COURT OF JUSTICE
OF THE EUROPEAN UNION

MONTHLY CASE-LAW DIGEST
July 2022

I. INSTITUTIONAL PROVISIONS: INSTITUTIONS AND BODIES OF THE EUROPEAN UNION

Judgment of the Court (Grand Chamber) of 14 July 2022, Italy v Council (Siège de l'Agence européenne des medicaments), C-59/18

Link to the full text of the judgment

Action for annulment – Law governing the institutions – EU bodies, offices and agencies – European Medicines Agency (EMA) – Competence to determine the location of the seat – Article 341 TFEU – Scope – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting – Jurisdiction of the Court under Article 263 TFEU – Author and legal nature of the act – Absence of binding effects in the EU legal order

Judgment of the Court (Grand Chamber) of 14 July 2022, Italy v Council and Parliament (Siège de l'Agence européenne des medicaments), C-106/19

Link to the full text of the judgment

Action for annulment – Law governing the institutions – Regulation (EU) 2018/1718 – Location of the seat of the European Medicines Agency (EMA) in Amsterdam (Netherlands) – Article 263 TFEU – Admissibility – Interest in bringing proceedings – Locus standi – Direct and individual concern – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting in order to determine the location of the seat of an EU agency – Absence of binding effects in the EU legal order – Prerogatives of the European Parliament

Judgment of the Court (Grand Chamber) of 14 July 2022, Parliament v Council (Siège de l'Autorité européenne du travail), C-743/19

Link to the full text of the judgment

Action for annulment – Law governing the institutions – Bodies, offices and agencies of the European Union – European Labour Authority (ELA) – Competence to determine the location of the seat – Article 341 TFEU – Scope – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting – Jurisdiction of the Court under Article 263 TFEU – Author and legal nature of the act – Absence of binding effects in the EU legal order

Five actions were brought before the Court for annulment of various measures adopted, first, by the Representatives of the Governments of the Member States and, secondly, by the Council and the European Parliament, concerning the determination of the seat of two European agencies.

Two actions were brought by the Italian Republic and the Comune di Milano (Municipality of Milan, Italy), respectively, against (i) the Council for the annulment of the decision of 20 November 2017[1] adopted by the Representatives of the Governments of the Member States (Joined Cases C 59/18 and C 182/18) and (ii) the Parliament and the Council for the annulment of Regulation (EU) 2018/1718[2] (Joined Cases C 106/19 and C 232/19) concerning the designation of the city of Amsterdam (Netherlands) as the new seat of the European Medicines Agency (EMA) following Brexit. Another action was brought by the Parliament against the Council for annulment of the decision of 13 June 2019[3] taken by common accord between the Representatives of the Governments of the Member States and determining the seat of the European Labour Authority (ELA) in Bratislava (Slovakia) (Case C 743/19).

In the cases concerning the seat of the EMA, the Heads of State or Government had approved, following Brexit, a procedure for adopting a decision on the transfer of that seat, which had until then been established in London (United Kingdom). At the end of that procedure, the offer of the Kingdom of the Netherlands had prevailed over the offer of the Italian Republic (Milan). Consequently, the Representatives of the Governments of the Member States had, by the decision of 20 November 2017, designated, in the margins of a meeting of the Council, the city of Amsterdam as the new seat of the EMA. That designation had been confirmed by the contested regulation at the end of the ordinary legislative procedure, involving the participation of the Parliament. The Italian Republic and the municipality of Milan maintained, however, that the decision determining the new seat of the EMA, in so far as it concerned the designation of the seat of an agency of the Union and not of an institution of the Union, fell within the exclusive competence of the European Union and that it had, in fact, to be attributed to the Council. They therefore disputed the lawfulness of that decision as the basis for the contested regulation and maintained, moreover, that the Parliament had not fully exercised its legislative prerogatives when adopting that regulation.

In the case concerning the seat of the ELA, the Representatives of the Governments of the Member States had approved by common accord the procedure and the criteria for deciding on the seat of that agency. In accordance with that procedure, they adopted, in the margins of a meeting of the Council, the decision fixing the seat of the ELA in Bratislava. The Parliament maintained that the actual author of that decision was in fact the Council and that, since it was a legally binding act of the European Union, it could be challenged before the Court in an action for annulment.

By three Grand Chamber judgments, the Court develops its case-law on the legal framework applicable to the determination of the seat of bodies, offices and agencies of the Union. It considers, inter alia, that decisions determining the new seat of the EMA and the seat of the ELA are political acts, adopted by the Member States alone in that capacity, and not as members of the Council, with the result that those acts are not subject to the review of legality provided for under Article 263 TFEU. Those decisions cannot be treated in the same way as those taken under Article 341 TFEU[4], which concerns only the determination of the seat of the institutions of the Union.[5] That provision cannot, therefore, constitute the legal basis for those decisions.

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1 Decision adopted in the margins of a meeting of the Council designating the city of Amsterdam as the new seat of the European Medicines Agency (EMA) ('the decision determining the new seat of the EMA').

2 Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency (OJ 2018 L 291, p. 3; 'the contested regulation').

3 Decision (EU) 2019/1199 taken by common accord between the Representatives of the Governments of the Member States of 13 June 2019 on the location of the seat of the European Labour Authority (OJ 2019 L 189, p. 68; 'the decision determining the seat of the ELA').

4 Article 341 TFEU lays down that 'the seat of the institutions of the Union shall be determined by common accord of the governments of the Member States'.

5 As referred to in Article 13(1) TEU.

Findings of the Court

– Admissibility of an action brought by a regional or local entity against a regulation determining the location of the seat of a body, office or agency of the Union (Joined Cases C 106/19 and C 232/19)

The Court notes, first of all, that an action brought by a regional entity cannot be treated in the same way as an action brought by a Member State within the meaning of Article 263 TFEU and that, consequently, such an entity must establish both an interest and standing to bring proceedings. After finding that the municipality of Milan had an interest in bringing proceedings, in so far as the possible annulment of the contested regulation would entail the resumption of the legislative procedure for determining the seat of the EMA in which it was a candidate, the Court holds that that entity is directly and individually concerned by that regulation and, therefore, has standing to seek its annulment. In that regard, it states, first, that that regulatory act leaves no discretion to its addressees and, secondly, that the municipality of Milan actually participated in the selection procedure for the seat of the EMA, which placed it in a situation which distinguished it individually in a similar manner to that of an addressee of the act.

– The jurisdiction of the Court to hear and determine proceedings concerning decisions of the Member States on the location of the seat of a body, office or agency of the Union (Joined Cases C 59/18 and C 182/18 and Case C 743/19)

The Court notes, as a preliminary point, that, in the context of an action for annulment, the EU Courts have jurisdiction only to review the legality of acts attributable to the institutions, bodies, offices and agencies of the Union. Acts adopted by the Representatives of the Governments of the Member States, acting in that capacity and thus collectively exercising the powers of the Member States, are therefore not subject to judicial review by the EU Courts, except where, having regard to its content and the circumstances in which it was adopted, the act in question is in reality a decision of the Council. The Court states, consequently, that the decisions determining the new seat of the EMA and the seat of the ELA can be understood only in the light of the legal framework applicable to the location of the seat of the bodies, offices and agencies of the Union.

In that regard, the Court examines, as part of a textual, contextual and teleological analysis, whether Article 341 TFEU may validly be relied on as the basis for those decisions.[6]

In the first place, it points out that the wording of Article 341 TFEU refers formally only to 'the institutions of the Union'.

In the second place, as regards the context of that provision, the Court considers, in particular, that the broad interpretation it gave to that term in relation to non-contractual liability[7] cannot usefully be relied on for the purposes of defining, by analogy, the scope of that provision. Furthermore, the Court notes that the previous institutional practice relied on by the Council, in accordance with which the seats of bodies, offices and agencies of the Union were determined on the basis of a political choice made solely by the Representatives of the Governments of the Member States, is far from being generalised, does not enjoy institutional recognition and, in any event, cannot create a precedent which is binding on the institutions.

In the third place, as regards the objective of Article 341 TFEU, the Court states, first of all, that that article preserves the decision-making powers of the Member States in determining the seat of the institutions of the Union only. It notes, next, that the establishment of the bodies, offices and agencies of the Union is the result of an act of secondary legislation adopted on the basis of the substantive

6 The Court, on the merits, follows similar reasoning in Joined Cases C-106/19 and C-232/19.

7 Under the second paragraph of Article 340 TFEU.

provisions implementing the EU policy in which the body, office or agency is involved. However, the decision on the location of the seat of those bodies, offices or agencies is consubstantial with the decision on their establishment. Accordingly, the EU legislature has, in principle, exclusive competence to determine the location of the seat of a body, office or agency of the Union, just as it has to define its powers and organisation. Lastly, the Court points out that the fact that the decision determining the location of the seat of a body, office or agency of the Union may have an important political dimension does not preclude that decision from being taken by the EU legislature in accordance with the procedures laid down by the substantively relevant provisions of the Treaties.

In the light of the foregoing, the Court concludes that Article 341 TFEU cannot be interpreted as governing the designation of the location of the seat of a body, office or agency of the Union, such as the EMA or the ELA, and that the competence to determine the location of the seat of those agencies lies not with the Member States but with the EU legislature, in accordance with the ordinary legislative procedure.

The Court then examines whether it has jurisdiction to rule on the validity of the decisions determining the location of the new seat of the EMA and the seat of the ELA under Article 263 TFEU. In that regard, it notes that the relevant criterion to exclude the jurisdiction of the EU Courts to hear and determine an action brought against acts adopted by the Representatives of the Governments of the Member States is solely that relating to their author, irrespective of their binding legal effects. To extend the concept of a challengeable act under Article 263 TFEU to acts adopted, even by common accord, by the Member States would amount to allowing the EU Courts to carry out a direct review of the acts of the Member States and, thus, to circumventing the remedies specifically provided for in the event of failure to fulfil their obligations under the Treaties.

Lastly, the Court states that it is for the EU legislature, for reasons of both legal certainty and effective judicial protection, to adopt an act of the European Union ratifying or, on the contrary, departing from the political decision adopted by the Member States. Since that act necessarily precedes any measure for the actual implementation of the location of the seat of the agency concerned, only that act of the EU legislature is capable of producing binding legal effects under EU law.

The Court concludes that the decisions of the Representatives of the Governments of the Member States determining the location of the new seat of the EMA and of the seat of the ELA (Joined Cases C 59/18 and C 182/18 and Case C 743/19) are not acts of the Council but acts of a political nature without any binding legal effects, taken by the Member States collectively, with the result that those decisions cannot be the subject of an action for annulment under Article 263 TFEU. Accordingly, it dismisses the actions in question as being directed against acts the legality of which it does not have jurisdiction to review.

