent years, the Court of Justice has ruled, in several judgments, on the retention of and access to personal data in the field of electronic communications. [22]

In particular, by two judgments of the Grand Chamber, of 6 October 2020, [23] the Court confirmed its case-law resulting from the judgment in *Tele2 Sverige* as to the disproportionate nature of the general and indiscriminate retention of traffic and location data. It also clarified inter alia the extent of the powers that the Directive on privacy and electronic communications recognises Member States have in respect of the retention of those data for the purposes of safeguarding of national security and combating crime.

In this case, the request for a preliminary ruling was submitted by the Supreme Court (Ireland) in the context of civil proceedings brought by a person sentenced to life imprisonment for a murder committed in Ireland. That person challenged the compatibility with EU law of certain provisions of national law on the retention of data generated in the context of electronic communications. [24] Pursuant to that law, [25] traffic and location data relating to the telephone calls of the person charged had been retained by providers of electronic communications services and made accessible to the police authorities. The referring court's doubts related in particular to the compatibility with the

22 Thus, in the judgment of 8 April 2014, Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238), the Court declared Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54) invalid on the ground that the interference with the rights to respect for private life and to the protection of personal data, recognised by the Charter of Fundamental Rights of the European Union ('the Charter'), which resulted from the general obligation to retain traffic and location data laid down by that directive was not limited to what was strictly necessary. Next, in the judgment of 21 December 2016, Tele2 Sverige and Watson and Others (C-203/15 and C-698/15, EU:C:2016:970), the Court held that Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) ('the Directive on privacy and electronic communications'), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), precludes national legislation providing for the general and indiscriminate retention of traffic and location data for the purposes of combating crime. Lastly, in the judgment of 2 October 2018, Ministerio Fiscal (C-207/16, EU:C:2018:788), the Court interpreted the same Article 15(1) in a case which concerned public authorities' access to data relating to the civil identity of users of means of electronic communication.

23 Judgments of 6 October 2020, Privacy International (C-623/17, EU:C:2020:790), and of 6 October 2020, La Quadrature du Net and Others (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

24 Communications (Retention of Data) Act 2011. That law was adopted in order to transpose into Irish law Directive 2006/24.

25 The law permits, for reasons going beyond those inherent to the protection of national security, the preventative, general and indiscriminate retention of traffic and location data of all subscribers for a period of two years.

Directive on privacy and electronic communications, [26] read in the light of the Charter, [27] of a system of the general and indiscriminate retention of those data, in connection with combating serious crime.

In its judgment, the Court, sitting as the Grand Chamber, confirms, while also providing detail as to its scope, the case-law resulting from the judgment in *La Quadrature du Net and Others* by recalling that the general and indiscriminate retention of traffic and location data relating to electronic communications is not permitted for the purposes of combating serious crime and preventing serious threats to public security. It also confirms the case-law resulting from the judgment in *Prokuratuur (Conditions of access to data relating to electronic communications)*, [28] in particular as regards the obligation to make access by the competent national authorities to those retained data subject to a prior review carried out either by a court or by an administrative body that is independent in relation to a police officer.

Findings of the Court

The Court holds, in the first place, that the Directive on privacy and electronic communications, read in the light of the Charter, precludes legislative measures which, as a preventive measure, for the purposes of combating serious crime and preventing serious threats to public security, provide for the general and indiscriminate retention of traffic and location data. Having regard, first, to the dissuasive effect on the exercise of the fundamental rights [29] which is liable to result from the retention of those data, and, second, to the seriousness of the interference entailed by such retention, it is necessary for that retention to be the exception and not the rule in the system established by that directive, such that those data should not be retained systematically and continuously. Crime, even particularly serious crime, cannot be treated in the same way as a threat to national security, since to treat those situations in the same way would be likely to create an intermediate category between national security and public security for the purpose of applying to the latter the requirements inherent in the former.

However, the Directive on privacy and electronic communications, read in the light of the Charter, does not preclude legislative measures which provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the targeted retention of traffic and location data which is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended. It adds that such a retention measure covering places or infrastructures that regularly receive a very high volume of visitors, or strategic locations, such as airports, stations, maritime ports or tollbooth areas, may allow the competent authorities to obtain information as to the presence in those places or geographical areas of persons using a means of electronic communication within those areas and to draw conclusions as to their presence and activity in those places or geographical areas for the purposes of combating serious crime. In any event, the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which targeted retention may be carried out is no reason for the Member States, by turning the exception into a rule, to provide for the general retention of traffic and location data.

That directive, read in the light of the Charter, also does not preclude legislative measures that provide, for the same purposes, for the general and indiscriminate retention of IP addresses assigned to the source of an internet connection for a period that is limited in time to what is strictly necessary, as well as data relating to the civil identity of users of electronic communications systems. As regards that latter aspect, the Court holds more specifically that neither the Directive on privacy and

26 More specifically, Article 15(1) of Directive 2002/58.

27 In particular, Articles 7, 8, 11 and Article 52(1) of the Charter.

28 Judgment of 2 March 2021, Prokuratuur (Conditions of access to data relating to electronic communications) (C-746/18, EU:C:2021:152).

29 Enshrined in Articles 7 to 11 of the Charter.

electronic communications nor any other act of EU law precludes national legislation, which has the purpose of combating serious crime, pursuant to which the purchase of a means of electronic communication, such as a pre-paid SIM card, is subject to a check of official documents establishing the purchaser's identity and the registration, by the seller, of that information, with the seller being required, should the case arise, to give access to that information to the competent national authorities.

The same is the case for legislative measures which allow, also for the purposes of combating serious crime and preventing serious threats to public security, recourse to an instruction requiring providers of electronic communications services by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention (*quick freeze*) of traffic and location data in their possession. Only actions to combat serious crime and, a fortiori, to safeguard national security are such as to justify that retention, on the condition that the measure and access to the retained data comply with the limits of what is strictly necessary. The Court recalls that such a retention measure may be extended to traffic and location data relating to persons other than those who are suspected of having planned or committed a serious criminal offence or acts adversely affecting national security, provided that those data can, on the basis of objective and non-discriminatory factors, shed light on such an offence or acts adversely affecting national security, such as data concerning the victim thereof, and his or her social or professional circle.

However, the Court indicates next that all the abovementioned legislative measures must ensure, by means of clear and precise rules, that the retention of data at issue is subject to compliance with the applicable substantive and procedural conditions and that the persons concerned have effective safeguards against risks of abuse. The various measures for the retention of traffic and location data may, at the choice of the national legislature and subject to the limits of what is strictly necessary, be applied concurrently.

In addition, the Court states that to authorise, for the purposes of combating serious crime, access to those data retained generally and indiscriminately in order to address a serious threat to national security would be contrary to the hierarchy of objectives of public interest which may justify a measure taken pursuant to the Directive on privacy and electronic communications. [30] That would be to allow access to be justified for an objective of lesser importance than that which justified its retention, namely the safeguarding of national security, which would risk depriving of any effectiveness the prohibition on a general and indiscriminate retention for the purpose of combating serious crime.

In the second place, the Court holds that the Directive on privacy and electronic communications, read in the light of the Charter, precludes national legislation pursuant to which the centralised processing of requests for access to data retained by providers of electronic communications services, issued by the police in the context of the investigation or prosecution of serious criminal offences, is the responsibility of a police officer, who is assisted by a unit established within the police service which enjoys a degree of autonomy in the exercise of its duties, and whose decisions may subsequently be subject to judicial review. First, such a police officer does not fulfil the requirements of independence and impartiality which must be met by an administrative body carrying out the prior review of requests for access issued by the competent national authorities, as he or she does not have the status of a third party in relation to those authorities. Second, while the decision of that officer may be subject to subsequent judicial review, that review cannot be substituted for a review which is independent and, except in duly justified urgent cases, undertaken beforehand.

30 That hierarchy is set out in the case-law of the Court, and in particular in the judgment of 6 October 2020, La Quadrature du Net and Others (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraphs 135 and 136). Under that hierarchy, combating serious crime is of lesser importance than safeguarding national security.

In the third place, lastly, the Court confirms its case-law according to which EU law precludes a national court from limiting the temporal effects of a declaration of invalidity which, pursuant to national law, it is bound to make as regards national legislation requiring providers of electronic communications services to retain, generally and indiscriminately, traffic and location data, owing to the incompatibility of that legislation with the Directive on privacy and electronic communications. However, the Court recalls that the admissibility of evidence obtained by means of such retention is, in accordance with the principle of procedural autonomy of the Member States, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness.

Judgment of the Court (Third Chamber) of 28 April 2022, Meta Platforms Ireland, C-319/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 80 – Representation of the data subjects by a not-for-profit association – Representative action brought by a consumer protection association in the absence of a mandate and independently of the infringement of specific rights of a data subject – Action based on the prohibition of unfair commercial practices, the infringement of a consumer protection law or the prohibition of the use of invalid general terms and conditions

Meta Platforms Ireland manages the provision of services of the online social network Facebook and is the controller of the personal data of users of that social network in the European Union. The Facebook internet platform contains, at the internet address www.facebook.de, an area called 'App-Zentrum' ('App Center') on which Meta Platforms Ireland makes available to users free games provided by third parties. When viewing some of those games, the user is informed that use of the application concerned enables the gaming company to obtain a certain amount of personal data and gives it permission to publish data on behalf of that user. By using that application, the user accepts its general terms and conditions and data protection policy. In addition, in the case of a specific game, the user is informed that the application has permission to post photos and other information on his or her behalf.

The German Federal Union of Consumer Organisations and Associations [31] considered that the information provided by the games concerned in the App Center was unfair. Therefore, as a body with standing to bring proceedings seeking to end infringements of consumer protection legislation, [32] the Federal Union brought an action for an injunction against Meta Platforms Ireland. That action was brought independently of a specific infringement of the right to data protection of a data subject and without a mandate from a data subject. The decision upholding that action was the subject of an appeal brought by Meta Platforms Ireland which, after that appeal was dismissed, then brought a further appeal before the Bundesgerichtshof (Federal Court of Justice, Germany). Since it had doubts as to the admissibility of the action brought by the Federal Union, and in particular as to its standing to bring proceedings against Meta Platforms Ireland, that court referred the matter to the Court of Justice.

31 Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV ('the Federal Union').

32 Under German law, the laws on consumer protection also include rules defining the lawfulness of the collection or processing or use of a consumer's personal data by an undertaking or entrepreneur.

By its judgment, the Court finds that Article 80(2) of the General Data Protection Regulation [33] does not preclude a consumer protection association from being able to bring legal proceedings, in the absence of a mandate granted to it for that purpose and independently of the infringement of the specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions. Such an action is possible where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.

Findings of the Court

First of all, the Court notes that while the GDPR [34] seeks to ensure harmonisation of national legislation on the protection of personal data which is, in principle, full, Article 80(2) of that regulation is amongst the provisions which leaves the Member States a discretion with regard to its implementation. [35] Therefore, in order for it to be possible to proceed with the representative action without a mandate provided for in that provision, Member States must make use of the option made available to them by that provision to provide in their national law for that mode of representation of data subjects. However, when exercising that option, the Member States must use their discretion under the conditions and within the limits laid down by the provisions of the GDPR and must therefore legislate in such a way as not to undermine the content and objectives of that regulation.

Next, the Court points out that, by making it possible for Member States to provide for a representative action mechanism against the person allegedly responsible for an infringement of the laws protecting personal data, Article 80(2) of the GDPR lays down a number of requirements to be complied with. Thus, first, standing to bring proceedings is conferred on a body, organisation or association which meets the criteria set out in the GDPR. [36]A consumer protection association, such as the Federal Union, which pursues a public interest objective consisting in safeguarding the rights and freedoms of data subjects in their capacity as consumers, since the attainment of such an objective is likely to be related to the protection of the personal data of those persons, may fall within the scope of that concept. Second, the exercise of that representative action presupposes that the entity in question, independently of any mandate conferred on it, considers that the rights which a data subject derives from the GDPR have been infringed as a result of the processing of his or her personal data.

Thus, first, the bringing of a representative action [37] does not require prior individual identification by the entity in question of the person specifically concerned by data processing that is allegedly contrary to the provisions of the GDPR. For that purpose, the designation of a category or group of persons affected by such treatment may also be sufficient. [38]

---

33 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) ('the GDPR'). Under Article 80(2), 'Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority … pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing [of personal data concerning him or her]'.

34 As is apparent from Article 1(1) of that regulation, read in the light of recitals 9, 10 and 13 thereof.

35 Pursuant to the 'opening clauses'.

36 In particular, Article 80(1) of the GDPR. That provision refers to 'a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data'.

37 Under Article 80(2) of the GDPR.

38 In particular, in the light of the scope of the concept of 'data subject' in Article 4(1) of the GDPR, which covers both an 'identified natural person' and an 'identifiable natural person'.

Second, the bringing of such an action does not require there to be a specific infringement of the rights which a person derives from the GDPR. In order to recognise that an entity has standing to bring proceedings, it is sufficient to claim that the data processing concerned is liable to affect the rights which identified or identifiable natural persons derive from that regulation, without it being necessary to prove actual harm suffered by the data subject, in a given situation, by the infringement of his or her rights. Thus, in the light of the objective pursued by the GDPR, authorising consumer protection associations, such as the Federal Union, to bring, by means of a representative action mechanism, actions seeking to have processing contrary to the provisions of that regulation brought to an end, independently of the infringement of the rights of a person individually and specifically affected by that infringement, undoubtedly contributes to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection.

Finally, the Court states that the infringement of a rule relating to the protection of personal data may at the same time give rise to an infringement of rules on consumer protection or unfair commercial practices. The GDPR [39] allows the Member States to exercise their option to provide for consumer protection associations to be authorised to bring proceedings against infringements of the rights provided for by the GDPR through rules intended to protect consumers or combat unfair commercial practices.

VI. SOCIAL POLICY: PROTECTION OF EMPLOYEES IN THE EVENT OF THE INSOLVENCY OF THEIR EMPLOYER

Judgment of the Court (Third Chamber) of 28 April 2022, Federatie Nederlandse Vakbeweging (Pre-pack procedure), C-237/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Directive 2001/23/EC – Articles 3 to 5 – Transfers of undertakings – Safeguarding of employees' rights – Exceptions – Insolvency proceedings – '*Pre-pack*' – Survival of an undertaking – Transfer of (part of) an undertaking following a declaration of insolvency preceded by a *pre-pack*

The Heiploeg group ('Heiploeg-former') consisted of several companies engaged in the wholesale trade in fish and seafood. In 2011 and 2012, Heiploeg-former suffered significant financial losses and, in 2013, a fine of EUR 27 million was imposed on four companies in that group for having participated in a cartel. Since no bank agreed to finance the payment of that fine, a *pre-pack* procedure was initiated.

In Netherlands law, the *pre-pac*k is a practice derived from case-law which is intended to enable, in the insolvency proceedings, a liquidation of the undertaking as a going concern which satisfies to the greatest extent possible the claims of all the creditors and preserves employment as far as possible. The sales transactions organised in the context of that procedure in respect of all or part of the undertaking are prepared by a 'prospective insolvency administrator', whose tasks are determined by the competent court which appoints him or her and by the instructions given by that court or by the 'prospective supervisory judge' appointed by that court for that purpose and who supervises the 'prospective insolvency administrator'. In the event of subsequent insolvency proceedings, that court

39 In particular, Article 80(2) of the GDPR.

reviews whether those persons followed all of the instructions given to them and, if not, appoints other persons as 'insolvency administrator' and 'supervisory judge' when the insolvency is declared.

In that context, in January 2014, in response to a request from Heiploeg-former, the competent court appointed two 'prospective insolvency administrators' and a 'prospective supervisory judge'. In the same month, Heiploeg-former was declared insolvent and those same persons were appointed as insolvency administrators and supervisory judge, respectively.

Two Netherlands companies ('Heiploeg-new'), entered in the commercial register on 21 January 2014, took over most of Heiploeg-former's business on the basis of an asset transfer agreement. In accordance with that agreement, Heiploeg-new took over the contracts of employment of approximately two-thirds of Heiploeg-former's employees for the purpose of carrying out the same work, but under less favourable employment conditions.

The Federatie Nederlandse Vakbeweging (Netherlands Federation of Trade Unions; 'the FNV') lodged an appeal against the judgment declaring Heiploeg-former insolvent. That appeal was dismissed on the ground that that insolvency had become inevitable and therefore a derogation from the safeguarding of employees' rights in the event of transfers of undertakings was applicable in the present case. Consequently, Heiploeg-new was not bound by the working and employment conditions applicable before the transfer.

In accordance with Directive 2001/23, [40] which is aimed at protecting employees, in particular by ensuring that their rights are safeguarded in the event of a transfer of an undertaking, three conditions must be satisfied in order for that derogation to be applicable: the transferor must be the subject of bankruptcy proceedings or any analogous insolvency proceedings, those proceedings must have been instituted with a view to the liquidation of the assets of the transferor and they must be under the supervision of a competent public authority (or an insolvency practitioner authorised by a competent public authority).

The FNV brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), submitting that, on the contrary, that derogation was not applicable in the case of a *pre-pack* procedure and that, accordingly, the employment conditions of the staff which were taken over should be maintained.

Ruling on a request for a preliminary ruling from that court, the Court of Justice holds that, in the event of a transfer prepared in a *pre-pack* procedure, such as that at issue in the main proceedings, and provided that that procedure is governed by statutory or regulatory provisions, the transferee is, in principle, entitled to derogate from the obligation to safeguard employees' rights. [41]

Assessment of the Court

First, the Court notes, as regards the condition concerning the institution of bankruptcy proceedings or any analogous insolvency proceedings with a view to the liquidation of the assets of the transferor, [42] that, in the present case, the insolvency of the transferor was inevitable and both the insolvency proceedings and the preceding *pre-pack* procedure were aimed at liquidating the assets of

40 Article 5(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

41 The rights in question are laid down in Articles 3 and 4 of Directive 2001/23. The first sentence of Article 3(1) of that directive concerns the transfer of the transferor's rights and obligations arising from contracts of employment or from employment relationships to the transferee, whereas the first sentence of Article 4(1) prohibits the dismissal of employees on the sole ground of the transfer.

42 In that respect, the Court draws a distinction between the pre-pack procedure at issue in the present case and that at issue in the case that gave rise to the judgment of 22 June 2017, Federatie Nederlandse Vakvereniging and Others, C-126/16, EU:C:2017:489, indicating that the latter was not aimed at the liquidation of the undertaking concerned.

the transferor, which was declared insolvent. Moreover, the transfer of the undertaking was carried out during those insolvency proceedings.

The objective of the derogation from the obligation to safeguard employees' rights is to eliminate the serious risk of a deterioration of the value of the transferred undertaking or in the living and working conditions of workers, whereas the objective of a *pre-pack* procedure followed by insolvency proceedings is to secure the greatest possible reimbursement of all creditors and to safeguard employment as far as possible. The Court adds that the aim of the use of a *pre-pack* procedure, for the purposes of liquidating a company, is to increase the chances of satisfying the creditors' claims. Consequently, the *pre-pack* procedure and insolvency proceedings, taken together, may be regarded as being aimed at the liquidation of the undertaking for the purposes of Article 5(1) of Directive 2001/23, provided that that *pre-pack* procedure is governed by statutory or regulatory provisions in order to meet the requirement of legal certainty.

Secondly, the Court notes that the *pre-pack* procedure at issue in the main proceedings may be regarded as having been carried out under the supervision of a competent public authority, as required by Article 5 of Directive 2001/23, provided that that procedure is governed by statutory and regulatory provisions. The 'prospective insolvency administrator' and the 'prospective supervisory judge' are appointed by the competent court for the *pre-pack* procedure, which determines their duties and reviews the exercise of those duties when the insolvency proceedings are subsequently opened, in deciding whether or not to appoint the same persons as insolvency administrator and supervisory judge.

Furthermore, the transfer prepared during the *pre-pack* procedure is not carried out until after the opening of the insolvency proceedings, since the insolvency administrator and the supervisory judge may refuse to carry out that transfer if they consider that it is contrary to the interests of the transferor's creditors. In addition, the 'prospective insolvency administrator' must not only account for his or her management of the preparatory phase in the insolvency report, he or she may also be held liable under the same conditions as the insolvency administrator.

VII. PUBLIC HEALTH

Judgment of the General Court (Eighth Chamber, Extended Composition) of 27 April 2022, Roos and Others v Parliament, T-710/21, T-722/21 and T-723/21

Public health – Requirement to present a valid EU digital COVID-19 certificate in order to access the buildings of the Parliament – Legal basis – Freedom and independence of Members – Obligation to ensure the health of staff in the service of the European Union – Parliamentary immunity – Processing of personal data – Right to respect for private life – Right to physical integrity – Right to security – Equal treatment – Proportionality

On 27 October 2021, the Bureau of the European Parliament introduced exceptional health and safety rules for access to the Parliament's buildings at its three places of work (Brussels, Strasbourg and Luxembourg). In essence, that decision made access to those buildings conditional on presentation of a digital COVID 19 vaccination, test or recovery certificate, [43] or an equivalent certificate, [44] for an initial period until 31 January 2022. The applicants, who are all Members of the

43 Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ 2021 L 211, p. 1).

44 As provided for in Article 8 of Regulation 2021/953 ('COVID-19 certificates and other documentation issued by a third country').

European Parliament, brought proceedings before the General Court of the European Union for the annulment of that decision.

The Court, ruling in extended composition, examines for the first time the lawfulness of certain restrictions imposed by the EU institutions with a view to protecting the health, in particular, of their staff, in the context of the COVID 19 pandemic. It dismisses the actions of the Members of the European Parliament and holds that the Parliament may require them to present a valid COVID certificate in order to access its buildings.

The Court's assessment

In the first place, the Court holds that the Parliament did not need express authorisation from the EU legislature in order to adopt the contested decision. In that it seeks to restrict access to the Parliament's buildings only to those with a valid COVID certificate, that decision falls within the Parliament's power to adopt rules for its own internal organisation [45] and is intended to apply only on its premises. In addition, that decision can determine the elements of processing of personal data, as it constitutes a 'law', [46] that concept not being limited to legislative texts adopted after parliamentary debate.

In the second place, the Court notes that the contested decision does not constitute a disproportionate or unreasonable interference with the free and independent exercise of the Member's mandate. The Court recognises that in that it imposes an additional condition for access to the Parliament's buildings, that decision constitutes an interference with the free and independent exercise of the Members' mandate. Nevertheless, that decision pursues a legitimate aim, seeking to balance two competing interests in the context of a pandemic, namely, continuity of the Parliament's activities and the health of those present on its premises.

As regards an alleged infringement of the immunities granted to Members of the European Parliament, the Court notes that it is not apparent either from the Protocol on the privileges and immunities of the European Union [47] or the Parliament's Rules of Procedure that the Parliament could not adopt the internal organisation measures at issue. On the contrary, the Rules of Procedure expressly provide that the right of Members to participate actively in the Parliament's work is to be exercised in accordance with those rules. [48]

In the third place, the Court holds that the processing of personal data by the Parliament under the contested decision is not unlawful or unfair. First, the contested decision, adopted on the basis of the power of internal organisation arising under the TFEU, constitutes a legal basis for the processing of the data contained in COVID certificates. [49] On that basis, the Court notes that that processing pursues an EU general public interest, namely, the protection of public health. Secondly, the processing of the data is transparent and fair, as the Parliament first provided the individuals concerned with information concerning further processing of data for a purpose other than that for which those data were initially obtained. [50]

In the fourth place, the Court considers that the contested decision is not an infringement or a disproportionate infringement of the right to physical integrity, the principles of equal treatment and non-discrimination, the right to free and informed consent to any medical treatment, the right to

45 As provided for in Article 25(2) of the Rules of Procedure of the European Parliament, itself based on Article 232 TFEU.

46 Within the meaning of Article 8 of the Charter of Fundamental Rights of the European Union.

47 Protocol No 7 on the privileges and immunities of the European Union (OJ 2012 C 326, p. 1).

48 Rule 5 of the Rules of Procedure of the European Parliament.

49 In compliance with Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

50 In accordance with Article 16(4) of Regulation 2018/1725.

freedom and, lastly, the right to privacy and protection of personal data. Furthermore, it holds that, in view of the epidemiological situation and current scientific knowledge the measures at issue, at the time they were adopted, were necessary and appropriate. Although it is true that neither vaccination, tests nor recovery allow transmission of COVID 19 to be completely ruled out, the requirement to present a valid COVID certificate allows the objective and non-discriminatory reduction of that risk and thus the objective of protecting health to be achieved.

The Court finds, moreover, that the measures at issue are also proportionate in relation to the objective pursued. The applicants have not established the existence of less restrictive measures that are equally effective. Therefore, without the measures at issue, a person who is neither vaccinated nor recovered, a potential carrier of the virus, could have free access to the Parliament's buildings, whilst risking, by the same token, infecting others. Furthermore, the contested decision takes account of the general epidemiological situation in Europe and also the specific situation of the Parliament, in particular frequent international travel of those with access to its premises. In addition, the measures at issue are limited in time and reviewed regularly.

Lastly, the Court finds that the practical disadvantages caused by the presentation of a valid certificate cannot outweigh the protection of the health of others or be treated in the same way as disproportionate interferences with the applicants' fundamental rights.

However, it notes that those measures must be reassessed from time to time in the light of the health situation in the European Union and in the Parliament's three places of work and that they must apply only for so long as the exceptional circumstances which justify them continue.

VIII. INTERNATIONAL AGREEMENTS: EXTERNAL COMPETENCE OF THE EUROPEAN UNION

Judgment of the Court (Grand Chamber) of 5 April 2022, Commission v Council (International Maritime Organisation), C-161/20

Link to the complete text of the judgment

Action for annulment – Council decision, contained in the act of the Permanent Representatives Committee (Coreper) of 5 February 2020, endorsing the submission to the International Maritime Organisation (IMO) concerning the introduction of life cycle guidelines to estimate well-to-tank greenhouse gas emissions of sustainable alternative fuels – Article 17(1) TEU – External representation of the European Union – Transmission of that submission to the IMO by the Member State holding the Presidency of the Council, on behalf of the Member States and the Commission

Among the conventions concluded under the auspices of the International Maritime Organisation (IMO), [51] one of the specialised agencies of the United Nations, is the International Convention for the Prevention of Pollution from Ships. [52] All the Member States are parties to the IMO Convention and to the Marpol Convention, whereas the European Union is not a member of either.

---

51 The IMO, established by the Convention on the International Maritime Organisation, signed in Geneva on 6 March 1948 (*United Nations Treaty Series*, Vol. 289, p. 3), in the version applicable to the present proceedings ('the IMO Convention'), is a specialised agency of the United Nations with responsibility, inter alia, for the prevention of marine and atmospheric pollution by ships.

52 International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by two protocols adopted in 1978 and 1997 ('the Marpol Convention').

Under the Marpol Convention, the IMO adopted a number of mandatory measures for the reduction of emissions of greenhouse gases (GHG) from international shipping.

The Marine Environment Protection Committee ('MEPC') is the IMO's decision-making body, responsible for the implementation of the Marpol Convention. The IMO Council endorsed a decision by the MEPC to establish a Working Group on Reduction of GHG Emissions from Ships, which is required to report to the MEPC during its sessions. The MEPC instructed that working group to consider concrete proposals to encourage the uptake of alternative low-carbon and zero-carbon fuels. In connection with that task, that working group invited interested Member States and international organisations to cooperate and submit proposals for draft guidelines on life cycle GHG/carbon intensity for all relevant types of fuels.

In December 2019, the European Commission sent to the Council of the European Union a staff working document in which it indicated that the submission annexed to it fell under external exclusive EU competence and that it was presented to the Council with a view to establishing the EU position for its transmission to the IMO. The subheading of that submission, as proposed by the Commission, mentioned moreover that it was 'submitted by the European Commission on behalf of the European Union'.

In January 2020, the Council's 'Shipping' working group decided to propose to the Permanent Representatives Committee (Coreper) that the submission be presented to the IMO not on behalf of the European Union but in the name of the 27 Member States and of the Commission. Moreover, after having amended, in particular, the subheading of the Commission's draft submission, it invited Coreper to endorse the amended submission, with a view to its transmission to the IMO by the Presidency of the Council.

By decision of 5 February 2020, Coreper endorsed the amended submission ('the submission at issue'), with a view to its transmission by the Presidency of the Council to the IMO on behalf of the Member States and the Commission. On 7 February 2020, the Republic of Croatia, which held the Presidency of the Council at that time, sent the submission at issue by email to the IMO on behalf of the 27 Member States and the Commission.