– The validity of the legislative act determining the location of the seat of a body, office or agency of the Union (Joined Cases C 106/19 and C 232/19)

As regards the contested regulation, by which the Council and the Parliament confirmed, by means of the ordinary legislative procedure, the decision of the Representatives of the Governments of the Member States determining the location of the new seat of the EMA, the Court points out that it is for those institutions alone, in accordance with the principles of conferred powers and institutional balance enshrined in the EU Treaty,[8] to determine its content. In that regard, it points out that that decision cannot be given any binding force capable of limiting the EU legislature's discretion. That decision therefore has the force of a measure of political cooperation which cannot in any event encroach on the powers conferred on the institutions of the Union in the context of the ordinary legislative procedure. The fact that the Parliament was not involved in the process which led to that decision does not therefore constitute, in any event, an infringement or circumvention of the Parliament's prerogatives as co-legislator, and the political impact of that decision on the legislative

8 Article 13(2) TEU.

power of the Parliament and the Council cannot constitute a ground for annulment by the Court of the contested regulation. Since the decision of 20 November 2017 has no binding legal effect under EU law, the Court concludes that that decision cannot constitute the legal basis of the contested regulation, with the result that the lawfulness of that regulation cannot be affected by any unlawfulness vitiating the adoption of that decision.

II. PROCEEDINGS OF THE EUROPEAN UNION

1. ACTIONS FOR ANNULMENT

Judgment of the Court (Grand Chamber) of 12 July 2022, Nord Stream 2 AG v European Parliament and Council of the European Union, C-348/20 P

Link to the full text of the judgment

Appeal – Energy – Internal market in natural gas – Directive 2009/73/EC – Directive (EU) 2019/692 – Extension of the application of Directive 2009/73 to gas lines between Member States and third countries – Fourth paragraph of Article 263 TFEU – Action for annulment –Condition that an applicant must be directly concerned by the measure that forms the subject matter of its action – Lack of discretion as to the obligations imposed on the appellant –Condition that an applicant must be individually concerned by the measure that forms the subject matter of its action – Arrangements for the exemptions and derogations excluding the appellant as the sole operator from their benefit – Request that documents be removed from the case file – Rules on the production of evidence before the EU Courts – Documents internal to the European Union institutions

The appellant, Nord Stream 2 AG, is a company incorporated under Swiss law whose sole shareholder is the Russian public joint stock company Gazprom. It is responsible for the planning, construction and operation of the offshore gas pipeline Nord Stream 2, which is intended to ensure the flow of gas between Vyborg (Russia) and Lubmin (Germany). The construction works began in January 2017.

On 17 April 2019 the European Parliament and the Council of the European Union adopted Directive 2019/692, [9] amending Directive 2009/73 concerning common rules for the internal market in natural gas. Directive 2019/692, which entered into force on 23 May 2019, is aimed at ensuring that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the European Union, to gas transmission lines to and from third countries, such as the Nord Stream 2 gas pipeline. Thus, following the entry into force of that directive, the owners of gas pipelines between a Member State and a third country, such as the appellant, were henceforth, in principle, subject to the obligations laid down by Directive 2009/73 for the part of their transmission lines located on the territory of the Member States, in the present case the part of the Nord Stream 2 gas pipeline situated on the territory of the Federal Republic of Germany. This means that those operators have, inter alia, an obligation to unbundle transmission systems and transmission system operators from the structures of production and supply [10] and to introduce a system of non-

9 Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1, 'the directive at issue').

10 Article 9 of Directive 2009/73.

discriminatory third-party access to gas transmission systems on the basis of published and approved tariffs. [11]

By the order of 20 May 2020, [12] the General Court dismissed as inadmissible the action brought by the appellant seeking the annulment of the directive at issue, on the ground that it was not directly concerned by that directive. It held inter alia that a directive could not, in itself, create obligations for an individual in the absence of the prior adoption of transposing measures. Accordingly, the General Court did not examine the admissibility of the action as regards the individual concern of the appellant. In that action, the General Court also ordered the removal from the file of certain internal documents produced by the appellant in the context of its action without the prior authorisation of the institutions concerned.

Hearing an appeal bought by the appellant, the Court of Justice, sitting as the Grand Chamber, sets aside the order of the General Court and declares the action to be admissible. On this occasion, the Court clarifies its case-law as regards the admissibility of direct actions brought by individuals against directives. It also clarifies the role of Regulation No 1049/2001 regarding public access to documents [13] for the purposes of the examination of requests for the withdrawal of internal documents from the court file.

Findings of the Court

First of all, the Court recalls that, under the second limb of the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act which is of direct and individual concern to that person. For an individual to be directly concerned by the act being challenged, two criteria must cumulatively be met. First, the measure challenged must directly affect the person's legal situation and, second, it must leave no discretion to the addressees responsible for its implementation.

As regards the first condition requiring that an individual's legal situation is directly affected, the Court observes that the capacity of an act to produce such effects cannot be assessed having regard to its form alone and that it is necessary to examine the substance of that act. It follows that any act can, in principle, produce direct effects for the legal situation of an individual, irrespective of whether that act entails implementing measures, including, as regards a directive, transposing measures. Transposing measures do not call into question the direct nature of the link between a directive and those effects provided that the directive leaves no discretion to the Member States as to the imposition of those effects on that individual.

In the present case, by extending the scope of application of Directive 2009/73 to gas pipelines between Member States and third countries, the directive at issue had the consequence of subjecting the appellant, as the owner of such a gas pipeline, to the obligations flowing from it. In that regard, the necessity for the Member State concerned, in this case the Federal Republic of Germany, to adopt transposing measures for the implementation of those obligations was of no significance since that Member State did not have any discretion capable of preventing the imposition of those obligations on the appellant.

Consequently, the Court of Justice holds that the General Court erred in law in finding that the directive at issue did not directly affect the legal situation of the appellant.

As regards the second condition relating to the discretion left to the addressees of a measure with a view to its implementation, the Court states that whether there is such discretion must also be

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11 Article 32 of Directive 2009/73.

12 Order of 20 May 2020, *Nord Stream 2* v *Parliament and Council* (T-526/19, EU:T:2020:210).

13 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). It is appropriate to note that that regulation is not applicable in the present case.

examined having regard to the substance of that act and must, in addition, necessarily be assessed having regard to the specific legal effects referred to in the action and which could in fact affect the legal situation of the person concerned.

In the present case, while the Member States who are the addressees of the directive at issue have a certain margin of manoeuvre as to the realisation of the obligations that it imposes, the Member State concerned has no discretion with regard to the imposition of those obligations on the appellant. In particular, it does not have the possibility of granting the appellant one of the exemptions or derogations laid down in Directive 2009/73. [14] Notwithstanding the Member States' discretion to grant the exemptions and derogations provided for in Directive 2009/73 to gas undertakings that meet the necessary conditions, none of those exemptions or derogations is capable of being applied to the appellant's situation, which does not meet those conditions. There is therefore a direct link between the entry into force of the directive at issue and the imposition on the appellant of the obligations that it lays down.

Therefore, the Court of Justice finds that the General Court erred in law in finding that the directive at issue left discretion to the Member States, without taking into account the appellant's situation and the fact that the entry into force of the directive at issue had the direct consequence of subjecting the latter to obligations which it could not avoid.

Having regard to those considerations, the Court concludes that the appellant is directly concerned by the directive at issue.

Next, the Court considers the Council's request for the removal of certain internal documents which were improperly produced by the appellant during the proceedings. That request concerned, more specifically, a recommendation by the European Commission addressed to the Council for the opening of negotiations between the European Union and a third State with a view to concluding an international agreement, an opinion of the Council's legal service on that recommendation and the observations of the Federal Republic of Germany made in the context of the legislative procedure for the adoption of the directive at issue.

The Court notes, at the outset, that the admissibility of those items of evidence, which were improperly produced, such as documents internal to the European Union institutions the production of which had not been authorised, depends on the balance between the interests of the parties, in particular with regard to the objective of ensuring their right to a fair hearing. In that regard, while Regulation No 1049/2001 has a certain indicative value in the weighing up of those interests, it does not govern the matter exhaustively.

Thus, as regards the opinion of the Council's legal service, the Court of Justice finds, as did the General Court, that the balance weighs in favour of the protection of the Council's interests, whose right to a fair hearing and whose interest in receiving frank, objective and comprehensive advice would be harmed by the retention of that opinion in the court file, without the sole interest of the appellant in substantiating its argument with the support of that opinion being sufficient, in the present case, to justify that retention, all the more so given that the merits of that argument did not depend in any way on the production of that opinion. As regards the Commission recommendation and the observations of the Federal Republic of Germany, however, the Court of Justice finds that the General Court in fact exclusively applied the provisions of Regulation No 1049/2001, without weighing up the interests at stake and without examining, in that context, whether the retention of those documents in the file could specifically and actually harm the interest relied on to justify their removal, namely the public interest as regards international relations. [15]

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14 Articles 36 and 49a of Directive 2009/73.

15 Article 4(1) of Regulation No 1049/2001.

Having upheld the appeal, the Court, making use of its power to determine the case, rules finally on the appellant's individual concern by the directive at issue. In that regard it finds that the appellant is individually concerned by the conditions of exemption and derogation which are laid down by the directive, since it is the sole operator which is, or which could be, in such a situation as to be excluded from their benefit.

Having regard to the foregoing, the Court of Justice declares that the appellant's action for annulment is admissible and refers the case back to the General Court for a decision on the merits.

Judgment of the General Court (Sixth Chamber, Extended Composition) of 6 July 2022, Carles Puigdemont i Casamajó and Antoni Comín i Oliveres v European Parliament, T-388/19

Law governing the institutions – Members of the European Parliament – Refusal of the President of the Parliament to recognise the status of Member of the European Parliament and the associated rights of elected candidates – Action for annulment – Act not open to challenge – Inadmissibility

The applicants, Mr Carles Puigdemont i Casamajó and Mr Antoni Comín i Oliveres, stood as candidates in the elections for the European Parliament which were held in Spain on 26 May 2019. Following those elections, the list led by the applicants received 1 018 435 votes and won two seats in the Parliament.

On 29 May 2019, the then President of the Parliament issued an internal instruction to the Secretary-General of the institution, first, to refuse all the candidates elected in Spain access to the 'Welcome Village' and to the assistance which the institution provided to candidates newly elected to the Parliament and, second, to suspend their accreditation until the Parliament had officially received confirmation of their election in accordance with Article 12 of the Electoral Act.[16]

On 13 June 2019, the Junta Electoral Central (Central Electoral Commission, Spain) adopted a decision in the form of a declaration of the Members elected to the European Parliament in the elections held on 26 May 2019.[17] That decision stated that, in accordance with Article 224(1) of the Spanish Electoral Law,[18] the Central Electoral Commission had issued the declaration of elected candidates mentioned by name, including the applicants. The declaration also stated that the session during which the elected candidates would take an oath to respect the Spanish Constitution, as required by Article 224(2) of the Spanish Electoral Law, would take place on 17 June 2019.