By its action, the Commission sought annulment of that Council decision. It maintained that, in the present case, Article 17(1) TEU confers exclusive competence on the Commission for ensuring the external representation of the European Union, meaning that it was for that institution to transmit the submission at issue to the IMO. The Commission also argued that, since that submission was made in relation to a matter falling under the exclusive competence of the European Union, it should have been presented on behalf of the European Union, and not on behalf of the Member States and the Commission.

By its judgment, delivered by the Grand Chamber, the Court dismisses the Commission's action in its entirety. This case thus gives the Court the opportunity to clarify the principles and modalities of the external representation of the European Union at an international organisation within which the European Union has no status.

Findings of the Court

Verifying first of all that it has jurisdiction to hear and determine the action brought by the Commission, the Court recalls having previously declared admissible an action for annulment brought against a decision of Coreper to submit a reflection paper to a commission established by an international agreement, in so far as such a decision is intended to produce legal effects.

Admittedly, the Court notes that it does not, in principle, have jurisdiction to review the legality of acts of EU law in the light of provisions of an international agreement to which the European Union is not a party. However, in accordance with settled case-law, when the European Union decides to exercise its powers they must be exercised in observance of the relevant international law. It follows that the Court must take account, in the context of its jurisdiction under, in particular, Article 263 TFEU, of the relevant rules of international law to the full extent necessary in order to dispose of the case before it. In this instance, in order to dispose of the case, it is necessary for the Court to take account of the IMO Convention in order to determine whether or not the European Union has a status within that organisation. In those circumstances, the Court declares that it has jurisdiction to rule on the Commission's action.

As regards the substance, the Court begins by examining the Commission's plea alleging a breach of the sixth sentence of Article 17(1) TEU. According to that provision, with the exception of the common foreign and security policy, and other cases provided for in the Treaties, the Commission is to ensure the European Union's external representation.

The Court notes first of all that that provision makes no distinction as to whether the European Union exercises its exclusive external competence in accordance with Article 3(2) TFEU or exercises an external competence that is shared with the Member States, whether together with them or in reliance by the Council on the possibility of the required majority being obtained for the European Union to exercise that external competence alone. It follows that the Commission's competence to represent the European Union in the latter's exercise of its external competence does not depend on the exclusive or shared nature of that competence, which relates only to internal EU rules that do not bind third States or other international organisations.

In addition, while it is true that the Treaties limit the Commission's competence to ensure the European Union's external representation only in accordance with the derogations expressly mentioned in Article 17(1) TEU, according to the Court, the fact remains that when the European Union, as a subject of international law, decides to exercise its powers they must be exercised in observance of the relevant international law.

Although all the Member States of the European Union are members of the IMO, neither the Community nor the Union which replaced it entered into an arrangement with that organisation, meaning that the European Union is not a member of the IMO and does not have any status within it. Thus, the European Union does not have any basis on which it might itself be able to participate in the work of the institutions and committees of that organisation.

Turning to the Commission's argument to the effect that the Republic of Croatia could not transmit the submission at issue without infringing the external competence of the European Union and the Commission's power of external representation, the Court acknowledges that the mere fact that the European Union is not a member of an international organisation does not authorise a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect EU rules promulgated for the attainment of the objectives of the Treaty. However, in the present case, the Court states that it is apparent from the email sent to the IMO by the Republic of Croatia that the latter, acting on behalf of the Member States and the Commission, did no more than transmit to the IMO the submission of the Member States and the Commission that is at issue.

Admittedly, in so far as the relevant international law does not appear to preclude it, the Member States would have been able to give the Commission the task of ensuring their representation in their joint exercise, in the interest of the European Union, of an external competence which the European Union was precluded from exercising under the applicable rules of the IMO Convention. However, there is no provision in the Treaties that requires the Member States to give the Commission the task of ensuring their representation, even where the relevant international law does not preclude it. Indeed, aside from the exceptions expressly referred to in Article 17(1) TEU, that provision confers on the Commission exclusive competence to ensure only the representation of the European Union and not that of the Member States, including when they are acting jointly in the interest of the European Union.

Thus, the Court holds that the Member States remain free to decide on a case-by-case basis on the modalities of their own external representation, including when acting jointly in the interest of the European Union. For those purposes, there is nothing to prevent those States from mandating, from among themselves, the Member State which holds the Presidency of the Council, in so far as that Member State is acting neither individually nor in the name of the European Union.

IX. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the Court (Second Chamber) of 28 April 2022, Yieh United Steel v Commission, C-79/20 P

Link to the complete text of the judgment

Appeal – Dumping – Implementing Regulation (EU) 2015/1429 – Imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan – Definitive anti-dumping duty – Regulation (EC) No 1225/2009 – Article 2 – Calculation of the normal value – Calculation of the production cost – Production losses – Refusal to deduct the value of recycled scrap – Determination of the normal value on the basis of sales of the like product intended for domestic consumption – Exclusion from the basis of calculation used to determine the normal value of sales on the domestic market of the exporting country where those sales concern products intended for export

Following a complaint lodged by Eurofer, Association européenne de l'acier, the European Commission adopted, following an investigation, Implementing Regulation 2015/1429 [53] ('the contested regulation') imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan ('the product under consideration').

Yieh United Steel Corp. ('the appellant'), a company established in Taiwan, active in particular in the manufacture and distribution of the product under consideration, brought an action before the General Court for annulment of the contested regulation in so far as it concerned the appellant. It relies, inter alia, on an infringement of Article 2(2) of the basic regulation, [54] under which the 'normal value' of products subject to the anti-dumping duty is normally determined on the basis of sales of the like product intended for domestic consumption. In that regard, the appellant challenged, inter alia, the Commission's refusal to take into consideration, for the purposes of determining the normal value, certain sales of the product concerned to its independent buyer in the exporting country ('the sales in question'), on the sole ground that the product concerned had been exported by that customer after those sales, whereas the Commission had not shown that the appellant intended not to use that product for domestic consumption.

By judgment of 3 December 2019 [55] ('the judgment under appeal'), the General Court dismissed the action brought by the appellant, holding, inter alia, that the Commission could refuse to take into account the sales in question for the purposes of determining the normal value, irrespective of whether the exporting producer had, at the time those sales were concluded, any knowledge of the export of the products concerned, if it had objective evidence that those sales were in fact export sales.

By judgment on appeal, the Court of Justice upholds the judgment of the General Court, while clarifying the expression 'intended for consumption' used in Article 2(2) of the basic regulation.

---

53 Commission Implementing Regulation (EU) 2015/1429 of 26 August 2015 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (OJ 2015 L 224, p. 10).

54 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51).

55 Judgment of 3 December 2019, *Yieh United Steel* v *Commission* (T-607/15, EU:T:2019:831).

Findings of the Court

As a preliminary point, the Court notes that, in accordance with Article 2(1) and (2) of the basic regulation, domestic sales in the exporting country are not to be taken into account for the purposes of determining the normal value when the products concerned by those sales are destined, not for consumption on that market, but for a different purpose, such as export.

It then examines the question whether the expression 'intended for consumption', within the meaning of Article 2(2) of the basic regulation, implies a subjective element, in particular the existence of actual intention or knowledge on the part of the seller as to the final destination of the product concerned.

In that regard, the Court of Justice confirms the General Court's approach, relying in particular on the wording, context and purpose of Article 2(2) of the basic regulation, according to which a purely subjective interpretation of the concept of 'sales of the like product intended for domestic consumption' cannot be accepted. However, the Court of Justice explains that a purely 'objective' interpretation of that concept, as adopted by the General Court, implies that the mere proof that a trader downstream in the distribution chain has exported the products concerned by the initial sale is sufficient for the Commission to be able to consider that those products were, at the time of their initial sale, 'intended' for export and must therefore be excluded from the basis of calculation used to determine the normal value.

According to the Court, such a purely objective interpretation is not compatible with the principles of foreseeability and legal certainty, since it would allow the Commission to impose anti-dumping duties irrespective of the pricing policy of the exporting producer and would oblige that producer to be held accountable for the marketing policies of its independent customers which that producer is not, in principle, able to control.

In that regard, in order, in particular, to ensure compliance with those principles, the Commission may exclude a domestic sale from the basis of calculation used to determine normal value only if it establishes the existence of an objective link between that sale and a destination of the product concerned other than domestic consumption. It follows that the Commission must demonstrate that it follows from the objective circumstances surrounding that sale, including, first and foremost, the price, that the products concerned by that sale have a destination other than consumption on the domestic market of the exporting country, such as export.

If the Commission establishes the existence of such circumstances relating to the initial sale, it may be considered that the exporting producer in question should reasonably have known, at the time of conclusion of the sale, that, in all likelihood, the final destination of the product concerned was export and not consumption on the domestic market of the exporting country.

In the present case, the Court observes that part of the appellant's domestic sales was subject to an export rebate scheme, which is an objective circumstance surrounding those sales and relating to their price. Similarly, in view also of the fact that the appellant's largest customer was primarily active in the export sector for the product concerned and that the appellant's sales to that customer concerned, as a general rule, products intended for export and not for consumption on the domestic market, the appellant should reasonably have been aware, at the time the sales in question were concluded, of the final destination of the product concerned, namely, in all likelihood, export.

Consequently, the Court of Justice holds that the General Court did not err in law in holding that the Commission could lawfully and without committing any manifest error of assessment exclude the sales in question from the basis of calculation used to determine the normal value pursuant, inter alia, to Article 2(2) of the basic regulation.

X. JUDGMENTS PREVIOUSLY DELIVERED

1. PROCEEDINGS OF THE EUROPEAN UNION

1.1 Legal representation before the EU Courts

Judgment of the Court (Third Chamber) of 24 March 2022, PJ and PC v EUIPO, C-529/18 P and C-531/18 P

Appeal – Principles of EU law – Article 19 of the Statute of the Court of Justice of the European Union – Representation of the parties in direct actions before the Courts of the European Union – Lawyer representing the applicant as a third party – Requirement of independence – Lawyer working as an associate in a law firm – Article 47 of the Charter of Fundamental Rights of the European Union

PJ was the proprietor of the European Union word mark Erdmann & Rossi. Erdmann & Rossi GmbH brought an application for declaration of invalidity and the European Union Intellectual Property Office (EUIPO) cancelled that mark.

PJ brought an action for annulment of that decision before the General Court. The application initiating the proceedings was signed by Mr S. The General Court restated that the requirement that lawyers should be independent means the absence of any employment relationship between a lawyer and his or her client. It added that a party's lawyer must not have any personal connection with the case, or even maintain economic or structural relations with the client.

In the present case, after noting that PJ was a cofounder and one of the two partners in the law firm which he had instructed to represent him through Mr S., acting on behalf of that firm, the General Court dismissed the action as inadmissible, on the ground that the application initiating proceedings had not been signed by an independent lawyer. [56]

The Court dismisses PJ's appeal and holds, by way of substitution of grounds, that the links between the lawyer, an associate in a law firm, and his client, a founding partner of that firm, manifestly undermine the independence of the lawyer. [57]

Findings of the Court

First of all, the Court notes that a party is not permitted to act for itself before the EU judicature but must use the services of another. Representation in court can be ensured only by a lawyer in order to protect and defend the client's interests to the greatest possible extent, acting in full independence and in line with the law and professional rules and codes of conduct.

In that context, the lawyer's duty of independence must be understood not as the lack of any connection whatsoever between the lawyer and his or her client, but only a lack of connection which has a manifestly detrimental effect on his or her capacity to carry out the task of defending his or her client while acting in that client's best interests.

Next, the Court points out that cases of inadmissibility on account of failure to perform the task of representation must be limited to situations in which it is clear that the lawyer himself or herself is not in a position to carry out his or her task of defending his or her client while acting in that client's

---

56 Order of 30 May 2018, *PJ* v *EUIPO – Erdmann & Rossi (Erdmann & Rossi)* (T-664/16, EU:T:2018:517).

57 Within the meaning of the third paragraph of Article 19 of the Statute of the Court of Justice of the European Union.

best interests. Thus, the mere existence of a private-law contractual relationship between a lawyer and his or her client is not sufficient for the view to be taken that that lawyer is in a situation which is manifestly detrimental to his or her ability to defend his or her client's interests.

Lastly, the Court states that it must be assumed that an associate lawyer in a law firm, even if he or she practises his or her profession under an employment contract, satisfies the same requirements of independence as a lawyer practising individually or as a partner in a firm. However, a distinction must be made on the basis of the situation of the client being represented.

The situation in which the client is a natural or legal person who is a third party in relation to the law firm in which the associate in question carries out his or her duties does not raise any particular issue of independence. That is not the case where the client, a natural person, is himself or herself a founding partner of the law firm and can therefore exercise effective control over the employee. In such a case, it must be held that the links between the associate lawyer and the client – a partner – are such as manifestly to undermine the independence of the lawyer.

1.2 Treatment of confidential information in an action for annulment

Order of the General Court (Fourth Chamber, Extended Composition) of 14 March 2022, Bulgarian Energy Holding and Others v Commission, T-136/19

Link to the complete text of the order

Measure of inquiry – Article 103(3) of the Rules of Procedure – Production of non-confidential versions of documents

By decision of 17 December 2018, [58] the European Commission found that Bulgarian Energy Holding EAD ('BEH'), its gas supply subsidiary Bulgargaz EAD ('Bulgargaz') and its gas infrastructure subsidiary Bulgartransgaz EAD ('Bulgartransgaz') had abused a dominant position on the market for the supply of gas in Bulgaria consisting, between 30 July 2010 and 1 January 2015, in a refusal to grant third parties access to three gas infrastructures. Consequently, it imposed a fine on them.

By application lodged on 1 March 2019, BEH and its two subsidiaries ('the applicants') lodged an action with the Court seeking, principally, annulment of that decision and, in the alternative, a reduction of the amount of the fine imposed on them.

By order of 18 November 2019, the company Overgas Inc., which claims to be BEH's main competitor on the market for the supply of natural gas in Bulgaria, was granted leave to intervene in support of the form of order sought by the Commission. In that regard, it was stated, first, that its position on the relevant market depends on access to BEH's products and services, and second, that it had participated, as an interested third person, in the administrative procedure that led to the contested decision.

In support of their action against the contested decision, the applicants raised, in particular, a plea in law alleging that the Commission had infringed the principle of good administration and their rights of defence. In that regard, they state, in essence, that, in the context of the administrative procedure which led to the adoption of the contested decision, the Commission failed to give them access or, at

58 Commission Decision C(2018) 8806 final of 17 December 2018 relating to a proceeding under Article 102 TFEU (Case AT.39849 – BEH Gas) ('the contested decision').

least, sufficient access to documents which, in their view, contain exculpatory evidence. In the present case, those documents are the detailed minutes of eight meetings held by the Commission with Overgas, Overgas' confidentiality claims relating to those minutes, the confidential versions of Overgas' submissions following those eight meetings and the confidential version of the report drawn up by the applicants' representatives in the context of a data room procedure on 28 June 2018 ('the information report').

By an order for measures of inquiry of 26 May 2021 granting a request made by the applicants to that end, the Court ordered the Commission to produce the documents at issue, stating that those documents would not be sent to the applicants at that stage. The Commission complied with that request on 17 June 2021 by lodging the documents at issue, while stating that some elements set out in those documents were confidential vis-à-vis the applicants.

By the present order, at the end of the in-depth analysis required in such circumstances by Article 103 of its Rules of Procedure, the General Court rules on the confidentiality of the elements referred to by the Commission in order to determine precisely the material and information to be communicated to the applicants. In that regard, it orders the Commission to lodge non-confidential versions, vis-à-vis the applicants, of various documents among those initially lodged, in which only the elements identified by the Court as having or preserving a confidential nature are redacted.

Findings of the Court

Article 103 of the Rules of Procedure of the General Court determines the treatment applicable to information and material produced following a measure of inquiry, where the party complying with that measure has requested confidential treatment, vis-à-vis the other main party, of some of the information set out therein. According to paragraph 1 of that article, in such a situation, it is for the Court to ascertain whether the information or material concerned is relevant in order for it to rule in the case and whether it is confidential. If, following that examination, it appears that some of the information or material concerned meets those two criteria, it is then for the Court to weigh that confidentiality against the requirements of the right to effective judicial protection, particularly the adversarial principle, in accordance with paragraph 2 of that article.

In that regard, the Court takes the view, at the outset, that the requirements relating to the right to effective judicial protection, reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union, are all the more significant in circumstances such as those in the present case. The documents at issue are those, placed in the administrative file after having been submitted to the Commission by Overgas, to which the applicants had previously been refused access, for reasons of confidentiality, during the administrative procedure. In those circumstances, the applicants have, in the context of their action relying, in particular, on a plea in law alleging infringement of their rights of defence, to defend their interests without having knowledge of those documents, unlike the other parties, namely the Commission and Overgas. In the light of the foregoing, the Court relies on the prerogatives conferred on it, as an EU Court, with a view to ensuring full compliance with the requirements arising, in particular, from the adversarial principle and the principle of equality of arms, in order to take the view that, in such circumstances, it is for the Court itself to give the applicants the widest possible access to the file, such as to enable them to put forward all available and relevant arguments in support of their action.

Applying the principle thus formulated in the context of the decision which it is called upon to give under Article 103(3) of the Rules of Procedure, the Court states that it is necessary to communicate all elements of documents produced following a measure of inquiry the analysis of which does not establish their confidential nature. It recalls, in this regard, that that is the case in particular where the information concerned is public or readily available by legal means, or may even be deduced from information of the same nature, including where it is apparent from other documents in the case file which have not given rise to any confidentiality requests to that end. Likewise, it is apparent from settled case-law that the confidentiality of information cannot, in principle, last longer than five years, other than in exceptional circumstances.

As regards, by contrast, documents that are confidential, the Court rules that it is for it at that stage to examine whether those documents are relevant in order to rule in the case.

In that regard, the Court recalls the margin of discretion conferred on it by Article 103 of the Rules of Procedure as regards confidential information or material, for the purpose of preserving, to the greatest extent possible, the procedural rights of the party vis-à-vis which confidentiality is claimed. Thus, if the interests protected by confidentiality do not allow the disclosure of the information concerned, even if accompanied by appropriate undertakings, the lack of disclosure must be accompanied by specifications relating to the procedures for protecting the other party's procedural safeguards.

Applying the principles previously set out, the Court then proceeds with the detailed and individual analysis of each element described by the Commission as being confidential vis-à-vis the applicants when it lodged the documents referred to in the measure of inquiry adopted to that end on 26 May 2021, so as to determine the precise content of the information or material to be communicated to the applicants, to the extent required in order to safeguard their procedural rights.

Among the documents regarded, at the end of that analysis, as including elements that are relevant for a ruling in the case, and, accordingly, as being eligible to be placed on the file, the Court orders the Commission to lodge a non-confidential version, intended to be subsequently communicated to the applicants, in accordance with the precise and exhaustive instructions relating to the redaction of information the confidentiality of which it remains necessary to preserve, having regard to the protected interests. In that context, seeking to ensure compliance with the adversarial principle and with the principle of equality of arms inherent in the right to effective judicial protection, the Court decides, in particular, to communicate to the applicants, subject to the redaction of limited passages, the confidential information report that their lawyers had drawn up after receiving access to the confidential information in the detailed minutes, even though the granting of that access had been conditional on those lawyers undertaking not to disclose that information to the applicants. By contrast, the Court decides not to communicate to the applicants the precise reason why Overgas insisted that some information not be provided to them, in the light of the serious consequences that such disclosure could have in the present case for that party.

2. FREEDOM OF MOVEMENT: FREE MOVEMENT OF CAPITAL

Judgment of the Court (Second Chamber) of 17 March 2022, AllianzGI-Fonds AEVN, C-545/19

Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Taxation of dividends paid to undertakings for collective investment (UCIs) – Resident and non-resident UCIs – Difference in treatment – Withholding tax imposed solely on dividends paid to non-resident UCIs – Comparability of the situations – Assessment – Account to be taken of the tax regime applicable to shareholders or unitholders in UCIs and of whether resident undertakings are subject to other taxes – None

AllianzGI-Fonds, an open-ended undertaking for collective investment (UCI), formed under German legislation and resident for tax purposes in Germany, is exempt there from corporation tax under national law. That tax status prevents it from recovering taxes paid abroad in the form of a tax credit in respect of international double taxation or from requesting any repayment of those taxes.

In 2015 and 2016, AllianzGI-Fonds held shares in various companies formed in Portugal. The dividends which it received on that basis during that period were taxed, in Portugal, at source in full discharge of its liability at a rate of 25%. AllianzGI-Fonds brought an action before the referring court seeking annulment of the acts by which the Portuguese tax authorities had withheld that tax at source. AllianzGI-Fonds submits that it is subject to less favourable tax treatment than UCIs that are resident in Portugal and receive dividends from resident companies, since they are exempt from corporation tax as regards dividends paid to them by resident companies. On that basis, AllianzGI-Fonds alleges, inter alia, a restriction on the free movement of capital prohibited by Article 63 TFEU.

The referring court asks the Court of Justice for a preliminary ruling on the compatibility with EU law of legislation under which dividends distributed by resident companies to a non-resident UCI are

subject to a withholding tax, whereas dividends distributed to a resident UCI are exempt from such a withholding tax. By its judgment, the Court held that such legislation is not compatible with Article 63 TFEU.

Findings of the Court

After first determining the applicable freedom of movement as the free movement of capital, the Court carried out an analysis of a possible restriction on that freedom. In that regard, it states that the fact that the Portuguese legislation allows only resident UCIs to obtain the exemption from a withholding tax constitutes a less favourable treatment of dividends paid to non-resident UCIs which is liable to discourage, on the one hand, non-resident UCIs from investing in Portuguese companies and, on the other hand, investors resident in Portugal from acquiring shares in non-resident UCIs.

That difference in treatment is compatible with EU law only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest.

As regards the comparability of the situations concerned, it should be noted that the Portuguese Government submits, in essence, that the respective situations of resident and non-resident UCIs are not objectively comparable because, first, the taxation of dividends received by those two categories of investment undertakings from companies resident in Portugal is governed by different taxation techniques – namely, such dividends are subject to withholding tax when paid to a non-resident UCI whereas they are subject to stamp duty as well as to the specific tax provided for in Article 88(11) of the Corporation Tax Code when paid to a resident UCI. Second, the Portuguese Government submits that dividends distributed by resident UCIs to shareholders or unitholders resident in Portuguese territory are taxed at a rate varying between 25% and 28%, whereas dividends paid to shareholders or unitholders who do not reside in Portuguese territory are, in principle, exempt from personal income tax and corporation tax.

According to the case-law, different treatment of the taxation of dividends according to whether taxpayers are resident or non-resident, resulting from the application of two different methods of taxation, may be justified. However, subject to verification by the referring court, the national legislation at issue in the main proceedings does not merely lay down detailed rules for the collection of tax which differ depending on the place of residence of the UCI receiving nationally sourced dividends, but provides, in fact, for the imposition of systematic taxation of those dividends only on non-resident undertakings.

The Court examines, first, the Portuguese Government's argument alleging, in essence, that the situations concerned are not comparable, on account of the existence, in the Portuguese tax regime, of taxes to which resident UCIs alone are subject. In particular, although nationally sourced dividends received by a resident UCI may be subject to specific taxation under the national legislation at issue, that taxation is provided for only in limited situations, with the result that it cannot be treated in the same way as the general tax applicable to nationally sourced dividends received by non-resident UCIs. Non-resident UCIs are therefore not in an objectively different situation from resident UCIs with regard to the taxation of dividends from Portuguese sources.

Second, in so far as the Portuguese Government's arguments relate to the alleged need to take account of the situation of shareholders or unitholders, the Court points out that, according to the case-law, the comparability of the situations concerned must be examined having regard to the objective pursued by the national provisions at issue and the purpose and content of those provisions. Moreover, only the relevant distinguishing criteria established by the legislation concerned must be taken into account in determining whether the difference in treatment resulting from that legislation reflects situations which are objectively different.

In the present case, the Portuguese Government submits that the Portuguese regime on the taxation of dividends was conceived in accordance with the logic of 'exit taxation'. [59] That regime was intended to achieve objectives such as, in particular, the avoidance of international economic double taxation and the transfer of taxation from the UCIs to the shareholders or unitholders, so that the taxation of that income is approximately equivalent to that which would have been applied if that income had been obtained directly by the shareholders or unitholders in those UCIs.

As regards the relevant distinguishing criteria, the Court finds that the only distinguishing criterion established by the national legislation at issue in the main proceedings, since it relates solely to the place of residence of the UCIs, does not make it possible to conclude that there is an objective difference between the situations of resident and non-resident entities.

As regards the possible existence of an overriding reason in the public interest capable of justifying the restriction found to exist, the Court considers, in the first place, that, in the absence of a direct link between the exemption from withholding tax on nationally-sourced dividends received by a resident UCI and the taxation of those dividends as income of the shareholders or unitholders in that undertaking, the justification based on the need to preserve the coherence of the national tax regime should be rejected. In the second place, as regards the need to preserve a balanced allocation of the power of taxation between the Portuguese Republic and the Federal Republic of Germany, the Court points out that, where a Member State has chosen, as in the situation at issue in the main proceedings, not to tax resident UCIs in receipt of nationally sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power of taxation in order to justify the taxation of non-resident UCIs in receipt of such income.

3. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION 2015/848 ON INSOLVENCY PROCEEDINGS

Judgment of the Court (Fifth Chamber) of 24 March 2022, Galapagos BidCo., C-723/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Regulation (EU) 2015/848 – Insolvency proceedings – Article 3(1) – International jurisdiction – Moving of the centre of a debtor's main interests to another Member State after a request to open main insolvency proceedings has been lodged

Galapagos, a holding company with its registered office in Luxembourg, moved its central administration to Fareham (United Kingdom) in June 2019. On 22 August 2019, its directors lodged a request to open insolvency proceedings before a court of the United Kingdom. [60] The following day, those directors were replaced by a new director, who set up an office in Düsseldorf (Germany) for Galapagos and sought, unsuccessfully, to have that request withdrawn.

Subsequently, Galapagos lodged another request to open insolvency proceedings in respect of itself, this time before the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany), which was held to be inadmissible on the ground that that court did not have international jurisdiction. Another request to open insolvency proceedings, this time from two other companies that are creditors of Galapagos,

59 Meaning that UCIs established and operating in accordance with Portuguese legislation are exempt from income tax, the burden of that tax being transferred to the shareholders or unitholders who are residents, while non-resident shareholders or unitholders are exempt.

60 In the present case, the High Court of Justice (England and Wales), Chancery Division (Business and Property Courts, Insolvency and Companies List), United Kingdom.

was then lodged with that same court. Further to that request, the Amtsgericht Düsseldorf (Local Court, Düsseldorf) appointed a temporary insolvency administrator and ordered interim measures, taking the view that the centre of Galapagos' main interests was in Düsseldorf when that request was lodged.

Galapagos Bidco., which is both a subsidiary and a creditor of Galapagos, brought an immediate appeal before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) seeking to have the order of the Amtsgericht Düsseldorf (Local Court, Düsseldorf) set aside on the ground that the German courts did not have international jurisdiction. That appeal having been dismissed, Galapagos BidCo. brought an appeal before the Bundesgerichtshof (Federal Court of Justice, Germany), the referring court.

The referring court states that the outcome of the appeal before it depends on the interpretation of Regulation 2015/848 [61] and, in particular, on the article thereof relating to the rules covering the international jurisdiction of the courts of Member States to hear and determine insolvency proceedings. [62] Stating that, on the date on which it lodged the request for a preliminary ruling with the Court, the court of the United Kingdom was still yet to deliver its decision on the first request, the referring court is uncertain, in particular, whether the court of a Member State initially seised continues to have exclusive jurisdiction over a request to open main insolvency proceedings where the centre of the debtor's main interests is moved to another Member State after that request is lodged, but before that court has delivered a decision on it.

By its judgment, the Court interprets Regulation 2015/848 as meaning that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is moved to another Member State after that request has been lodged, but before that court has delivered a decision on it. Thus, in so far as that regulation is still applicable to the first request, a court of another Member State with which another request is lodged subsequently for the same purpose cannot, in principle, declare that it has jurisdiction to open main insolvency proceedings until the first court has delivered its decision and declined jurisdiction.