On 15 June 2019, the investigating judge of the Tribunal Supremo (Supreme Court, Spain) rejected the applicants' request for the withdrawal of the national arrest warrants issued against them by the Spanish criminal courts for them to be tried in the context of the criminal proceedings brought against them by the Spanish Public Prosecutor, the State Counsel and the political party VOX.[19]

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16 Act concerning the election of the Members of the European Parliament by direct universal suffrage (OJ 1976 L 278, p. 5), annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976 (OJ 1976 L 278, p. 1), as amended by Council Decision 2002/772/EC, Euratom of 25 June and 23 September 2002 (OJ 2002 L 283, p. 1) ('the Electoral Act'). Article 12 of the Electoral Act provides as follows: 'The [Parliament] shall verify the credentials of members of the [Parliament]. For this purpose it shall take note of the results declared officially by the Member States and shall rule on any disputes which may arise out of the provisions of this Act other than those arising out of the national provisions to which the Act refers.'

17 Boletín Oficial del Estado No 142 of 14 June 2019, p. 62477 ('the declaration of 13 June 2019').

18 Ley orgánica 5/1985, del Régimen Electoral General (Institutional Law 5/1985 on the general electoral regime) of 19 June 1985 (Boletín Oficial del Estado No 147 of 20 June 1985, p. 19110; 'the Spanish Electoral Law').

19 Those criminal proceedings had been brought before the Spanish criminal courts in respect of acts coming within, inter alia, the offences of 'sedition' and 'misuse of public funds'.

On 17 June 2019, the Central Electoral Commission notified the Parliament of the list of candidates elected in Spain, which did not include the applicants' names. On 20 June 2019, the Central Electoral Commission, in essence, refused to allow the applicants to take the required oath or make the required promise to respect the Spanish Constitution by means of a written declaration made before a notary or through attorneys designated by a notarised deed, on the ground that that oath or promise is an act which must be made in person before the Central Electoral Commission. On the same day, the Central Electoral Commission notified the Parliament of a decision in which it noted that the applicants had not taken or made the abovementioned oath or promise and declared that the seats allocated to the applicants in the Parliament were vacant and that all the prerogatives to which they might be entitled by virtue of their duties were suspended until such time as they took that oath or made that promise.

On 27 June 2019, the former President of the Parliament sent a letter to the applicants informing them, in essence, that he was not able to treat them as future Members of the European Parliament because their names were not on the list of elected candidates officially communicated by the Spanish authorities.

Following that letter, the applicants brought an action for annulment before the General Court directed, in essence, against, first, the Instruction of 29 May 2019 of the former President of the Parliament refusing them access to the welcome and assistance service offered to incoming Members of the European Parliament and the grant of temporary accreditation and, second, the refusal of the former President of the Parliament to recognise their status as Members of the European Parliament, contained in the letter of 27 June 2019.

The Parliament, supported by the Kingdom of Spain, relied, principally, on the inadmissibility of the action, on the grounds that the application does not clearly define certain acts which the General Court is asked to annul and that there are no challengeable acts.

The General Court, sitting in extended composition, dismisses the action as inadmissible in that it is not directed against acts that are challengeable under Article 263 TFEU.

Findings of the General Court

The General Court begins by referring to settled case-law according to which acts adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects capable of affecting the interests of an applicant, by bringing about a distinct change in his or her legal position, are regarded as actionable measures for the purposes of Article 263 TFEU.[20] By contrast, any act not producing binding legal effects, such as preparatory acts, confirmatory measures, implementing measures, mere recommendations and opinions and, in principle, internal instructions, falls outside the scope of the judicial review provided for in Article 263 TFEU.[21] Finally, in order to determine whether an act is capable of having legal effects and, therefore, whether an action for annulment under Article 263 TFEU can be brought against it, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which that act was adopted and the powers of the EU institution which adopted it.[22]

In the first place, examining whether the refusal of the former President of the Parliament to recognise the applicants' status as Members of the European Parliament, contained in the letter of 27 June 2019, is a challengeable act, the General Court finds that that refusal is not an act producing

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20 Judgments of 11 November 1981, IBM v Commission (60/81, paragraph 9), and of 26 January 2010, Internationaler Hilfsfonds v Commission (C-362/08 P, paragraph 51).

21 See judgment of 12 September 2006, Reynolds Tobacco and Others v Commission (C-131/03 P, paragraph 55 and the case-law cited), and order of 14 May 2012, Sepracor Pharmaceuticals (Ireland) v Commission (C-477/11 P, paragraph 52 and the case-law cited); see also, to that effect, judgment of 23 November 1995, Nutral v Commission (C-476/93 P, paragraph 30).

22 See judgment of 20 February 2018, Belgium v Commission (C-16/16 P, paragraph 32 and the case-law cited).

binding legal effects capable of affecting the applicants' interests within the meaning of the settled case-law of the Court of Justice.[23] The action for annulment of that refusal is, therefore, inadmissible.

First, the General Court states that it is apparent from the wording of the letter of 27 June 2019 that the former President of the Parliament merely took note of the applicants' legal situation which had been officially notified to him by the Spanish authorities by way of their communications of 17 and 20 June 2019. Furthermore, that letter expressly indicated that the position expressed by the former President of the Parliament could have evolved on the basis of further information received from the Spanish authorities. Therefore, according to the General Court, that letter expressly demonstrated that the position of the former President of the Parliament in that letter was neither a decision nor definitive.

Second, the General Court examines whether the refusal of the former President of the Parliament to recognise the applicants' status as Members of the European Parliament was the cause of the legal effects alleged by them, including the fact that they could not take office, exercise their mandate and sit in Parliament. To that end, the General Court assesses whether the former President of the Parliament had the power to call into question the communication of 17 June 2019, by which the Spanish authorities officially notified him of the list of the candidates elected at the elections of 26 May 2019, which did not mention the applicants' names even though their names featured in the official declaration of 13 June 2019.

In that regard, the General Court states that, as regards the election of Members of the European Parliament, the Electoral Act establishes a sharing of power between the Parliament and the Member States. First, subject to the provisions of the Electoral Act, the electoral procedure is governed in each Member State by its national provisions.[24] Second, after referring to the wording of Article 12 of the Electoral Act,[25] the General Court states that that article expressly excludes the Parliament's power to rule on disputes arising out of national law, even where the Electoral Act refers to that law, such as the requirement laid down in Article 224(2) of the Spanish Electoral Law. It follows that, in order to verify the credentials of its Members, the Parliament must rely on the list of elected candidates officially communicated by the national authorities, which, in theory, is established in the light of the officially declared results and after any disputes based on the application of national law have been dealt with by those authorities. The former President of the Parliament did not therefore have the power to review the validity of the exclusion of certain elected candidates from the list which was officially communicated by the Spanish authorities on 17 June 2019, since that list reflected the official results of the elections of 26 May 2019 as established, where necessary, after any disputes raised on the basis of national law had been dealt with.

In view of the foregoing, the General Court concludes that the fact that the applicants could not take office, exercise their mandate and sit in Parliament is not a result of the refusal of the former President of the Parliament to recognise their status as Members of the European Parliament, contained in the letter of 27 June 2019, but is a result of the application of Spanish law, as reflected in the communications of the Central Electoral Commission of 17 and 20 June 2019, in respect of which the former President of the Parliament and, more generally, the Parliament did not have any discretion.

In the second place, examining whether the Instruction of 29 May 2019 is a challengeable act, the General Court finds that, in view of its content, its provisional nature and the context in which it was adopted, that instruction did not produce binding legal effects capable of affecting the applicants'

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23 See above, footnote 20

24 Pursuant to the first paragraph of Article 8 of the Electoral Act.

25 See above, footnote 16.

interests, within the meaning of the settled case- law of the Court of Justice.[26] The action for annulment of that instruction is, therefore, inadmissible.

According to the General Court, that instruction did not prevent the applicants from carrying out the administrative steps necessary for them to take office and exercise their mandate and, therefore, did not result in the applicants being unable to exercise the rights associated with their status as Members of the European Parliament from the opening of the first session following the elections, that is to say, from 2 July 2019.

III. LEGAL REPRESENTATION BEFORE THE EU COURTS

Judgment of the Court (Second Chamber) of 14 July 2022, Universität Bremen v REA, C-110/21

Link to the full text of the judgment

Appeal – Action for annulment – Article 19 of the Statute of the Court of Justice of the European Union – Representation of non-privileged parties in a direct action before the Courts of the European Union – University teacher – University teacher teaching at the university represented in that action and performing duties as coordinator and head of the project that is the subject matter of the dispute – Condition of independence – Existence of a direct and personal interest in the outcome of the dispute

The University of Bremen was appointed coordinator of a research consortium comprising several European universities, carrying out interdisciplinary comparative law research in the field of tenancy law and housing policy throughout the European Union.

On 17 March 2019, following a call for proposals, the University of Bremen submitted a project proposal to the European Research Executive Agency (REA). That proposal obtained a score that put it in 10th place out of all applications submitted. By decision of 16 July 2019, [27] the REA rejected that proposal since, due to budgetary constraints, it could select only the projects ranked in the first three places. On 25 September 2019, the University of Bremen brought an action seeking annulment of that decision.

By order of 16 December 2020, [28] the General Court dismissed that action as manifestly inadmissible [29] on the ground that the professor representing the university concerned was not a third party in relation to that university and that, consequently, he did not satisfy the condition of independence laid down in the Statute of the Court of Justice. [30]

Ruling on the appeal brought by the University of Bremen, the Court of Justice sets aside that order of the General Court on the ground that the General Court erred in concluding that the action was manifestly inadmissible. In that context, it provides clarification concerning the condition of

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26 See above, footnote 20

27 Decision Ares (2019) 4590599 of the REA of 16 July 2019.

28 Order of 16 December 2020, *Universität Bremen* v *REA* (T-660/19, not published, EU:T:2020:633).

29 Within the meaning of Article 126 of the Rules of Procedure of the General Court.

30 See Article 19 of the Statute of the Court of Justice of the European Union ('the Statute of the Court of Justice').

independence imposed on the representatives of non-privileged parties [31] in a direct action before the Courts of the European Union.

Findings of the Court

The Court of Justice points out, first of all, that, in applying the condition of independence imposed by EU law on the representatives of non-privileged parties, the Courts of the European Union carry out a restricted review which limits findings of inadmissibility in respect of actions to situations in which it is quite obvious that the representative concerned is not in a position to carry out the task of defending his or her client while acting in that client's interests to the greatest possible extent, with the result that that representative must be removed in the interests of the client.