Findings of the Court

At the outset, the Court finds, as regards the international jurisdiction of the courts of Member States to hear and determine insolvency proceedings, that Regulation 2015/848, which is applicable in the present case, pursues in the same terms the same objectives as the preceding Regulation No 1346/2000. [63] Consequently, the Court's case-law on the interpretation of the rules established by Regulation No 1346/2000 regarding international jurisdiction remains relevant for the purpose of interpreting the corresponding article of Regulation 2015/848, which is the subject of the reference for a preliminary ruling.

Thus, the exclusive jurisdiction conferred by those regulations on the courts of the Member State within the territory of which the debtor has the centre of its main interests remains with those courts where that debtor moves the centre of its main interests to another Member State after a request has been lodged, but before the proceedings are opened. The Court arrives at that conclusion by making reference to the findings made in its earlier case-law. [64]

---

61 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19).

62 Article 3(1) of Regulation 2015/848. In essence, that provision provides that the courts with jurisdiction to open main insolvency proceedings are the courts of the Member State within the territory of which the centre of the debtor's main interests is situated.

63 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), which was repealed by Regulation 2015/848.

64 Judgment of 17 January 2006, *Staubitz-Schreiber* (C-1/04, EU:C:2006:39).

Next, the Court examines the consequences of the court of a Member State initially seised continuing to have jurisdiction on the jurisdiction of the courts of another Member State to hear and determine further requests to open main insolvency proceedings. It states that it is apparent from Regulation 2015/848 that only one set of main insolvency proceedings may be opened and that they are effective in all the Member States in which that regulation is applicable. Moreover, it is for the court initially seised to examine of its own motion whether it has jurisdiction and, for that purpose, to verify that the centre of the debtor's main interests is situated within the territory of its own Member State. If it is not, the court initially seised must not open main insolvency proceedings. On the other hand, if that verification confirms that it does have jurisdiction, any decision to open insolvency proceedings delivered by that court is, in accordance with the principle of mutual trust, to be recognised in all the other Member States from the moment that it becomes effective in the Member State of the opening of proceedings. Therefore, the courts of those Member States cannot, in principle, declare that they have jurisdiction to open such proceedings until the first court has delivered its decision and declined jurisdiction.

However, where the court initially seised is a court in the United Kingdom, if, at the end of the transition period provided for in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [65] that court has not yet delivered its decision, Regulation 2015/848 no longer requires a court of a Member State, within the territory of which the centre of Galapagos' main interests is situated, to refrain from declaring that it has jurisdiction to open such proceedings.

4. COMPETITION

4.1 Agreements, decisions and concerted practices (Article 101 TFEU)

Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, SAS Cargo Group and Others v Commission, T-324/17

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of airfreight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Rights of the defence – Equality of arms – Article 266 TFEU – State coercion – Single and continuous infringement – Amount of the fine – Value of sales – Gravity of the infringement – Duration of participation in the infringement – Mitigating circumstances – Substantially limited involvement – Aggravating circumstances – Repeated infringement – Unlimited jurisdiction

The applicants, SAS Cargo Group A/S ('SAS Cargo'), Scandinavian Airlines System Denmark-Norway-Sweden ('SAS Consortium') and SAS AB ('SAS'), are active in the market for airfreight services.

65 OJ 2020 L 29, p. 7.

They are among the 19 addressees of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) ('the contested decision'). By that decision, the European Commission found that there had been a single and continuous infringement of those provisions, by which the undertakings in question had coordinated, over certain periods between 1999 and 2006, their pricing behaviour for the provision of freight services worldwide. The Commission imposed fines [66] on the applicants for their participation in that infringement.

On 7 December 2005, the Commission had received, under its 2002 Leniency Notice, [67] an application for immunity submitted by Lufthansa and two of its subsidiaries. That application reported that anticompetitive contacts had taken place between a number of undertakings operating in the freight market ('the carriers') with respect to various elements forming part of the prices charged for services on that market, namely the imposition of 'fuel' and 'security' surcharges and, in essence, the refusal to grant freight forwarders a discount on those surcharges. The evidence gathered and the investigations carried out by the Commission led it to send, on 19 December 2007, a Statement of Objections to 27 carriers and then to adopt, on 9 November 2010, a first decision against 21 carriers, including the applicants. [68] That decision was, however, annulled by the Court by its judgments of 16 December 2015, [69] within the limits of the respective claims for annulment to that end, on account of contradictions in the reasoning in that decision.

In its judgment, the Court upholds in part the claim for annulment of the contested decision, as well as the claim for reduction of the fines imposed on the applicants. Although, by that judgment, the Court validates, in principle, the analysis carried out by the Commission in order to establish the existence of a single and continuous infringement affecting several types of air routes, it nevertheless considers that a number of aspects relating to the precise extent of the liability attributed to the applicants as regards their participation in the various elements of that infringement are insufficiently substantiated. In addition, that judgment allows the Court to express further clarifications, in particular on the extent of the Commission's jurisdiction to apply Article 101 TFEU in the case of anticompetitive conduct in third countries and on the scope of the need to respect the right to be heard in relation to access to information provided by undertakings in response to a statement of objections.

Findings of the Court

As regards, first, the rights of the defence, the Court holds that the Commission was wrong to refuse the applicants access to various passages of the replies to the Statement of Objections referred to in the contested decision, in so far as they constitute inculpatory evidence. However, such an irregularity can result in the annulment of a measure only if it can be established that the result at which the Commission arrived might have been different in the absence of the inculpatory evidence at issue. It

---

66 In the present case, a fine of EUR 5 355 000 was imposed on SAS Consortium, a fine of EUR 4 254 250 was imposed jointly and severally on SAS Consortium and SAS Cargo, a fine of EUR 22 308 250 was imposed on SAS Cargo, and a fine of EUR 32 984 250 was imposed jointly and severally on SAS Cargo and SAS. Lastly, a fine of EUR 5 265 750 was imposed on those three companies jointly and severally.

67 Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

68 Decision C(2010) 7694 final of 9 November 2010 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight) ('the initial decision').

69 Judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994); *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995); *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992); *Cathay Pacific Airways* v *Commission* (T-38/11, not published, EU:T:2015:985); *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991); *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986); *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989); *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987); *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988); *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990); *Air France-KLM* v *Commission* (T-62/11, not published, EU:T:2015:996); *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993); and *Martinair Holland* v *Commission* (T-67/11, EU:T:2015:984).

is in the context of the examination of the merits of the Commission's findings concerning the applicants' participation in the infringement at issue that the Court considers that it will be for it, if necessary, to draw the appropriate conclusions from that non-disclosure.

In the second place, the Court examines two complaints relating to the definition of the territorial scope of EU rules, in the light of the geographic scope of the infringement at issue. Accordingly, the Court holds that the Commission did not exceed the limits of its own territorial jurisdiction by finding that there was a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement, affecting flights on 'incoming' air routes, that is to say routes from airports located in third countries to those located in Member States of the European Union or other States party to the European Economic Area (EEA) which are not members of the European Union. It notes that the Commission has the competence to find and penalise conduct adopted outside the territory of the European Union or the EEA, in so far as it was implemented in that territory or that it was foreseeable that it would produce an immediate and substantial effect there. In the present case, the Commission was justified in stating that it had jurisdiction in the light of the qualified effects of the infringement at issue. More specifically, the inherent harmfulness of a horizontal price-fixing agreement or practice, such as the infringement at issue, which leads to it being classified as a restriction of competition by 'object', exempted the Commission of the need to examine its actual effects within the EEA. Moreover, the Court does not criticise the Commission for accepting the foreseeable, immediate and substantial nature of the effects of the conduct at issue within the EEA resulting from the passing on by freight forwarders asked to pay for the increased cost of air freight services on the routes concerned of the corresponding additional cost to shippers, which could be reasonably expected due to the normal operation of the market. That passing on is itself likely to contribute to an increase in the price of goods imported into the EEA.

Likewise, the Court considers that it is to no avail that the applicants claim that the Commission lacked the competence to find and penalise an infringement of Article 53 of the EEA Agreement on routes between Switzerland, on the one hand, and Norway and Iceland, on the other. That plea is unfounded, since it is apparent from the operative part of the contested decision that the Commission did not find any infringement of that provision on those routes.

In the third place, the Court finds that, contrary to what is argued by the applicants, the analysis carried out by the Commission in order to establish the existence of the infringement at issue, as a single and continuous infringement, in the light of the conduct described in the contested decision, is not vitiated by any error of law or assessment. The Court notes, first, that the factors relied on by the Commission for the purposes of its analysis, relating in particular to the existence of a single anticompetitive objective and the identical nature of the undertakings and services in question, were such as to enable the Commission to classify the conduct at issue as a single infringement. Secondly, the Court considers that the evidence relied on by the Commission in support of its conclusion is sufficient and free from any errors of assessment.

In the fourth place, the Court examines the claims that, in essence, seek to dispute the extent of the applicants' participation in the single and continuous infringement.

As regards, first, the assessment of the evidence relied on by the Commission in relation to conduct that took place in third countries, the Court held, first of all, that the principles governing the defence of State coercion apply both to the rules of Member States and to those of third countries and that the burden of proof lies with the party relying on that defence. Next, the Court observes that, in concluding that there was no such coercion in the various third countries concerned, the Commission relied on evidence to which it had wrongly refused access to the applicants. The Court finds, however, that the conclusions in support of which that evidence was relied on remain well founded, even in the absence of that evidence. Lastly, the Court holds that, contrary to the Commission's finding, the Thai authorities had created a legal framework eliminating any possibility of competition between the carriers as regards the determination of the amount of the 'fuel' surcharge applicable to flights from Thailand to the EEA between July 2005 and February 2006.

Secondly, the Court examines the applicants' claims seeking to challenge the finding that they participated in the single and continuous infringement and holds, in particular, that the finding that they had the knowledge required to be attributed liability for the element relating to the refusal to grant discounts was insufficiently substantiated.

The Court concludes that, although the contested decision must be annulled, in so far as it finds that the applicants participated in the element of the single and continuous infringement relating to the refusal to grant discounts and that relating to the 'fuel' surcharge, as regards routes from Thailand to the EEA between July 2005 and February 2006, the fact remains that the Commission had a body of precise and consistent evidence, even after the exclusion of a few insufficiently substantiated items of evidence, to conclude that the applicants participated in the single and continuous infringement described in the contested decision.

In the fifth place, the Court examines the applicants' complaints concerning the determination of the amount of the fines imposed on them. In that regard, the Court considers that the Commission can in no way be criticised for having determined the value of sales by reference to the turnover from sales of freight services on incoming routes, before the application of a reduction of 50% of the basic amount of the fine, which is justified by the particularities of the relevant market. Furthermore, the choice of a gravity factor of 16%, on a scale of 0 to 30%, is held to be free of errors. First, such a gravity factor is very favourable to the applicants in view of the gravity inherent in the practices at issue. Secondly, the applicants did not contest any of the three additional factors on which the Commission relied in order to determine the gravity factor, namely the combined market shares of the carriers at issue, the geographic scope of the cartel at issue and the implementation of the practices in question. Lastly, none of the claims seeking to contest the increase of 50% of the basic amount which was applied to the applicants on account of repeated infringement is successful. In particular, the Court holds that the infringement at issue and the previous market-sharing infringement in respect of which the applicants had previously been penalised are similar, in so far as they both concern a horizontal cartel which the Commission considered infringed Article 101 TFEU.

Lastly, the Court exercises its unlimited jurisdiction to rule on the claim for reduction of the amount of the fine imposed. Applying the method of calculation used by the Commission in the contested decision, it considers, unlike the Commission, that it is necessary to include the applicants' turnover on routes operated exclusively within Denmark, Sweden and Norway, respectively. Those routes fell within the scope of the infringement in question and the inclusion of their turnover was necessary in order to ensure equal treatment with the other incriminated carriers and to make a fair assessment of the economic significance of the infringement at issue and of the role played by each of the incriminated carriers in that infringement. The Court also holds that, since the applicants' participation in the single and continuous infringement was more limited than the Commission had found, they should be granted an additional reduction on account of mitigating circumstances. Consequently, it recalculates the amount of the respective fines imposed on the applicants, setting the amount of the fine imposed on SAS Consortium at EUR 7 030 618, that imposed jointly and severally on SAS Consortium and SAS Cargo at EUR 5 937 909, that imposed on SAS Cargo at EUR 21 687 090, that imposed jointly and severally on SAS Cargo and SAS at EUR 29 045 427, and that imposed on those three companies jointly and severally at EUR 6 314 572.

Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, Air France-KLM v Commission, T-337/17

Competition – Agreements, decisions and concerted practices – Airfreight market – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of airfreight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Single and continuous infringement – Attributability of unlawful conduct – Conditions for granting immunity – Equal treatment – Obligation to state reasons – Amount of the fine – Value of sales – Gravity of the infringement – Duration of participation in the infringement – Mitigating circumstances – Encouragement of anticompetitive conduct by public authorities – Proportionality – Unlimited jurisdiction

The applicant, Air France-KLM, is a company arising from the transformation into a holding company and the change of corporate purpose and name of the former Air France company. It holds 100% of the voting and economic rights in Air France ('Air France') and 49% of the voting rights and 93.63% of

the economic rights in Koninklijke Luchtvaartmaatschappij NV ('KLM'), two airline companies operating in the airfreight services market.

The applicant, Air France and KLM are among the 19 addressees of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on air transport (Case AT.39258 – Airfreight) ('the contested decision'). By that decision, the European Commission found a single and continuous infringement of those provisions through which the undertakings in question had coordinated, over periods between 1999 and 2006, their pricing behaviour in the provision of freight services worldwide. Accordingly, holding the applicant liable for that infringement for the conduct of Air France between 7 December 1999 and 14 February 2006 and the conduct of KLM between 5 May 2004 and 14 February 2006, the Commission imposed two fines on them, one set at EUR 182 920 000, jointly and severally with Air France, and the other in the amount of EUR 124 440 000, jointly and severally with KLM.

On 7 December 2005, the Commission received, under its 2002 Leniency Notice, [70] an immunity application submitted by Lufthansa and two of its subsidiaries ('Lufthansa'). That application referred to the existence of anticompetitive contacts between a number of undertakings operating in the sector ('the carriers') with respect to various elements forming part of the prices charged for services in that context, namely the imposition of 'fuel' and 'security' surcharges as well as, in essence, the refusal to pay commission to freight forwarders on those surcharges. The evidence collected by the Commission and its investigations led it to send, on 19 December 2007, a statement of objections to 27 carriers, and then to adopt a first decision, on 9 November 2010, against 21 carriers, including the applicant, Air France and KLM. [71] That decision was, however, set aside by the General Court, by judgments of 16 December 2015, [72] within the limits of the respective forms of order to that end, on the grounds of there being contradictions vitiating the statement of reasons of that decision.