Next, the Court examines whether the condition of independence developed in the case-law with regard to lawyers applies also to university teachers authorised to represent a party in legal proceedings.

In that regard, it finds that the two professions are not comparable as regards the description of their tasks, since a lawyer is required to protect and defend his or her client's interests, whereas a university teacher's role is to teach and carry out research, in full independence having regard to the academic freedom governing that profession. However, where a university teacher represents a party before the Courts of the European Union, he or she is no longer acting as a teacher and researcher but carries out the same task as that which is the duty of a lawyer, namely representing non-privileged parties. Furthermore, university teachers accorded a right of audience under the law of their Member State have the same rights as are accorded to lawyers by the Statute of the Court of Justice. [32]

It follows, according to the Court, that, in accordance with the objective of the task of representation, which is above all to protect and defend the principal's interests to the greatest possible extent, university teachers must meet the same criteria of independence as those applied to lawyers. Those criteria are determined, negatively, by the absence of an employment relationship between the representative and his or her client, and positively, by reference to ethical obligations entailing, inter alia, the absence of a connection which has a manifestly detrimental effect on the capacity of the lawyer to carry out the task of defending his or her client while acting in that client's interests to the greatest possible extent, in line with the law and professional rules.

As regards the issue of the absence of an employment relationship between the representative and his or her client, the Court finds that, in the present case, the university professor concerned is linked to the university which he represents by virtue of a public-law statutory relationship. That status confers on him, according to the conditions and rules of national law, independence in his capacity not only as a teacher and researcher, but also as a representative of non-privileged parties before the Courts of the European Union. Since legal representation is not one of the tasks which that professor is called upon to perform within the university as a teacher or researcher, that representation is in no way connected to his academic duties and is therefore performed outside any relationship of subordination with that university, even where he is called upon to represent that university.

Furthermore, the Court finds that, in the light of its case-law, [33] the existence of a public-law statutory relationship between a university teacher and the university which he or she represents is insufficient for a finding that that university teacher is in a situation preventing him or her from defending that university's interests.

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31 The privileged parties are the parties referred to in the first and second paragraphs of Article 19 of the Statute of the Court of Justice, namely the Member States, the institutions of the European Union, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and the EFTA Surveillance Authority referred to in that Agreement.

32 Third paragraph of Article 19 of the Statute of the Court of Justice.

33 Judgment of 4 February 2020, *Uniwersytet Wrocławski and Poland* v *REA* (C-515/17 P and C-561/17 P, EU:C:2020:73, paragraphs 66 and 67).

Lastly, the Court adds that, given that the Statute of the Court of Justice confers on university teachers the same rights as are accorded to lawyers, [34] a university teacher accorded a right of audience under national law is presumed to satisfy, in principle, the condition of independence, even where that university teacher represents the university where he or she pursues his or her academic activities.

As regards the absence of a connection which has a detrimental effect on the representative's capacity to carry out the task of defending his or her client, the Court of Justice rules that the General Court erred in finding that, since the representative of the university concerned was coordinator and head of the project and had been entrusted with 'essential tasks and duties' in the context of that project, his personal connection with the subject matter of the dispute compromised his capacity to provide the legal assistance needed by that university.

According to the Court of Justice, the duties performed by the representative concerned in the context of the project that is the subject matter of the dispute indeed meant that he shared common interests with the University of Bremen. Nevertheless, such interests cannot suffice to establish that that representative was not capable of duly carrying out the task of representation with which he was entrusted.

Since, moreover, no evidence has been put forward such as to indicate that those interests precluded legal representation of the University of Bremen by that representative, the General Court exceeded the limits of its review as set out in the case-law of the Court of Justice.

In those circumstances, the Court of Justice rules that the General Court erred in concluding that the action was inadmissible on the ground that the University of Bremen was not duly represented by the university professor concerned.

IV. CONTRACTUAL DISPUTES

Judgment of the General Court (Seventh Chamber, Extended Composition) of 13 July 2022, JF v EUCAP Somalia, T-194/20

Link to the full text of the judgment

Arbitration clause – International contract staff of EUCAP Somalia – Common Foreign and Security Policy mission – Non-renewal of employment contract following the United Kingdom's withdrawal from the European Union – Right to be heard – Equal treatment – Non-discrimination on grounds of nationality – Transition period provided for in the Agreement on the withdrawal of the United Kingdom from the European Union – Action for annulment – Action for damages – Acts inseparable from the contract – Inadmissibility

The applicant, JF, a United Kingdom national, signed several successive fixed-term employment contracts with EUCAP Somalia, an EU mission to assist Somalia in building its maritime security capacity, [35] under which he was recruited as an international contract staff member.

His last contract of employment, which ended on 31 January 2020, provided that it could be terminated early if the United Kingdom ceased to be a member of the European Union.

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34 Within the meaning of the third and seventh paragraphs of Article 19 of the Statute of the Court of Justice.

35 EUCAP Somalia was established by Council Decision 2012/389/CFSP of 16 July 2012 on the European Union capacity building mission in Somalia (EUCAP Somalia) (OJ 2012 L 187, p. 40), as amended by Council Decision (CFSP) 2018/1942 of 10 December 2018 (OJ 2018 L 314, p. 56).

By a note dated 18 January 2020, the Head of Mission of EUCAP Somalia informed the international contract staff who were nationals of the United Kingdom in that mission, including the applicant, that, owing to the probable withdrawal of the United Kingdom from the Union on 31 January 2020, their employment contracts would end on that date. Subsequently, by letter dated 29 January 2020, he confirmed to JF that his contract would not be renewed beyond its term and would end on 31 January 2020 due to the withdrawal of the United Kingdom from the Union.

By his action, JF sought, principally, on the basis of Articles 263 and 268 TFEU, that the note of 18 January 2020 and the letter of 29 January 2020 (together, 'the contested acts') be annulled and that the damage which he allegedly suffered as a result of those acts by virtue of EUCAP Somalia's non-contractual liability be made good, and, in the alternative, on the basis of Article 272 TFEU, that the disputed acts be declared unlawful and that the same losses by virtue of the contractual liability of that mission also be made good.

By its judgment, delivered in an enlarged chamber, the General Court dismisses the action brought by JF in its entirety. On that occasion, it supplements the case-law by ruling, in particular, on the admissibility and nature of the action and on the possibility, under certain conditions, of not determining the applicable national law to resolve a dispute in contractual matters. It also examines the pleas alleging infringements of Union law in the context of such a contractual dispute and clarifies the application of the principle of non-discrimination on grounds of nationality in this case.

The Court's assessment

As regards the admissibility of the action, first, the Court rejects as inadmissible the application for annulment of the contested acts based on Article 263 TFEU. In that regard, it observes in particular that the conditions of employment and the rights and obligations of EUCAP Somalia's international staff are defined by contract, so that the employment relationship between the applicant and EUCAP Somalia was contractual in nature. The Court further finds that, by the contested acts, the Head of Mission of EUCAP Somalia confirmed to the applicant the date of termination of his contract as provided for therein, following the withdrawal of the United Kingdom from the Union, which was a contractual cause for termination of the contract. It concludes that those acts are not intended to produce binding legal effects outside the contractual relationship between the applicant and EUCAP Somalia and involving the exercise by the latter of prerogatives of public authority. Thus, those acts are contractual in nature and their annulment cannot be sought on the basis of Article 263 TFEU.

Second, the Court dismisses as inadmissible the claim for damages for the non-contractual liability of the Union for the actions of EUCAP Somalia, based on Article 268 TFEU. A genuine contractual context surrounds that claim, so that it falls within the contractual liability of the Union.

Third, the Court finds that the action is admissible in so far as it is based, in the alternative, on Article 272 TFEU. It states that, in support of his claims under that provision, the applicant relies on rules which the Union administration is required to observe in a contractual context, since he puts forward pleas alleging, in particular, infringements of the right to be heard and of the principles of equal treatment and non-discrimination, [36] as well as a plea alleging infringement of the principle of the protection of legitimate expectations, which constitutes a general principle of Union law. Consequently, unless the principle of effective judicial protection is disregarded, the applicant cannot be prevented from relying on infringement of those principles in support of his claims, on the ground that he can validly invoke only a failure to perform the terms of his contract or an infringement of the law applicable to it. [37]

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[36] Guaranteed respectively by Article 41(2)(a) and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

[37] Within the meaning of the judgment of 16 July 2020, *ADR Center* v *Commission* (C-584/17 P, EU:C:2020:576, paragraphs 85 to 89).

As regards the applicable law, the Court notes the principle that the Union's contractual liability is governed by the law applicable to the contract concerned. [38] However, it considers that it is not necessary to determine the national law applicable to the present dispute, which can be resolved on the basis of the contract at issue, the EUCAP Somalia standard operating procedures to which it refers and the Charter and general principles of Union law. In that context, the Court observes, in particular, that in support of his subsidiary claims, based on Article 272 TFEU, the applicant relies exclusively on pleas in law alleging infringements of Union law, in particular of the general principles of that law and of the Charter. Furthermore, it does not appear that, in order to resolve the dispute, it is necessary to apply mandatory provisions of national law.

As to the merits of the case, the Court notes, first, that as regards the breach of the right to be heard, it is not apparent from the terms of the contract at issue, nor from EUCAP Somalia's standard operating procedures, to which that contract refers, that EUCAP Somalia's Head of Mission was required to hear JF before issuing the note of 18 January 2020. Furthermore, the Court considers that EUCAP Somalia's decision not to avail itself of the possibility of renewing the applicant's contract, as is apparent from the contested acts, was not a measure taken against him which adversely affected him within the meaning of Article 41(2)(a) of the Charter. Thus, the right to be heard as guaranteed by that provision did not require EUCAP Somalia to hear the applicant prior to drafting the note of 18 January 2020. Moreover, the Court points out, in the context of an action of a contractual nature, that even supposing that the applicant had had the right to be heard prior to the drafting of that note, the procedure could not have led to a different result if he had been able to exercise that right.

Second, as regards alleged discrimination on grounds of nationality, the Court points out that the applicant, as a national of a Member State which has initiated the procedure for withdrawal from the Union, was not objectively in a situation comparable to that of international contract staff who are nationals of another Member State within EUCAP Somalia, so that the head of that mission could decide not to renew his contract of employment after 31 January 2020, without that constituting discrimination on grounds of nationality.

Third and finally, as regards an alleged infringement, by the contested acts, of the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom, [39] the Court observes, in the context of an action of a contractual nature, that the provisions of the latter, which are relevant to the present case, govern the conditions in which Union law applies to the United Kingdom during the transitional period and therefore constitute substantive rules. However, since those rules do not apply to legal situations arising before the date of entry into force of that agreement and since the acts at issue predate that date, such an infringement cannot be found.