In its judgment, the Court dismisses the claims for annulment of the contested decision, as well as the claims seeking a reduction of the fines imposed on the applicant. Accordingly, it confirms, in particular, the grounds relied on for the purpose of holding the applicant answerable for the conduct of its subsidiaries and of the former Air France company. However, it provides clarification on the use of evidence adduced by an undertaking in the context of an application for immunity from fines, the scope of the Commission's territorial jurisdiction when faced with the practices implemented, in part, outside the European Union, and on the application of the criteria for determining the amount of fines in such circumstances.

Findings of the Court

In the first place, the Court holds that the Commission did not exceed the limits of its own territorial jurisdiction when it found that there was a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement,

---

70 Commission notice on immunity from fines and reduction of fines in cartel cases, (OJ 2002 C 45, p. 3).

71 Commission Decision C(2010) 7694 final of 9 November 2010 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight).

72 Judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995), *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992), *Cathay Pacific Airways* v *Commission* (T-38/11, not published, EU:T:2015:985), *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991), *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986), *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989), *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987), *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988*) SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), *Air France KLM* v *Commission* (T-62/11, not published, EU:T:2015:996), *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993), and *Martinair Holland* v *Commission* (T-67/11, not published, EU:T:2015:984).

according to the routes concerned, and within the territorial and temporal limits described in the contested decision. [73]

In the second place, the Court finds that the Commission cannot be criticised by the Court for having imputed the unlawful practices of Air France and KLM to the applicant. First, it states that the applicant could be held liable for the unlawful practices of the former Air France company and, as from 5 May 2004, for those of KLM, that being the date when KLM was acquired by the former Air France company. According to the Court, the applicant and the former Air France company are one and the same legal person, the latter having 'become' the first on 15 September 2004, by its being transformed into a holding company, accompanied by a change of name and corporate purpose.

As regards Air France's practices after that date, first, the Court recalls that the applicant's holding of all the capital and voting rights associated with its subsidiary's shares made it possible to presume that it exercised decisive influence over its subsidiary. The Commission set out to the requisite legal standard, and without making any error, the reasons why none of the evidence put forward by the applicant was sufficient to rebut that presumption. Second, the Commission was entitled to rely on a series of factors establishing that the applicant exercised decisive influence over Air France, namely the applicant's powers of management, guidance and control over its operations, the existence of a structure which was common to Air France and KLM as regards specifically freight and the number of directors' functions being combined across the applicant and Air France.

As regards KLM, the Commission did not rely on the presumption that decisive influence was exercised, but was able to rely on factors comparable to those used against Air France in order to conclude that KLM did not act autonomously on the market.

In the third place, in response to the applicant's plea by which it argued that the evidence adduced by Lufthansa in the context of its application for immunity from fines ought to have been removed from the file on the ground that Lufthansa was ineligible for such immunity given that its unlawful conduct was alleged to be continuing, the Court observes that the conditions for granting immunity from fines do not concern the lawfulness of the collection of evidence upon which, as appropriate, the Commission's ability to use it depends. In any event, the Court observes that making the use of evidence adduced in the context of an immunity application subject to compliance with those conditions would undermine the practical effect of the leniency procedure.

In the fourth place, the Court examines the applicant's objections to the determination of the amount of the fines imposed upon it by the Commission, in particular those concerning the taking into account, by the Commission, of the gravity and the duration of the single and continuous infringement, in the circumstances described in the 2006 Guidelines. [74] In that regard, first, the choice of a gravity factor of 16%, on a scale of 0 to 30% is found not to be an error. On the one hand, such a gravity factor is very favourable to the applicant in view of the gravity inherent in the practices at issue, which must be characterised as an agreement or horizontal pricing practice. On the other hand, the applicant either had not challenged or had not succeeded in calling into question the three additional factors on which the Commission had relied in determining the gravity factor, namely the combined market shares of the carriers at issue, the geographic scope of the single and continuous infringement and the implementation of the practices at issue. Second, in so far as the applicant relied on the lack of sufficient evidence establishing Air France's uninterrupted involvement in the infringement for the duration of the period under consideration, the Court finds an absence of direct evidence concerning the continuation of collusive contacts during the infringement period of 11 months and 13 days. Nonetheless, in the absence of any public distancing by Air France or any evidence that it had resumed fair and independent competitive conduct on the market during that period, the Court points out that such circumstances cannot be regarded as an interruption to its

---

73 See, in that regard, the presentation of the judgment of 30 March 2022, *Japan Airlines* v *Commission* (T-340/17).

74 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

participation in the single and continuous infringement, but are rather explained by the nature of that infringement and by the functioning of the freight market and the cartel in question.

Lastly, the Court rejects the form of order seeking the reduction of the fines imposed without departing from the calculation method followed by the Commission in the contested decision.

Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, Japan Airlines v Commission, T-340/17

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of airfreight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Article 266 TFEU – Limitation period – Rights of the defence – Non-discrimination – Single and continuous infringement – Amount of the fine – Value of sales – Gravity of the infringement – Additional amount – Mitigating circumstances – Encouragement of the anticompetitive conduct by public authorities – Substantially limited involvement – Proportionality – Unlimited jurisdiction

The applicant, Japan Airlines Co. Ltd, formerly Japan Airlines International Co. Ltd, is an air transport company, one of whose divisions, JAL Cargo, provides airfreight services. At the material time, the applicant was a subsidiary of Japan Airlines Corp., which has been absorbed by the applicant, its legal successor.

The applicant is one of the 19 addressees of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) ('the contested decision'). By that decision, the European Commission found that there had been a single and continuous infringement of those provisions by which the undertakings in question had coordinated, over periods between 1999 and 2006, their behaviour as regards the pricing of freight services worldwide. It imposed a fine of EUR 35 700 000 on the applicant for its participation in that infringement.

On 7 December 2005, the Commission had received, under its 2002 Leniency Notice, [75] an application for immunity lodged by Lufthansa and two of its subsidiaries. That application referred to the existence of anticompetitive contacts between a number of undertakings operating on the airfreight market ('the carriers') with respect to various elements forming part of the prices charged for services provided on that market, namely the imposition of 'fuel' and 'security' surcharges and, in essence, the refusal to grant freight forwarders a discount on those surcharges. On 19 December 2007, the evidence gathered by the Commission and its investigations led it to address a statement of objections to 27 carriers, then to adopt, on 9 November 2010, an initial decision [76] against 21 carriers, including the applicant. That decision was, however, annulled by the General Court, by judgments of

75 Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

76 Commission Decision C(2010) 7694 final of 9 November 2010 relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight).

16 December 2015, [77] within the limits of the respective claims for annulment to that end, on account of contradictions vitiating the statement of reasons for that decision.

In its judgment, the Court upholds in part the claim for annulment of the contested decision, as well as the claim for a reduction in the amount of the fine imposed on the applicant. Thus, it finds an infringement of the rules on limitation periods for the imposition of penalties for infringements of the competition rules, while validating the analysis by which the Commission established the existence of a single and continuous infringement affecting several types of air routes and providing clarifications as to the extent of the Commission's territorial jurisdiction in the case of practices implemented in part outside the European Union, and as to the application of the criteria for determining the amount of fines in such circumstances.

Findings of the Court

In the first place, the Court examines the plea alleging a lack of jurisdiction on the part of the Commission to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on routes from third countries to the European Economic Area (EEA). In that regard, the Court recalls that the Commission has jurisdiction to find and penalise conduct adopted outside the territory of the European Union or the EEA, provided that such conduct was implemented in that territory or that it was foreseeable that such conduct would have an immediate and substantial effect in that territory. In the present case, the Commission was entitled to consider that it had jurisdiction in the light of the qualified effects of the infringement at issue. More specifically, the inherent harmfulness of a horizontal price-fixing agreement or practice, such as the infringement at issue, from which its classification as a restriction of competition by 'object' stems, relieved the Commission of the need to examine its actual effects within the EEA. Furthermore, the Court could not find fault with the Commission's acceptance of the foreseeable, immediate and substantial nature of the effects of the conduct at issue within the EEA, which results from the passing on, by the freight forwarders called upon to pay the increased cost of airfreight services on the routes concerned, of the corresponding additional cost to shippers, which the normal operation of the market makes it possible reasonably to expect and which is itself liable to contribute to an increase in the price of goods imported into the EEA.

In the second place, the Court rejects the plea, raised of its own motion, alleging a lack of jurisdiction on the part of the Commission to find and penalise an infringement of Article 53 of the EEA Agreement on routes between Switzerland, on the one hand, and Iceland and Norway, on the other. According to the Court, it is apparent from both the operative part and the grounds of the contested decision that the Commission did not find any infringement of that provision on those routes.

In the third place, the Court ascertains whether the expiry of the limitation period [78] precluded the Commission from exercising its power to impose penalties, as the applicant maintains. In so far as the contested decision imputed the infringement at issue to the applicant as regards routes not mentioned in the operative part of the Decision of 9 November 2010, the Court draws a distinction between, on the one hand, the routes set out in the operative part of that decision, in respect of which the applicant's action against that decision was liable to have suspensive effect on the limitation period, and, on the other hand, the routes referred to in the operative part of the contested decision

---

77 Judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995), *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992), *Cathay Pacific Airways* v *Commission* (T-38/11, not published, EU:T:2015:985), *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991), *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986), *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989), *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987), *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), *Air France-KLM* v *Commission* (T-62/11, not published, EU:T:2015:996), *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993), and *Martinair Holland* v *Commission* (T-67/11, not published, EU:T:2015:984).

78 That is, in the present case, the period referred to in Article 25(5) and (6) of Regulation No 1/2003, which is 10 years from the day on which the infringement ceased.

alone, in this case intra-EEA routes and EU-Switzerland routes, in respect of which no ground for extending the limitation period applies. As regards the latter routes, it should be noted that the contested decision was adopted more than 10 years after the conduct at issue ceased, so that the applicant is entitled to rely on the expiry of the limitation period in relation to those routes, without, however, being able to claim, on that basis, that the contested decision should be annulled in its entirety.

In the fourth place, in response to the applicant's complaints that the Commission found it liable for the infringement at issue on routes on which it does not operate or which it is not allowed to operate, the Court emphasises that the imputation to an undertaking of the anticompetitive conduct comprising a single infringement in which it did not participate directly requires the existence of an overall plan pursuing a common objective, the intentional contribution of the undertaking concerned to that plan and its awareness (proved or presumed) of that conduct. Since those conditions were satisfied in the present case, the Commission was entitled to find the applicant liable for the single and continuous infringement in so far as it related to routes between the EEA and third countries except Japan, irrespective of its possible status as a potential competitor on those routes.

In the fifth place, the Court examines the applicant's complaints concerning the determination of the amount of the fine imposed on it, in particular those relating to the determination of the value of sales and the gravity factor in the circumstances described in the 2006 Guidelines. [79] In that regard, the Court does not fault the Commission for determining the value of sales by reference to the turnover generated by the sale of freight services, rather than by reference solely to the revenues derived from the surcharges at issue. According to the Court, the value of sales must reflect the price charged to customers for freight services, in respect of which surcharges are but one element. Furthermore, the choice of a gravity factor of 16%, on a scale of 0 to 30%, is deemed free of error. First, such a gravity factor is highly favourable to the applicant in the light of the gravity inherent in the practices at issue. Second, the applicant had not disputed any of the three additional factors on which the Commission had relied in order to determine the gravity factor, namely the combined market share of the carriers at issue, the geographic scope of the single and continuous infringement and the implementation of the practices at issue. Lastly, in so far as the applicant claimed that the general 15% reduction granted to it on account of mitigating circumstances was insufficient in the light of the specificities of the Japanese regulatory regime, the Court held its line of argument to be insufficiently substantiated.

In the last place, the Court exercises its unlimited jurisdiction to rule on the claim for a reduction in the amount of the fine imposed. Without departing from the method of calculation used by the Commission in the contested decision, it thus draws the necessary inferences from its conclusions, in particular with regard to the expiry of the limitation period in respect of the practices relating to intra-EEA routes and EU-Switzerland routes. The Court then accepts the limited nature of the applicant's involvement in the single and continuous infringement and, accordingly, the application of an additional reduction on that ground. Consequently, the amount of the fine imposed on the applicant, set at EUR 35 700 000 by the Commission, is reduced to EUR 28 875 000.

---

79 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, British Airways v Commission, T-341/17

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of air freight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Obligation to state reasons – Article 266 TFEU – State coercion – Single and continuous infringement – Amount of the fine – Value of sales – Duration of participation in the infringement – Mitigating circumstances – Encouragement of anticompetitive conduct by public authorities – Unlimited jurisdiction

The applicant, British Airways plc, is an air transport company operating in the market for airfreight.

It is one of the 19 addressees of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) ('the contested decision'). By that decision, the European Commission found that there had been a single and continuous infringement of those provisions whereby the undertakings in question had coordinated, during periods between 1999 and 2006, their pricing behaviour in the provision of freight services on a global basis. It imposed a fine of EUR 104 040 000 on the applicant for its participation in that infringement.

On 7 December 2005, the Commission received, under its 2002 Leniency Notice, [80] an application for immunity lodged by Lufthansa and two of its subsidiaries. That application mentioned that there were anticompetitive contacts between a number of undertakings operating on the airfreight market ('the carriers') with respect to various elements forming part of the prices charged for services on that market, namely the imposition of 'fuel' and 'security' surcharges and, in essence, the refusal to grant freight forwarders a discount on those surcharges. The evidence gathered by the Commission and its investigations led it to address, on 19 December 2007, a statement of objections to 27 carriers and subsequently to adopt, on 9 November 2010, against 21 carriers including the applicant, an initial decision. [81] However, that decision was annulled by the General Court by judgments of 16 December 2015, [82] within the limit of the respective claims for annulment to that end, on account of contradictions vitiating the statement of reasons for that decision.

---

80 Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

81 Commission Decision C(2010) 7694 final of 9 November 2010 relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight) ('the initial decision').

82 Judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995), *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992), *Cathay Pacific Airways* v *Commission* (T-38/11, not published, EU:T:2015:985), *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991), *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986), *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989), *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987), *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), *Air France-KLM* v *Commission* (T-62/11, not published, EU:T:2015:996), *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993), and *Martinair Holland* v *Commission* (T-67/11, not published, EU:T:2015:984).

Taking the view, in essence, that the General Court had erred in law by taking refuge behind the prohibition on ruling *ultra petita* in order to limit the scope of the annulment that it had thus ordered after finding of its own motion a defective statement of reasons vitiating the initial decision in its entirety, the applicant brought an appeal against the judgment delivered against it. By judgment of 14 November 2017, [83] the Grand Chamber of the Court of Justice dismissed that appeal as unfounded in its entirety.

Ruling on the action brought by the applicant against the contested decision in so far as it concerns the applicant, the General Court upholds in part the claim for annulment of the contested decision, as well as the claim for a reduction of the amount of the fine imposed on the applicant. More specifically, it annuls the contested decision so far as concerns the finding that the applicant participated in the component of the infringement relating to the refusal to pay commission, regarding that finding as insufficiently substantiated, and consequently reduces the amount of the fine in the light of the limited nature of the applicant's participation in the infringement. By contrast, called upon to rule on the requirements arising from the obligation to adopt the necessary measures to comply with a judgment following the annulment of a decision finding an infringement of EU competition rules, the General Court holds that the Commission was entitled, without warranting criticism from the applicant, to impose a fine on the applicant also on the basis of the findings of infringement made in the operative part of the initial decision, in so far as they had not been disputed and had therefore become final.

Assessment of the General Court

In the first place, the General Court holds that the Commission did not exceed the limits of its own territorial jurisdiction when it found that there had been a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement, affecting flights on 'inbound' air routes, understood as routes from airports in third countries to those in Member States of the European Union or other States party to the European Economic Area which are not members of the European Union, within the periods referred to in the contested decision.

In the second place, the General Court rejects the plea, raised of its own motion, alleging lack of jurisdiction on the part of the Commission to find and penalise an infringement of Article 53 of the EEA Agreement on routes between Switzerland, on the one hand, and Norway and Iceland, on the other. That plea is unfounded, since it is apparent from the operative part of the contested decision that the Commission did not find any infringement of that provision on those routes.

In the third place, the General Court examines the applicant's complaints seeking to dispute the procedures for complying with the judgment annulling the decision concerning the applicant. In that regard, the General Court notes, in particular, that the scope of a judgment annulling a measure must be assessed in the light of the limits of the dispute set by the applicant in the form of order sought. In those circumstances, the General Court concludes that the Commission was entitled to find, without contradicting itself or failing to comply with its obligation to adopt the necessary measures to comply with the judgment, in respect of the applicant, that there was no need to alter findings of infringement which had not been disputed by the applicant and which it could therefore regard as definitive in respect of the applicant, even if the co-perpetrators of the infringements at issue were not strictly the same. It is therefore to no avail that the applicant criticises the approach adopted by the Commission that led the Commission to impose on it a fine which did not relate exclusively to the findings of infringement made in the contested decision. In that regard, the General Court also states that, contrary to what the applicant submits, the appeal that the applicant brought in order to dispute the limitation in respect of it of the annulment of the contested decision in no way affects the validity of the approach thus adopted by the Commission, since that appeal had no suspensive effect and, in

83 Judgment of 14 November 2017, *British Airways* v *Commission* (C-122/16 P, EU:C:2017:861).

any event, was not capable of extending the scope of the form of order sought that circumscribed the subject matter of the dispute.

In the fourth place, the General Court also examines the complaints seeking, in essence, to dispute the conclusions drawn by the Commission from the examination of the regulatory schemes of various third countries, as well as the adequacy of the reasons given in that regard, concluding that those complaints are not well founded. First of all, the General Court holds that the principles governing the State-coercion defence apply both to the regulations of Member States and to those of third countries and that the burden of proof lies with the party relying on that defence. Next, the Commission was legitimately entitled to conclude that the applicant had failed to prove that it had acted under duress from the schemes concerned. Lastly, in so far as the examination of those schemes led the Commission to accept that they could have encouraged the applicant's unlawful conduct, justifying its granting the applicant the benefit of mitigating circumstances by applying a general reduction, the Commission duly explained why it chose the rate of 15% applied for that purpose.

In the fifth place, in so far as the Commission concluded that the applicant participated in an infringement relating to the refusal to grant discounts, the General Court finds, however, that the evidence relied on by the Commission as a basis for that conclusion is insufficient and, consequently, annuls the contested decision in so far as it finds that the applicant participated in that component of the infringement.

In the sixth place, the General Court examines the applicant's complaints concerning the determination of the amount of the fine that the Commission imposed on it, in particular those concerning the calculation of the reduction granted under the leniency programme. In that regard, it notes that the 2002 Leniency Notice makes the grant of a reduction of the fine conditional, inter alia, on the submission of conclusive evidence representing significant added value – for the purpose of establishing the facts in question – with respect to the evidence already in the Commission's possession. Following an in-depth examination of the items of evidence adduced by the applicant – the value of which, in the applicant's view, was disregarded by the Commission – the General Court finds, however, that it was by means of a fair assessment of the value of each of those items of evidence that the Commission could conclude that their added value was inadequate. In any event, the applicant cannot reasonably rely on the principle of equal treatment in order to dispute the less favourable treatment to which it claims to have been subject as compared to the treatment applied to other carriers to which the contested decision is addressed, given that those carriers were not in a situation comparable to its own.

In the seventh and last place, the General Court makes use of its unlimited jurisdiction to rule on the claims for a reduction of the amount of the fines imposed. Without departing from the method of calculation used by the Commission in the contested decision, the General Court draws, on that basis, the conclusions from the partial annulment of the contested decision in so far as that decision found that the applicant had participated in the component of the infringement relating to the refusal to grant discounts. Consequently, the amount of the fine imposed on the applicant, set at EUR 104 040 000 by the Commission, is reduced to EUR 84 456 000.

Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022, Singapore Airlines and Singapore Airlines Cargo v Commission, T-350/17

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and Switzerland on Air Transport – Coordination of elements of the price of airfreight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – *Ne bis in idem* principle – State coercion – Single and continuous infringement – Amount of the fine – Value of sales – Gravity of the infringement – Unlimited jurisdiction

The applicants are Singapore Airlines Ltd and its subsidiary Singapore Airlines Cargo Pte Ltd. Singapore Airlines Cargo Pte Ltd is active in the airfreight services market.

They are among the 19 addressees of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) ('the contested decision'). By that decision, the European Commission found that there had been a single and continuous infringement of those provisions by which the undertakings in question had coordinated, over periods between 1999 and 2006, their pricing behaviour for the provision of freight services worldwide. It imposed a fine of EUR 74 800 000 on the applicants for their participation in that infringement.

On 7 December 2005, the Commission received an application for immunity under the 2002 Leniency Notice, [84] lodged by Lufthansa and two of its subsidiaries. That application referred to the existence of anticompetitive contacts between a number of undertakings operating in the airfreight market ('the carriers') with respect to various elements forming part of the prices charged for services on that market, namely the imposition of 'fuel' and 'security' surcharges and, in essence, the refusal to grant freight forwarders a discount on those surcharges. The evidence gathered by the Commission and its investigations led it to send a statement of objections to 27 carriers on 19 December 2007 and then to adopt a first decision against 21 carriers, including the applicants, on 9 November 2010. [85] However, that decision was annulled by the General Court, by judgments of 16 December 2015, [86] within the limits of the respective claims for annulment to that end, due to contradictions in the statement of reasons for that decision.

---

84 Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

85 Commission Decision C(2010) 7694 final of 9 November 2010 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight) ('the initial decision').

86 Judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995), *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992), *Cathay Pacific Airways* v *Commission* (T-38/11, not published, EU:T:2015:985), *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991), *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986), *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989), *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987), *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), *Air France KLM* v *Commission* (T-62/11, not published, EU:T:2015:996), *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993), and *Martinair Holland* v *Commission* (T-67/11, not published, EU:T:2015:984).

In its judgment, the Court rejects the claim for annulment of the contested decision as well as the claim for reduction of the amount of the fine imposed on the applicants. Thus, it endorses the analysis followed by the Commission in order to establish the existence of a single and continuous infringement affecting several types of air routes, as well as the applicants' participation in that infringement, to the extent found in the operative part of the decision at issue. It nevertheless provides clarification on the scope of the principle *ne bis in idem* in proceedings aimed at establishing and, where appropriate, penalising infringements of the competition rules.

Findings of the Court

In the first place, the Court holds that the Commission did not exceed the limits of its own territorial jurisdiction when it found that there was a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement, affecting flights on so-called 'inbound' air routes, understood as routes from airports located in third countries to those located in Member States of the European Union or other States party to the European Economic Area which are not members of the European Union within the temporal limits described in the contested decision.

In the second place, the Court rejects the plea, raised of its own motion, alleging a lack of jurisdiction on the part of the Commission to find and penalise an infringement of Article 53 of the EEA Agreement on routes between Switzerland, on the one hand, and Norway and Iceland, on the other. That plea is unfounded, since it is apparent from the operative part of the contested decision that the Commission did not find any infringement of that provision on those routes.

In the third place, the Court examines the applicants' various complaints seeking to dispute, in principle, the existence of a single and continuous infringement in the light of the conduct found in the contested decision.

In that regard, the Court finds, in particular, that, contrary to what is argued by the applicants, the analysis carried out by the Commission in order to establish the existence of the infringement at issue, envisaged as a single and continuous infringement, is not vitiated by any error of law or assessment. First, the Court observes that the factors relied on by the Commission for the purposes of its analysis, relating in particular to the existence of a single anticompetitive objective and the identical nature of the undertakings and services in question, were such as to enable the Commission to classify the conduct at issue as a single infringement. Second, the Court examines in detail the evidence relied on by the Commission in that respect, which leads it to consider, in conclusion, that the applicants failed to establish the errors of assessment which they allege.

As regards, in the fourth place, the finding of the applicants' participation in the single and continuous infringement, the Court examines in turn various pleas and complaints put forward by the applicants seeking to challenge both the finding taken as a whole and various elements of that finding relating to their participation in the various aspects of the infringement at issue, and the scope of that finding, as set out in the operative part of the contested decision.

In that context, the Court examines, in particular, a complaint alleging breach of the principle *ne bis in idem*, which precludes inter alia an undertaking being found liable or proceedings being brought against it afresh on the grounds of anticompetitive conduct for which it has been declared not liable by an earlier decision that can no longer be challenged. In that regard, it observes at the outset, as the applicants do, that the operative part of the contested decision expressly finds that the applicants participated in the infringement at issue by virtue of their conduct in connection with air routes between Member States of the European Union and between those of Member States of the European Union and Switzerland. That finding, although envisaged in the Statement of Objections of 2007, did not appear in the operative part of the initial decision, adopted on 9 November 2010. The Court nevertheless considers that such silence does not amount to a declaration of non-liability in that regard. According to the Court, to hold otherwise would be irreconcilable with various provisions

and, what is more, with the general scheme of the system relating to the application of the EU competition rules. Thus, first, in the exercise of its prerogatives in competition matters, [87] the Commission is not under any obligation to rule on whether or not there has been an infringement of the relevant competition rules, to find and penalise any anticompetitive conduct, or even, in the context of an investigation procedure giving rise to a statement of objections, to rule in the final decision on each objection referred to in that statement. Secondly, from the point of view of the general scheme of Regulation No 1/2003, [88] the Court notes that Article 10 of that regulation provides for a specific legal basis for the adoption of a 'negative' decision on the substance, which is specifically intended to make a finding that Article 101 TFEU does not apply to specific conduct. Furthermore, the Court notes that, according to the case-law, [89] the adoption by a national competition authority of a decision that there are no grounds for action under the second paragraph of Article 5 of Regulation No 1/2003 does not lead to a declaration of non-liability capable of precluding a subsequent finding of an infringement.

In the present case, given that the initial decision was not adopted on the basis of Article 10 of that regulation, there is nothing to justify regarding it as a declaration of non-liability, even though it amounts, in the circumstances of the present case, to a decision that there were no grounds for action.

In those circumstances, the Court holds that no breach of the principle *ne bis in idem* may be alleged against the Commission.

Lastly, after rejecting the claims for annulment in their entirety, the Court also rejects the claim for reduction of the amount of the fine imposed jointly and severally on the applicants by the Commission. In that regard, considering it appropriate to adhere to the method of calculation used by the Commission in the contested decision, the Court rejects the applicants' complaints concerning the application of that method in the present case.

4.2 State aid

Judgment of the General Court (Tenth Chamber, Extended Composition) of 15 December 2021, Oltchim v Commission, T-565/19

Link to the complete text of the judgment

State aid – Measures taken by Romania to support a petrochemical company – Non-enforcement, accumulation and cancellation of public claims – Action for annulment – Period within which proceedings must be brought – Point from which time starts to run – Article 24(1) of Regulation (EU) 2015/1589 – Interest in bringing proceedings – Existence of one or more measures – State resources – Imputability to the State – Applicability of the private creditor test – Application of the private creditor test – Obligation to state reasons

The financial situation of Oltchim SA, a Romanian undertaking active in the manufacture of petrochemical products, deteriorated progressively over the period from 2007 to 2012.

87 The Court refers, in the present case, to Article 105(1) TFEU, Article 55(1) of the EEA Agreement, the EC-Switzerland Air Transport Agreement, Regulation No 1/2003 and the implementing provisions of Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement.

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

89 See, inter alia, judgment of 3 May 2011, *Tele2 Polska* (C-375/09, EU:C:2011:270, paragraphs 22 to 28).

In January 2013, Oltchim filed a request for the opening of insolvency proceedings. In the context of those proceedings, Oltchim's creditors, which included both public and private entities, approved a reorganisation plan providing, inter alia, for the partial cancellation of its debt ('the reorganisation plan').

By decision of 17 December 2018 [90] ('the contested decision'), the European Commission found that three separate measures adopted in favour of Oltchim, taken together or separately, constituted State aid incompatible with the internal market. The measures addressed by that decision concerned, first, the non-enforcement and further accumulation of debts by the Autoritatea pentru Administrarea Activelor Atatului (State Management Authority, Romania; 'AAAS'), between September 2012 and January 2013, second, the continuation of supplies free of charge during that same period by CET Govora, and, third, the cancellation of debt under the reorganisation plan by AAAS, the Administrația Națională apele Române (National Administration of Romanian waters; 'the ANE') and the undertakings Salrom, Electrica and CET Govora ('the partial cancellation of debt').