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38 Article 340, first paragraph, TFEU.

39 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), which entered into force on 1 February 2020.

V. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 1393/2007 ON THE SERVICE IN THE MEMBER STATES OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

Judgment of the Court (Fourth Chamber) of 7 July 2022, LKW WALTER Internationale Transportorganisation AG v CB and Others, C-7/21

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Service of documents – Regulation (EC) No 1393/2007 – Article 8(1) – One-week period within which the right to refuse to accept a document is to be exercised – Enforcement order made in one Member State and served in another Member State in the language of the first Member State only – Legislation of that first Member State laying down an eight-day period to lodge an objection to that order – Period for lodging an objection starting to run at the same time as the period laid down for the purpose of exercising the right to refuse to accept the document – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective remedy

In 2019, a Slovenian court served on LKW WALTER Internationale Transportorganisation AG, a company established in Austria, an order for enforcement made *in absentia*, on the basis of authentic documents, written in Slovenian. The Austrian lawyers representing that company then lodged an objection to that order. However, that objection was rejected because the eight-day period for lodging an objection starting on the day of service of the order, laid down in Slovenian law, had not been complied with.

As a result of the rejection of the objection, the company brought an action for damages against those lawyers before the Bezirksgericht Bleiburg (District Court, Bleiburg, Austria). In answer, they state that the period for lodging an objection in Slovenian law is contrary, inter alia, to Regulation No 1393/2007 on the service of documents [40] and the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). The correct application of those provisions would have therefore prevented the objection from being rejected as out of time.

In the light of those arguments, the court seised is uncertain, inter alia, about the relationship between the starting point of the eight-day period for lodging an objection, laid down in Slovenian law, and Article 8 of Regulation No 1393/2007. That provision enables the addressee of a document to be served to refuse, within one week, to accept that document where, as in the present case, it is not written in or accompanied by a translation into one of the languages which the addressee is deemed to understand.

A request having been made for a preliminary ruling, the Court of Justice rules that Article 8(1) of Regulation No 1393/2007, read in conjunction with Article 47 of the Charter, precludes legislation of the Member State of the authority which issued a document to be served, pursuant to which the starting point of the one-week period referred to in Article 8(1) of that regulation, within which the addressee of such a document may refuse to accept it on one of the grounds set out in that provision, is the same as the starting point for the period within which a remedy is to be sought against that document in that Member State.

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40 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ 2007 L 324, p. 79).

Findings of the Court

According to the Court's case-law, the right to refuse to accept a document to be served, laid down in Article 8(1) of Regulation No 1393/2007, makes it possible to protect the rights of defence of the addressee of that document, in compliance with the requirements of a fair trial, enshrined in the second paragraph of Article 47 of the Charter. It is therefore important to ensure that the addressee of a document to be served, written in a language other than that which he or she is deemed to understand, is actually in a position to exercise the right to refuse to accept that document, which forms part of the fundamental right to effective judicial protection.

In particular, the practical effect of the right to refuse to accept a document to be served requires, first, that the addressee has been informed of the existence of that right. To that end, the standard form set out in Annex II to Regulation No 1393/2007 must be used in a mandatory and systematic manner. Second, the addressee must have the whole of the one-week period, laid down in Article 8(1) of that regulation, to assess whether it is appropriate to accept or refuse to accept the document and, in the event of refusal, to return it.

Accordingly, where the document to be served is not written in or translated into one of the languages referred to in Article 8(1) of Regulation No 1393/2007, the starting point for the one-week period for exercising the right to refuse to accept the document cannot, without undermining the effectiveness of that provision, read in conjunction with Article 47 of the Charter, be the same as the starting point of the period within which a right of appeal is to be exercised in accordance with the legislation of the Member State of origin. That latter period must, in principle, start to run after the expiry of the first one-week period.

If it were otherwise, the addressee of the document may be encouraged, in order not to suffer a procedural disadvantage as a result of his or her cross-border situation, to choose the option of refusing that document. Such an incentive would run counter to the objective of Regulation No 1393/2007, which is, inter alia, to facilitate the expedited transmission of judicial and extrajudicial documents in civil and commercial matters for the purpose of service, without prejudice to compliance with the rights of defence of the addressee of those documents. Thus, to secure the effectiveness of Regulation No 1393/2007, the possibility of refusing service of documents should be confined to exceptional situations.

VI. COMPETITION: CONCENTRATIONS

Judgment of the General Court (Third Chamber, Extended Composition) of 13 July 2022, Illumina, Inc. v European Commission, T-227/21

Link to the full text of the judgment

Competition – Concentrations – Pharmaceutical industry market – Article 22 of Regulation (EC) No 139/2004 – Referral request from a competition authority not having jurisdiction under national law to examine the concentration – Commission decision to examine the concentration – Commission decisions accepting requests from other national competition authorities to join the referral request – Competence of the Commission – Time limit for submitting the referral request – Concept of 'made known' – Reasonable time – Legitimate expectations – Public statements by the Vice-President of the Commission – Legal certainty

Illumina is an American company specialising in genomic sequencing. It develops, manufactures and markets integrated systems for genetic analysis, in particular next generation genomic sequencers which are used, among other things, in the development of cancer screening tests. Grail is an American biotechnology company which relies on genomic sequencing to develop such cancer screening tests.

On 21 September 2020, those two undertakings [41] made public a proposal on the acquisition of exclusive control of Grail by Illumina. Since turnover did not exceed the relevant thresholds, the concentration at issue did not have a European dimension, within the meaning of Article 1 of the Merger Regulation, [42] and was accordingly not notified to the European Commission. Nor was it notified in the EU Member States or in States party to the Agreement on the European Economic Area, since it did not reach the relevant national thresholds either.

Under Article 22 of the Merger Regulation, a national competition authority has the option to request referral to the Commission for the examination of any concentration that does not have a European dimension, but which affects trade between Member States and threatens significantly to affect competition in the territory of the Member State concerned.

In the present case, after receiving, on 7 December 2020, a complaint concerning the concentration at issue, the Commission reached the preliminary conclusion that that concentration appeared to satisfy the necessary conditions to be the subject of a referral by a national competition authority. [43] It therefore sent a letter on 19 February 2021 to the Member States ('the invitation letter') in order, first, to inform them of that concentration and, second, to invite them to send it a referral request under Article 22 of the Merger Regulation. On 9 March 2021, the French competition authority sent it such a referral request, which the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities subsequently requested, each in its own right, to join. On 11 March 2021, the Commission informed the undertakings concerned of the referral request ('the information letter'). By decisions of 19 April 2021 ('the contested decisions'), the Commission accepted the referral request, along with the respective requests to join.

Illumina, supported by Grail, brought an action for annulment against the contested decisions and the information letter. By its judgment, delivered by a panel sitting in an extended composition following an expedited procedure, the General Court dismisses that action in its entirety. On this occasion, the General Court rules for the first time on the application of the referral mechanism laid down in Article 22 of the Merger Regulation to a transaction that did not have to be notified in the State which made the referral request but which entails the acquisition of an undertaking whose significance for competition is not reflected in its turnover. In the present case, the General Court acknowledges, in principle, that the Commission may be regarded as competent in such a situation. Moreover, the General Court gives clarification concerning the calculation of the time limit of 15 working days for Member States to submit a referral request in such a situation.

The analysis thus accepted by the General Court prefigured a new approach on the part of the Commission concerning the application of the referral mechanism laid down in Article 22 of the Merger Regulation, according to the guidelines published on 31 March 2021, [44] whose implementation opens the way for the EU merger control rules better to take into account transactions involving innovative undertakings with significant competitive potential.

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41 Together 'the undertakings concerned'.

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

43 As regards, in particular, the potential impact of the concentration at issue on competition in the internal market, the preliminary analysis carried out by the Commission led it to describe concerns as regards the fact that the transaction could allow Illumina, a company well established in Europe, to block access to Grail's competitors to the next generation sequencing systems required for the development of cancer screening tests, and, accordingly, to restrict their development in the future.

44 Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (OJ 2021 C 113, p. 1).

Findings of the General Court

First, the General Court rules on the admissibility of the action, which the Commission disputes, in the light of the nature of the contested acts.

In that regard, the General Court notes, on the one hand, that the contested decision are, as such, binding and, on the other hand,, that each of them entails a change in legal system applicable to the examination of the concentration at issue. In addition, those decisions which put an end to the specific referral procedure, definitively determined the Commission's position on that matter. By accepting the requests submitted by the national competition authorities concerned, under Article 22 of the Merger Regulation, the Commission acknowledged its own authority to examine the concentration at issue in accordance with the substantive and procedural rules laid down for that purpose by the Merger Regulation, to which, in particular, the standstill obligation referred to in Article 7 relates. In those circumstances, it is therefore necessary to find that the contested decisions constitute challengeable acts for the purposes of Article 263 TFEU.

By contrast, according to the General Court, this is not the case with regard to the information letter, which, although it also triggers the standstill obligation, is merely an intermediary stage in the referral procedure, with the result that the action is held to be inadmissible, in so far as it is directed against that information letter.

Second, as regards the substance of the case, the General Court examines, in the first place, the plea alleging lack of competence on the part of the Commission. In that regard, the General Court specifies at the outset that it is called upon, in that context, to determine whether, under Article 22 of the Merger Regulation, the Commission is competent to examine a concentration which is the subject of a referral request made by a Member State which has a national merger control system, but where that concentration does not fall within the scope of that national legislation.

In the present case, the General Court finds, first, that, when it acknowledged its own competence in such a scenario, the Commission did not rely on an incorrect interpretation of Article 22 of the Merger Regulation.

The wording of that provision, in particular the use of the expression 'any concentration', makes it clear that a Member State is entitled to refer any concentration to the Commission which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules. Furthermore, it follows from the origin of that provision that the referral mechanism it established was originally to be used in respect of Member States without their own merger control system, without limiting its applicability to that situation alone. Moreover, from the point of view of the general structure of the Merger Regulation and its objectives, the General Court emphasises that its scope and therefore the extent of the Commission's power of examination concerning mergers depend primarily on the exceeding of the turnover thresholds which define the European dimension, but also, in the alternative, on the referral mechanisms laid down, inter alia, in Article 22 of that regulation.

In those circumstances, after noting that the objective of the Merger Regulation is to permit effective control of all concentrations with significant effects on the structure of competition in the European Union, the General Court finds, lastly, that the referral mechanism at issue is a corrective mechanism forming part of that objective. It provides the flexibility necessary for the examination, at EU level, of concentrations which are likely to significantly impede effective competition in the internal market which, because the turnover thresholds have not been exceeded, would otherwise escape control under the merger control systems of both the European Union and the Member States. Consequently, the Commission regarded itself as competent to examine the concentration at issue in line with a correct interpretation of Article 22 of the Merger Regulation.

Second, the General Court considers that such an interpretation does not disregard either the principle of conferral of competences, [45] the principle of subsidiarity, [46] or the principle of proportionality. [47] Lastly, as regards the principle of legal certainty, the General Court stresses that it is only the interpretation adopted in the contested decisions which ensures the necessary legal certainty and the uniform application of Article 22 of the Merger Regulation in the European Union. The General Court thus finds that the entirety of the plea in law alleging lack of competence on the part of the Commission is unfounded.

As regards, in the second place, the plea in law alleging that the referral request was submitted out of time, the General Court finds that, according to the second subparagraph of Article 22(1) of the Merger Regulation, the referral request must be made within 15 working days of the concentrations being 'made known' to the Member State concerned, if no notification of that concentration is required.

In that regard, the General Court finds, first of all, that such 'making known' should be understood as the active transmission of information to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral have been satisfied. It follows that the invitation letter, in the present case, constitutes the 'making known' referred to. In those circumstances, it must be held that the referral request was made in due time, so that it cannot be regarded as having been submitted out of time.

That being so, in the context of the examination of the subsidiary complaints alleging infringement of the principles of legal certainty and 'good administration', the General Court stresses next that the Commission is nevertheless required to comply with a reasonable time limit in the conduct of administrative procedure, particularly, in the context of merger control, given the fundamental objectives of effectiveness and speed underlying the Merger Regulation. However, in the present case, the General Court considers that a period of 47 days between the complaint's being received and the invitation letter's being sent was unreasonable. Nevertheless, since it has not been established that the Commission's failure to comply with a reasonable time limit affected the capacity of the undertakings concerned to defend themselves effectively, it cannot justify the annulment of the contested decisions. Consequently, the General Court also rejects the second plea in law in its entirety.

In the third place, the General Court also rejects the plea alleging breach of the principles of the protection of legitimate expectations and of legal certainty. In that regard, since it considers the claims relating to the latter principle to be insufficiently substantiated, the General Court limits its examination to the complaints concerning the principle of the protection of legitimate expectations. It recalls in that regard that in order properly to rely on that principle, it is for the party concerned to establish that he or she received precise, unconditional and consistent assurances, originating from authorised, reliable sources, such as to lead him or her to entertain well-founded expectations. However, in the present case, Illumina failed to demonstrate such circumstances and cannot properly rely on the reorientation of the Commission's decision-making practice.

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45 As referred to in Article 4(1) TEU, read in conjunction with Article 5 TEU.

46 As set out in Article 5(1) and (3) TEU and implemented by Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ 2016, C 202, p. 206).

47 As set out in Article 5(1) and (4) TEU.

VII. APPROXIMATION OF LAWS

1. EUROPEAN UNION TRADEMARK

Judgment of the General Court (Tenth Chamber, Extended Composition) of 6 July 2022, Ladislav Zdút v European Union Intellectual Property Office T-250/21

Link to the full text of the judgment

EU trade mark – Invalidity proceedings – EU figurative mark NEHERA – Absolute ground for invalidity – No bad faith – Article 52(1)(b) of Regulation (EC) No 207/2009 (now Article 59(1)(b) of Regulation (EU) 2017/1001)

In 2014, Mr Ladislav Zdút, the applicant, obtained from the European Union Intellectual Property Office (EUIPO) the registration of an EU figurative mark NEHERA for goods in the textile industry.

In 2019, Ms Nehera, Mr Nehera and Ms Sehnal filed an application for a declaration of invalidity against that mark, based on the applicant's bad faith when he filed the application for registration. [48] They claimed that in Czechoslovakia in the 1930s, their grandfather, Mr Jan Nehera, had established a business marketing clothing and accessories, and had filed and used a national mark identical to the contested mark, enjoying a reputation.

That application was upheld by the Second Board of Appeal of EUIPO. That Board found that the applicant's intention was to take unfair advantage of the reputation of Mr Jan Nehera and of the former Czechoslovak trade mark and, therefore, that the applicant was acting in bad faith when he filed the application for registration of the contested mark.

The applicant brought an action before the General Court seeking the annulment of that decision of the Board of Appeal of EUIPO.

The Court annuls the contested decision and clarifies the concept of bad faith where that is based on an intention to take unfair advantage of the reputation of an earlier trade mark or of the celebrity of a person's name.

Findings of the Court

First of all, the Court notes that, in order to assess the applicant's bad faith, it is possible to take into account the extent of the reputation enjoyed by the sign at issue at the time its registration was sought, including where that sign had previously been registered or used by a third party as a trade mark. The fact that use of a sign for which registration is sought would enable the applicant to take unfair advantage of the reputation of an earlier trade mark or sign or even of the name of a famous person is such as to establish bad faith on the part of the applicant. The relevant public for the purpose of assessing the existence of the reputation and of the unfair advantage taken thereof is the average consumer of the goods for which the contested mark was registered.

Next, the Court considers that parasitic behaviour with regard to the reputation of a sign or of a name is, in principle, only possible if that sign or that name actually and currently enjoys a certain reputation or a certain celebrity. In the present case, on the date on which the application for registration of the contested mark was filed, the former Czechoslovak trade mark and Mr Jan Nehera's name were no longer either registered or protected, or used by a third party to market clothing, or even well known among the relevant public. In that context, the Court specifies that the mere fact that

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48 Within the meaning of Article 52(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p 1).

the applicant knew or ought to have known that a third party had, in the past, used a mark similar or identical to the mark applied for is not sufficient to establish the existence of bad faith on the part of that applicant.

In addition, the Court points out that the existence on the part of the relevant public of a link between the contested mark and the former sign cannot be sufficient, on its own, to support a finding that unfair advantage was taken of the reputation of the sign or of the former name. In that regard, it underlines that the applicant made his own commercial efforts in order to revive the image of the former Czechoslovak trade mark and that the mere fact of having referred to that mark and to the historic image of its creator for promotional purposes does not appear to be contrary to honest practices in industrial or commercial matters.

Furthermore, the Court recognises that it cannot be ruled out that, in certain specific circumstances, reuse by a third party of a previously renowned former mark or of the name of a previously famous person may give a false impression of continuity or of inheritance with that former mark or with that person. That could be the case, in particular, where the trade mark applicant presents itself to the relevant public as the legal or economic successor of the holder of the former mark, whereas there is no continuity or inheritance relationship between the holder of the former mark and the applicant. Such a circumstance could be taken into account in order to establish, where appropriate, bad faith on the part of the applicant. In the present case, it does not appear, according to the Court, that the applicant deliberately sought to establish a false impression of continuity or inheritance between his undertaking and that of Mr Jan Nehera.

Lastly, the Court rules on the alleged intention on the part of the applicant to defraud Mr Jan Nehera's descendants and heirs and to usurp their rights. In that regard, it notes that at the time the application for registration of the contested mark was filed, the former Czechoslovak trade mark and Mr Jan Nehera's name no longer benefited from any legal protection. Therefore, Mr Jan Nehera's descendants and heirs did not hold any right that might be susceptible to fraud or to being usurped by the applicant.

Consequently, the Court finds no bad faith on the part of the applicant and annuls the decision of the Second Board of Appeal of EUIPO.

VIII. MOTOR VEHICLES

Judgment of the Court (Grand Chamber) of 14 July 2022, GSMB Invest, C-128/20

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 3(10) – Article 5(1) and (2) – Defeat device – Motor vehicles – Diesel engines– Pollutant emissions – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition

Judgment of the Court (Grand Chamber) of 14 July 2022, Volkswagen, C-134/20

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 3(10) – Article 5(1) and (2) – Defeat device – Motor vehicles – Diesel engines– Pollutant emissions – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Article 3(2) – Device installed during the repair of a vehicle

Judgment of the Court (Grand Chamber) of 14 July 2022, Porsche Inter Auto and Volkswagen, C-145/20

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 5(2) – Defeat device – Motor vehicles – Diesel engines – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve ('EGR valve') – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition – Consumer protection – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Article 2(2)(d) – Concept of 'goods which show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods' – Vehicle covered by an EC type-approval – Article 3(6) – Concept of a 'minor lack of conformity'

The objective of ensuring a high level of environmental protection within the European Union is reflected, inter alia, by the adoption of measures to limit pollutant emissions. Accordingly, motor vehicles have been the subject of increasingly restrictive legislation, in particular with the adoption of Regulation No 715/2007 on type approval of motor vehicles. [49] That regulation aims, inter alia, to reduce significantly the nitrogen oxide (NOx) emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution.

These three cases concern the purchase of vehicles equipped with software installed in the electronic engine controller which, outside certain temperature conditions and above a certain driving altitude, reduces the effectiveness of the exhaust gas recirculation system (EGR), which results in the NOx emission limit values laid down in Regulation No 715/2007 being exceeded.

Following an update of the software installed in the electronic engine controller, the purification of exhaust gas is deactivated at an outside temperature of below 15 °C and above 33 °C, and at driving altitude above 1 000 metres ('the temperature window'). Outside that window, per 10 °C and above an altitude of 1 000 metres, per 250 metres of altitude, the rate of exhaust gas recirculation decreases in a linear way down to zero, meaning that NOx emissions increase beyond the limits of Regulation No 715/2007.

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

These three cases follow on from the judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)*('the judgment in *CLCV*'), [50] where the Court of Justice interpreted, for the first time, the concept of a 'defeat device', within the meaning of Regulation No 715/2007, [51] and determined the extent to which such a device is unlawful in the light of that regulation, [52] which provides for exceptions to the prohibition on defeat devices, which include the need to protect the engine against damage or accident and for safe operation of the vehicle.

It was in that context that the three Austrian referring courts asked the Court whether software, such as that at issue, constitutes a 'defeat device' within the meaning of Regulation No 715/2007. If so, those courts are uncertain whether that software can be authorised on the basis of the exception to the prohibition of such devices based on the need to protect the engine against damage or accident and for the safe operation of the vehicle. Lastly, if the software is not authorised, those courts want to know if its use can entail the cancellation of the sale by virtue of a minor lack of the vehicle's conformity with the contract on the basis of the directive on certain aspects of the sale of consumer goods and associated guarantees. [53]

By three judgments delivered by the Grand Chamber, the Court determines, first of all, that the software at issue reduces the effectiveness of the emission control system in normal vehicle operation and use and that it, therefore, constitutes a 'defeat device' within the meaning of Regulation No 715/2007. Next, it concludes that a defeat device which serves primarily to protect components, such as the EGR valve, the EGR cooler and the diesel particulate filter, does not fall within the exception to the prohibition on such devices if the functioning of those parts does not affect the protection of the engine. Lastly, the Court states that a vehicle equipped with such a device is not in conformity with the contract of sale, within the meaning of the directive on certain aspects of the sale of consumer goods and associated guarantees, even if it is covered by a valid EC type-approval, and that the fault affecting such a vehicle cannot be classified as 'minor', which would in principle preclude the buyer from having the contract declared void.