Oltchim brought an action for annulment of that decision, which is partially upheld by the Tenth Chamber, Extended Composition, of the General Court. In that context, the Court provides clarification concerning, inter alia, the calculation of the time limit for bringing an action for annulment against a Commission decision terminating a formal investigation procedure in the field of State aid, as well as the assessment of measures consisting in the non-enforcement, accumulation and cancellation of claims under Article 107(1) TFEU.

Findings of the Court

In the first place, the Court rejects the Commission's plea of inadmissibility alleging that the action for annulment brought by Oltchim was out of time.

In that regard, the Commission argued that the time limit to be respected by Oltchim, pursuant to the sixth paragraph of Article 263 TFEU, for bringing its action for annulment began to run not from the date of publication of the contested decision in the *Official Journal*, but from the date on which it became aware of that decision.

On the basis of a literal, contextual and teleological interpretation of the sixth paragraph of Article 263 TFEU, the Court confirms that, contrary to what the Commission claimed, it is the publication in the *Official Journal* of a Commission decision terminating a formal investigation procedure concerning State aid which constitutes the starting point of the period prescribed for the bringing of an action for annulment by a party which is not an addressee of that decision, such as Oltchim, even if that publication does not determine the entry into force or the taking effect of that measure and is not provided for by the FEU Treaty.

As regards the wording of the sixth paragraph of Article 263 TFEU, which provides that actions for annulment must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be, the Court notes that that provision does not in any way suggest that the authors of the Treaty intended to restrict the concept of publication of the act solely to the situation where publication is a precondition for the applicability of the contested measure and is provided for by the FEU Treaty. Furthermore, in view of the context of the sixth paragraph of Article 263 TFEU, namely that it forms part of the rules that aim to guarantee the right of individuals to bring an action before the Courts of the European Union, the latter cannot interpret restrictively the concept of publication of an act which is the subject of an action for annulment. Lastly, the purpose of that provision, which seeks to safeguard legal certainty, requires the date of publication of the measure to be given priority, over the date on which the measure came to the knowledge of the

90 Decision (EU) 2019/1144 on State aid SA.36086 (2016/C) (ex 2016/NN) implemented by Romania for Oltchim SA (OJ 2019 L 181, p. 13).

applicant, as the certain, foreseeable and easily verifiable starting point of the period prescribed for instituting proceedings.

Although it cannot be ruled out that an interested party in State aid proceedings may receive communication of a decision closing the formal investigation procedure well before its publication in the *Official Journal* and may therefore benefit from a period longer than that available to the Member State concerned to bring an action for annulment of that decision, stipulating the date of publication in the *Official Journal* as the starting point for the period for bringing that action is not contrary to the principle of equality of persons before the law. In that regard, the Court points out that it is for the Commission to ensure compliance with the principle of equal treatment by avoiding, as far as possible, a time gap between the communication to the interested parties of a decision terminating the formal investigation procedure and its publication in the *Official Journal*.

In the second place, as regards the merits of the action for annulment brought by Oltchim, the Court states, first of all, that, in the light of the differences in the subject matter, nature and purpose of the measures covered by the contested decision as well as their chronology, their context and the situation of Oltchim at the time of their implementation, and the fact that those measures were not planned or foreseeable at the time of the first intervention and that the grantors of those measures are different, those measures must be regarded as different for the purposes of Article 107(1) TFEU.

As regards the partial cancellation of the debt, the Court finds, next, that it did not involve a transfer of State resources in so far as that cancellation had been granted by Electrica. The Court finds that the majority of Electrica's shareholdings were private and that there was nothing in the documents before the Court to support the conclusion that the latter's resources are constantly under the control of the State or at its disposal. In addition, although the Commission had shown that the votes of AAAS and the ANE in favour of the reorganisation plan were imputable to the Romanian State, it had not shown that, in the light of the applicable national rules, those votes represented the majority required to approve or to block approval of that plan. Thus, since the partial cancellation of the debt was not, as a whole, attributable to the State, that measure does not constitute State aid within the meaning of Article 107 TFEU.

As regards, lastly, the non-enforcement and further accumulation of debts by AAAS and the continued unpaid supplies by CET Govora, the Court finds that the Commission was wrong to consider that the private creditor test was not applicable to those measures. Given their purpose and their essentially economic nature, and having regard to the context and objectives of the measures, and to the legal rules to which they are subject, those measures come within the economic and commercial sphere and do not relate to the exercise by the State of public powers. In addition, as regards, in particular, the non-enforcement and further accumulation of debts by AAAS, it cannot be ruled out that a hypothetical private creditor in a situation comparable to that of AAAS would have acted in the same way. Accordingly, the Court finds that, since the Commission has failed to prove that that measure conferred an advantage on Oltchim, it cannot constitute State aid.

5. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Fifth Chamber) of 23 February 2022, Ancor Group v EUIPO – Cody's Drinks International (CODE-X), T-198/21

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – EU word mark CODE-X – Earlier national word and figurative marks Cody's – Earlier international figurative mark Cody's – Relative ground for refusal – No likelihood of confusion – Article 8(1)(b) of Regulation (EU) 2017/1001

Ancor Group GmbH filed an application for registration of the word sign CODE-X as an EU trade mark for beverages. Cody's Drinks International GmbH filed a notice of opposition on the basis of its German word and figurative marks Cody's and an international registration designating the European Union of that figurative mark, registered in respect of beverages. It claimed that there was a likelihood of confusion. [91] The opposition was rejected.

The Board of Appeal of the European Union Intellectual Property Office annulled the decision of the Opposition Division. Having accorded particular importance to the degree of phonetic similarity in the global assessment of the likelihood of confusion, it concluded that there was a likelihood of confusion on the part of the relevant public in respect of all the marks relied on.

Hearing an action brought before it by Ancor Group, the General Court annuls the decision of the Board of Appeal on the ground that it erred in finding that there was a likelihood of confusion and specifies that, in relation to beverages, it is not appropriate to accord preponderant importance to the phonetic perception of the marks in all cases.

Findings of the Court

The Court finds that the signs at issue have only a low degree, if not an average degree, of visual similarity and an average degree of phonetic similarity and are conceptually different.

As regards the particular importance given by the Board of Appeal to the degree of phonetic similarity, the Court notes that, in the global assessment of the likelihood of confusion, the respective weight to be given to the visual, phonetic or conceptual aspects of the signs at issue may vary according to the objective circumstances in which the marks may be present on the market. However, in that context, the circumstances in which it is usual to expect the categories of goods covered by the marks at issue to be marketed must be taken as a benchmark.

The Court points out that although it is of course not inconceivable that the perception of the phonetic differences between the signs at issue may not be clear in particularly noisy environments, such as in a bar or a nightclub during very busy periods, that cannot be used as the sole basis for assessing whether there is a potential likelihood of confusion between the signs at issue. An assessment of that kind must of necessity be carried out while keeping in mind the perception which the relevant public will have of those signs under normal marketing conditions.

---

91 Within the meaning of Article 8(1)(b) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

The Court acknowledges that, in some cases, particular importance has been attached to the phonetic similarity of the signs at issue, on account of the fact that the goods in question, belonging to the beverages sector, and more particularly the alcoholic beverages sector, could be ordered orally after their name had been seen on the menu or on the wine list. However, it adds that it is also clear from the case-law that there is nothing to indicate that, as a general rule, consumers of drinks will buy such goods in the course of a conversation where those goods are being ordered in a busy and noisy bar or restaurant.

Furthermore, even if bars and restaurants are not negligible sales channels for those types of goods, it is common ground that the consumer will be able to perceive the marks at issue visually in those places, inter alia by examining the bottle which will be served to him or her or by other means, such as on a menu or a drinks list, before placing an order orally. Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. Those goods are also sold in supermarkets or other retail outlets where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to that product.

Consequently, although preponderant importance has sometimes been accorded to the phonetic perception of marks in relation to beverages, that will not be appropriate in all cases.

In the present case, no evidence has been provided to show that the goods in question are mainly ordered orally. On the contrary, if the relevant public is led to order them orally in bars and restaurants, they will generally do so after seeing their name on a drinks list or a menu, or will be able to examine the product which will be served to them, so that they will be able to perceive the mark visually in order to express what they wish to purchase.

As a result, the Court concludes that there is no likelihood of confusion, annuls the decision of the Board of Appeal and, in exercising its power to alter decisions, rejects the opposition brought by Cody's Drinks International.

Judgment of the General Court (Third Chamber) of 16 March 2022, Nowhere v EUIPO – Ye (APE TEES), T-281/21

Link to the complete text of the judgment

EU trade mark – Opposition proceedings – Application for the EU figurative mark APE TEES – Earlier national non-registered figurative trade marks representing an ape – Relative ground for refusal – Article 8(4) of Regulation (EC) No 207/2009 (now Article 8(4) of Regulation (EU) 2017/1001) – Rules governing common-law actions for passing off – Agreement on the withdrawal of the United Kingdom from the European Union and Euratom

Mr Junguo Ye sought registration from the European Union Intellectual Property Office (EUIPO) of the EU figurative trade mark APE TEES in respect of various goods and services. Nowhere Co. Ltd filed a notice of opposition to registration of that mark on the basis of three earlier non-registered figurative trade marks, used in the course of trade in the United Kingdom, which, under the law applicable in that country, it enabled it to prevent the use of the mark applied for.

By decision of 10 February 2021, the Board of Appeal of EUIPO rejected the opposition on the ground that, after the withdrawal of the United Kingdom from the European Union and after the expiry of the transition period provided for in the withdrawal agreement, [92] Nowhere Co. could no longer rely on

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

the rules governing common-law actions for passing off under the law of the United Kingdom. It found, first, that the relevant date with regard to the existence of the earlier rights was that of the adoption of the contested decision, which took place, in the present case, after the expiry of the transition period. Secondly, it found that, as from the end of the transition period, no conflict between the mark applied for and the earlier non-registered trade marks could arise, in so far as those earlier non-registered trade marks were used in the course of trade in the United Kingdom.

The Court annulled the decision of the Board of Appeal of EUIPO. It found that, in spite of the withdrawal of the United Kingdom from the European Union and the end of the transition period, Nowhere Co. had a legitimate interest in the success of its opposition with regard to the period between the date on which the EU trade mark application was filed and the expiry of the transition period.

Findings of the Court

The Court pointed out at the outset that the existence of a relative ground for refusal must be assessed as at the time of filing of the application for registration of an EU trade mark against which an opposition has been brought. In that regard, the fact that an opposition under Article 8(4) of Regulation No 207/2009 [93] is based on non-registered trade marks used in the course of trade in the United Kingdom and on the law of passing off laid down in the law of the United Kingdom is irrelevant in the case of an opposition brought against an application for registration of an EU trade mark which was filed before the entry into force of the withdrawal agreement and the expiry of the transition period.

As regards EUIPO's argument that the relevant date with regard to the existence of the earlier rights in this case was that on which the contested decision was adopted, the Court pointed out, in the first place, that the mere use of the present tense in Article 8(4) of Regulation No 207/2009 does not make it possible to derive any conclusion as regards its interpretation. Since that provision begins with the words 'upon opposition by the proprietor of a non-registered trade mark', it cannot be ruled out that the present tense which is subsequently used in that provision refers more to the time when the opposition is brought, and not to the time when the contested decision is adopted.

In the second place, the Court stated that the time limit, before the expiry of which proof of the existence, validity and scope of protection of the earlier right had to be produced, was specified by EUIPO as being a date before the entry into force of the withdrawal agreement and the expiry of the transition period. Furthermore, Article 42(2) of Regulation No 207/2009, which lays down an obligation for the opponent to prove genuine use of the earlier mark, refers to the period of five years preceding the date of publication of the EU trade mark application, and not to the period which ends on the date of EUIPO's final decision on the opposition.

In the third place, the Court held that, even if it were to be accepted that, after the end of the transition period, a conflict between the marks at issue could no longer arise, the fact remained that, if the mark applied for was registered, such a conflict could nevertheless have existed during the period between the date on which the EU trade mark application was filed and the expiry of the transition period. It thus acknowledged that Nowhere Co. had a legitimate interest in the success of its opposition as regards that period. On the other hand, it would have been open to Mr Ye to file a new application for registration of the mark applied for as soon as the transition period had expired, an application which would no longer have come into conflict with the earlier non-registered trade marks in so far as they had been used in the course of trade in the United Kingdom.

---

93 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended, provides in Article 8(4) thereof that, upon opposition by the proprietor of a non-registered trade mark or of another sign used in the course of trade of more than mere local significance, the trade mark applied for is not to be registered where and to the extent that, pursuant to EU legislation or the law of the Member State governing that sign: (a) rights to that sign were acquired prior to the date of application for registration of the EU trade mark, or the date of the priority claimed for the application for registration of the EU trade mark; (b) that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.

Consequently, the Court held that none of the arguments put forward by EUIPO was capable of supporting its position that the date on which the contested decision was adopted, the only event in the present case which took place after the expiry of the transition period, was the relevant date with regard to the outcome of the present case.

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 24 February 2022, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto', C-262/20, EU:C:2022:117
- Judgment of 10 March 2022, Landkreis Gifhorn, C-519/20, EU:C:2022:178
- Judgment of 28 April 2022, Gräfendorfer Geflügel und Tiefkühlfeinkost and Others, C-415/20, C-419/20 and C-427/20, EU:C:2022:306
- Judgment of 28 April 2022, C and CD (Legal obstacles to the execution of a decision on surrender), C-804/21 PPU, EU:C:2022:307
- Judgment of 12 January 2022, Verelst v Conseil, T-647/20, EU:T:2022:5
- Order of 9 March 2022, Kirimova v EUIPO, T-727/20, EU:T:2022:136
- Judgment of 27 April 2022, Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii v Commission, T-4/20, EU:T:2022:242
- Judgment of 27 April 2022, Group Nivelles v EUIPO – Easy Sanitary Solutions (Shower drainage channel), T-327/20, EU:T:2022:263
- Judgment of 27 April 2022, Ilunga Luyoyo v Council, T-108/21, EU:T:2022:253
- Judgment of 27 April 2022, Veen v Europol, T-436/21, EU:T:2022:261