Findings of the Court

In the first place, in order to determine whether the software at issue constitutes a 'defeat device' within the meaning of Regulation No 715/2007, the Court interprets the concept of 'normal … operation and use' of a vehicle.

In that regard, it notes that it is apparent not only from the wording of the provision of Regulation No 715/2007, which defines such a device, [54] but also from the context of that provision, and from the objective pursued by that regulation, that that concept refers to the use of a vehicle under normal driving conditions, that is to say, not only its use under the conditions laid down for the approval test, applicable at the time of the facts in the main proceedings. That concept thus refers to the use of that vehicle under real driving conditions, such as are usually present in the territory of the European Union. The Court points out in that regard that, as it held in the judgment in *CLCV*, the use of a device that would make it possible to ensure compliance with the emission limits laid down by Regulation No 715/2007 only during the approval test phase, even though that test phase does not make it possible to reproduce the normal conditions of use of the vehicle, would run counter to the obligation

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50 Judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040).

51 Within the meaning of Article 3(10) of Regulation No 715/2007. That provision defines a 'defeat device' as being 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

52 Article 5(2)(a) of Regulation No 715/2007.

53 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12; 'the directive on certain aspects of the sale of consumer goods and associated guarantees').

54 Article 3(10) of Regulation No 715/2007.

to ensure that emissions are effectively limited under such conditions of use. The same applies to the use of a device that would make it possible to ensure such compliance only within a temperature window which, although covering the conditions in which the approval test phase takes place, does not correspond to normal driving conditions.

In those circumstances, the Court holds that software, such as that at issue, which ensures compliance with the emission limit values laid down by Regulation No 715/2007 only where the outside temperature is in the temperature window reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, within the meaning of Regulation No 715/2007. That software therefore constitutes a 'defeat device' within the meaning of that regulation. [55]

In the second place, the Court examines the question whether a device, such as that at issue, can fall within the exception to the prohibition on the use of defeat devices which relates to the need to protect the engine against damage or accident and for the safe operation of the vehicle, provided for by Regulation No 715/2007, [56] in so far as that device contributes to protecting components such as the EGR valve, the EGR exchanger and the diesel particulate filter.

In that regard, the Court points out that Regulation No 715/2007 provides for exceptions to the prohibition on the use of defeat devices, in particular where 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'. As regards, first of all, the concept of an 'engine', the Court notes that EU law [57] draws a clear distinction between, on the one hand, the engine covered by that exception and, on the other hand, the pollution control system parameters, which include the particulate filters and the EGR. Consequently, the EGR valve, the EGR exchanger and the diesel particulate filter constitute components that are distinct from the engine. As regards, next, the concepts of 'accident' and 'damage', the Court concludes that the clogging up or ageing of the engine cannot be regarded as an 'accident' or 'damage', within the meaning of Regulation No 715/2007, [58] since such occurrences are, in principle, foreseeable and inherent in the normal operation of the vehicle. According to the Court, only immediate risks of damage or accident to the engine which create a specific hazard when the vehicle is driven are, therefore, such as to justify the use of a defeat device under Regulation No 715/2007.

In view of the fact that the exception to the prohibition on the use of defeat devices must be interpreted strictly, the Court holds that the 'need' for such a device within the meaning of Regulation No 715/2007, exists only where, at the time of the EC type-approval of that device or vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine which give rise to a specific hazard when driving the vehicle.

Consequently, the Court finds that a defeat device which guarantees compliance with the emission limits laid down by Regulation No 715/2007 only where the external temperature is in the temperature window cannot fall within the exception to the prohibition on the use of such devices, laid down in that regulation, solely because that device contributes to protecting parts, such as the EGR valve, the EGR exchanger and the diesel particulate filter. The position is different, however, if it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of one of those parts, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. In any event, a defeat device which, under normal driving conditions, operates during most of the year in order to protect the engine from

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55 Article 3(10) of Regulation No 715/2007.

56 Article 5(2)(a) of Regulation No 715/2007.

57 Annex I of Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending [Regulation No 715/200] (OJ 2008 L 199, p. 1), as amended by Commission Regulation (EU) No 566/2011 of 8 June 2011 (OJ 2011 L 158, p. 1).

58 Article 5(2)(a) of Regulation No 715/2007.

damage or accident and ensure the safe operation of the vehicle could not fall within the exception provided for by Regulation No 715/2007.

Furthermore, the Court states that the fact that a defeat device, within the meaning of Regulation No 715/2007, was installed after a vehicle was put into service, in the course of a repair, [59] is irrelevant for the purposes of assessing whether the use of that device is prohibited under that regulation. [60]

In the third and last place, the Court examines the question of whether the use of prohibited software can entail the cancellation of the sale by virtue of a minor lack of the vehicle's conformity with the contract on the basis of the directive on certain aspects of the sale of consumer goods and associated guarantees.

In that regard, the Court notes, first, that vehicles falling within the scope of Directive 2007/46 [61] are to be EC type-approved and, second, that such approval may be granted only if the type of vehicle in question satisfies the provisions of Regulation No 715/2007, in particular those relating to emissions of pollutants. Furthermore, under Directive 2007/46, [62] the manufacturer in its capacity as the holder of an EC type-approval of a vehicle, is to deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type. That certificate is required for the purposes of registration and sale or entry into service of a vehicle. [63] When acquiring a vehicle model of a type that has been approved and is, consequently, accompanied by a certificate of conformity, a consumer can reasonably expect that Regulation No 715/2007 has been complied with in respect of that vehicle, even in the absence of specific contractual clauses.

Consequently, the Court finds that a motor vehicle falling within the scope of Regulation No 715/2007 does not show the 'quality which is normal in goods of the same type and which the consumer can reasonably expect', within the meaning of the directive on certain aspects of the sale of consumer goods and associated guarantees, [64] where, although it is covered by a valid EC type-approval and may, consequently, be used on the road, that vehicle is fitted with a defeat device, the use of which is prohibited under Regulation No 715/2007. [65]

Lastly, the Court states that a lack of conformity consisting in the presence, in the vehicle concerned, of a defeat device the use of which is prohibited under Regulation No 715/2007 is not to be classified as 'minor' [66] even if the consumer would still have purchased that vehicle if he or she had been aware of the existence and operation of that device.

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59 Within the meaning of Article 3(2) of Directive 1999/44.

60 Article 5(2) of Regulation No 715/2007.

61 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 1229/2012 of 10 December 2012 (OJ 2012 L 353, p. 1).

62 Pursuant to Article 18(1) of Directive 2007/46.

63 In accordance with Article 26(1) of Directive 2007/46.

64 Article 2(2)(d) of Directive 1999/44.

65 Article 5(2) of Regulation No 715/2007.

66 Pursuant to Article 3(6) of Directive 1999/44.

IX. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Tenth Chamber, Extended Composition) of 6 July 2022 (Extracts), ABLV Bank AS v Single Resolution Board, T-280/18

Link to the judgment as published in extract form

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Decision of the SRB not to adopt a resolution scheme – Action for annulment – Act adversely affecting a person – Interest in bringing proceedings – Standing to bring proceedings – Inadmissibility in part – Article 18 of Regulation (EU) No 806/2014 – Power of the author of the measure – Right to be heard – Obligation to state reasons – Proportionality – Equal treatment

The applicant, ABLV Bank AS, is a Latvian credit institution and the parent company of the ABLV group. ABLV Bank Luxembourg SA is a credit institution established in Luxembourg and is one of the subsidiaries of the ABLV group; the applicant is the sole shareholder of ABLV Luxembourg. Those two institutions were categorised as 'significant entities' and as such were subject to supervision by the European Central Bank (ECB) under the Single Supervisory Mechanism (SSM). [67]

On 13 February 2018, the United States Department of the Treasury announced a proposed measure to designate the applicant as an institution of primary money laundering concern. Following that announcement, the applicant was no longer able to make payments in dollars and experienced a wave of deposit withdrawals. The ECB therefore instructed the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia) to impose a moratorium to allow the applicant to stabilise its situation. On 23 February 2018, the ECB concluded that the applicant was failing or likely to fail. By two decisions of 23 February 2018, concerning the applicant and ABLV Luxembourg, respectively, the Single Resolution Board (SRB), reproducing the ECB's conclusion, nevertheless took the view that resolution action in respect of them was not necessary in the public interest. [68]

The General Court, hearing an action for annulment of those two decisions, rules for the first time on a decision of the SRB not to adopt a resolution scheme and concludes that the action should be dismissed in its entirety.

Findings of the Court

At the outset, the Court examines the pleas of inadmissibility raised by the SRB.

First, in the light of the case-law of the Court of Justice, [69] it concludes that the decision not to adopt resolution tools in respect of a credit institution is an act open to challenge. Since some of those tools may enable the applicant to continue part of its activities, such a decision produces binding legal

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

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

69 Judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369).

effects such as to affect its interests. That classification, moreover, enables the right to effective judicial protection to be observed.

Second, the General Court dismisses the action against the decision relating to ABLV Luxembourg as inadmissible on the ground that the applicant does not have standing to bring proceedings. That decision directly affects only the legal situation of its addressee, ABLV Luxembourg. The adverse effect of that decision on the applicant is economic and not legal in nature, since the right of shareholders to receive dividends and to participate in the management of that company remains unchanged.

As regards the decision relating to the applicant, the Court concludes that the applicant has standing to bring proceedings against that decision, since the latter directly affects its position. The SRB's conclusion, based on the ECB's assessment that the applicant is failing or is likely to fail ('the FOLTF assessment'), constitutes the necessary justification for taking a decision not to adopt resolution action. Moreover, that decision does not leave any discretion to the national regulatory authority responsible for implementing it, that implementation being purely automatic and resulting from EU rules alone.

Third, the Court finds that the applicant has an interest in bringing proceedings against that decision. If it were to conclude that the ECB's FOLTF assessment, which was reproduced by the SRB, was incorrect, the procedure which led to the adoption of such a decision should not have been triggered in respect of the applicant. Furthermore, with a view to carrying out its banking activities, the entity concerned has a legitimate interest in not being subject to such an assessment.

The Court then moves on to reject all of the substantive pleas raised by the applicant.

In particular, first, the Court notes that the applicant is incorrect to criticise the SRB for having relied solely on the ECB's FOLTF assessment, without carrying out its own examination. In that regard, it notes that it is true that the SRB is not bound by that ECB assessment and that there is nothing to indicate that it would have no power to make an assessment in that regard. However, the SRM Regulation [70] gives the ECB a primary – albeit not exclusive – role, since it is the ECB that is best placed to carry out such an assessment given its expertise as a supervisory authority.

Second, the Court notes that the assessments made by the ECB, which the SRB endorsed, namely those relating, on the one hand, to the applicant's counterbalancing capacity and, on the other hand, to the FOLTF assessment, were not vitiated by a manifest error. The Court found that, in circumstances such as those of the present case characterised by huge withdrawals of deposits following a breakdown in confidence between the credit institution and its customers, the ECB could reasonably attach less importance to the applicant's cover ratio and capitalisation and rely above all on the immediate availability of liquidity. Accordingly, it concludes that, in the light of the discretion enjoyed by the SRB, it did not make a manifest error of assessment in finding that the applicant was failing or was likely to fail.

Third, the Court concludes that the SRB did not err in law in relying on the ECB's FOLTF assessment in order to verify that there was no reasonable prospect that other alternative measures could prevent its failure within a reasonable timeframe. Although the examination of such measures is separate from that assessment, it finds that, in the present case, the ECB integrated that examination into that assessment.

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70 Art. 18(1), second subparagraph, of the SRM Regulation.

Fourth, the Court finds that the applicant's right to be heard was not infringed. It holds that, in the light of the nature of the complex administrative procedure at issue, conducted by the ECB and the SRB jointly and successively, there is no requirement that the entity concerned be heard at each stage of the procedure by each of those two bodies separately. In the present case, the applicant was heard by the ECB on several occasions and was therefore given an opportunity to express its views, with the result that the SRB was fully aware of its arguments when it adopted the decision, in which it endorsed the ECB's assessments.

X. SOCIAL POLICY: COORDINATION OF SOCIAL SECURITY SYSTEMS

Judgment of the Court (Second Chamber) of 7 July 2022, CC v Pensionsversicherungsanstalt, C-576/20

Link to the full text of the judgment

Reference for a preliminary ruling – Social security for migrant workers – Regulation (EC) No 987/2009 – Article 44(2) – Scope – Old-age pension – Calculation – Taking into account of child-raising periods completed in other Member States – Article 21 TFEU – Free movement of citizens

In November 1987, after working as a self-employed person in Austria, CC moved to Belgium where she gave birth to two children, on 5 December 1987 and 23 February 1990, respectively. After the birth of her first child, she devoted her time to raising her children, without taking up employment, without accruing any periods of insurance and without receiving benefits for raising her children. This was also the position in Hungary, where she stayed in December 1991.

On her return to Austria in 1993, CC continued to raise her children for 13 months, while being compulsorily affiliated to, and paying contributions into, the Austrian social security scheme. She then worked and paid contributions in that Member State until she retired.

CC applied for an old-age pension, which was granted to her by the Austrian Pension Insurance Institution by decision of 29 December 2017. The child-raising periods completed in Austria were treated as periods of insurance and taken into account for the purpose of calculating the amount of her pension. The child-raising periods completed in Belgium and Hungary, however, were not taken into account.

CC challenged that decision, claiming that child-raising periods completed in other Member States should be treated as periods of insurance on the basis of Article 21 TFEU, which establishes the right to freedom of movement of Union citizens, since she worked and was affiliated to the Austrian social security scheme before and after those periods.

After her appeal was dismissed, CC brought an appeal on a point of law before the Oberster Gerichtshof (Supreme Court, Austria). Uncertain as to the taking into account of child-raising periods completed in other Member States for the purpose of calculating an old-age pension, that court asked the Court of Justice to interpret a provision of secondary EU law, [71] applicable *ratione temporis* to the present case. In the referring court's view, it is not inconceivable that that provision sets out exclusively the conditions for taking such periods into account, and CC does not fulfil them: on the date on which the first child-raising period began, she was not pursuing any activity as an employed or self-employed person in Austria.

In its judgment, the Court does not accept that that provision is exclusive as regards the taking into account of child-raising periods completed by the same person in different Member States and confirms that those periods are to be taken into account, in the present case, under Article 21 TFEU.

Findings of the Court

In the first place, the Court finds that, in the light of its wording, its context and the objectives pursued by the legislation of which it forms part, Article 44 of Regulation No 987/2009 must be interpreted as not governing exclusively the taking into account of child-raising periods completed by the same person in different Member States.

As regards its wording, the Court observes that that provision does not indicate that it governs exclusively the taking into account of such periods and that while the provision constitutes a codification of the Court's case-law in this area, [72] on the date of its entry into force, the judgment in *Reichel-Albert* [73] had not yet been delivered, therefore the lessons arising from that judgment could not be taken into account when Regulation No 987/2009 was adopted with a view to their possible codification.

As regards the context of Article 44 of Regulation No 987/2009, the Court, referring to the title and chapter of that regulation to which Article 44 belongs, states that that provision establishes an additional rule that makes it possible to increase the likelihood of the persons concerned having their child-raising periods taken fully into account and to thus avoid, as far as possible, such periods not being taken into account.

Concerning the objective of Regulation No 987/2009, the interpretation according to which Article 44 of that regulation governs exclusively the taking into account of child-raising periods completed in different Member States would amount to allowing the Member State responsible for payment of a person's old-age pension, within which Member State that person worked and paid contributions

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71 Namely, Article 44(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).
Article 44, headed 'Taking into account of child raising-periods', provides in paragraph 2 thereof that where, under the legislation of the Member State which is competent under Title II of Regulation No 883/2004, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of Regulation No 883/2004, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, is to remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.

72 By judgments of 23 November 2000, *Elsen* (C-135/99, EU:C:2000:647), and of 7 February 2002, *Kauer* (C-28/00, EU:C:2002:82), the Court established the 'close link' or 'sufficiently close link' test between the periods of insurance completed as a result of the pursuit of an occupational activity in the Member State in which the person concerned seeks an old-age pension and the child-raising periods completed by that person in another Member State. The Court held that the fact that persons who had worked exclusively in the Member State responsible for payment of their old-age pension pursued, at the time of the birth of their child, an activity as an employed or self-employed person in the territory of that Member State made it possible to establish the existence of such a close or sufficiently close link and that, accordingly, the legislation of that Member State was applicable as regards the taking into account of child-raising periods completed in another Member State for the purpose of granting such a pension.

73 In the judgment of 19 July 2012, *Reichel-Albert* (C-522/10, EU:C:2012:475), the Court held that Article 21 TFEU must be interpreted as requiring the competent institution of a first Member State to take into account, for the purpose of granting an old-age pension, the child-raising periods completed in a second Member State as though those periods had been completed on its national territory by a person who pursued occupational activities only in the first Member State and who, at the time of the birth of his or her child, had temporarily stopped working and had, solely on family-related grounds, established his or her place of residence in the territory of the second Member State.

exclusively, both before and after the transfer of his or her place of residence to another Member State where he or she raised his or her children, to refuse to take into account child-raising periods completed by that person in another Member State and, consequently, placing that person at a disadvantage, solely by reason of having exercised his or her right to freedom of movement. Accordingly, such an interpretation would run counter to the objectives pursued by that regulation, in particular the objective of ensuring observance of the principle of freedom of movement, enshrined in Article 21 TFEU, and could therefore jeopardise the effectiveness of Article 44 of that regulation.

In the second place, the Court holds that, in order to ensure observance of that principle, the lessons from the judgment in *Reichel-Albert* are applicable to a situation such as that at issue in the main proceedings in which the person concerned does not fulfil the condition of pursuing an activity as an employed or self-employed person imposed by that provision in order, for the purpose of granting an old-age pension, to have taken into account, by the Member State responsible for payment of that pension, child-raising periods which that person has completed in other Member States. Accordingly, that Member State is required to take those periods into account pursuant to Article 21 TFEU where that person has worked and paid contributions exclusively in that Member State, both before and after the transfer of his or her place of residence to the other Member State in which he or she completed those periods.

Thus, the Court finds that, as in the situation at issue in the judgment in *Reichel-Albert*, there is a sufficiently close link between the child-raising periods completed by CC abroad and the periods of insurance completed as a result of the pursuit of an occupational activity in Austria. Therefore, the legislation of that Member State must be applied for the purpose of taking into account and crediting those periods, with a view to granting an old-age pension by that Member State.

If CC had not left Austria, her child-raising periods would have been taken into account for the purpose of calculating her Austrian old-age pension. Therefore, like the person concerned in the case which gave rise to the judgment in *Reichel-Albert*, CC is disadvantaged solely on the ground that she exercised her right to freedom of movement, which is contrary to Article 21 TFEU.

XI. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (First Chamber) of 6 July 2022 (Extracts), Zhejiang Hangtong Machinery Manufacture Co. Ltd and Ningbo Hi-Tech Zone Tongcheng Auto Parts Co. Ltd v European Commission, T-278/20

Link to the judgment as published in extract form

Dumping – Imports of steel road wheels originating in China – Imposition of a definitive anti-dumping duty and definitive collection of the provisional duty – Article 17(4), Articles 18 and 20 of Regulation (EU) 2016/1036 – Lack of cooperation – Insufficient information provided to the Commission

Following a complaint lodged by the Association of European Wheel Manufacturers (EUWA), the European Commission adopted Implementing Regulation 2020/353 [74] imposing a definitive anti-dumping duty on imports of steel road wheels originating in the People's Republic of China ('the goods at issue').

The applicants, Zhejiang Hangtong Machinery Manufacture Co. Ltd and Ningbo Hi-Tech Zone Tongcheng Auto Parts Co. Ltd, are two companies established in China which produce and export the goods at issue; they were included in the sample of exporting producers used by the Commission during the anti-dumping investigation leading to the adoption of the contested regulation. In the course of that investigation, however, the Commission found that the applicants had submitted non-verifiable data on the export price. In accordance with Article 18 of the basic anti-dumping regulation, [75] which sets out the consequences of non-cooperation by the interested parties in the anti-dumping investigation, the Commission decided not to take those data into account and to calculate the dumping margin in respect of the applicants on the basis of the facts available.

The applicants brought an action before the Court for annulment of the contested regulation, in particular on the ground of infringement of Article 18 of the basic anti-dumping regulation. In dismissing that action, the General Court clarifies the application of that provision where a party subject to the anti-dumping investigation provides non-verifiable accounting data which do not enable reasonably correct findings to be made.

Findings of the Court

According to the Court, the objective of Article 18 of the basic anti-dumping regulation is to enable the Commission to continue with the investigation, even though the interested parties refuse to cooperate or do not cooperate in a satisfactory manner. Paragraph 1 of that provision allows the Commission to use the facts available in order to calculate the dumping margin if the requested information is not finally obtained.

In order to be regarded as cooperating under Article 18 of the basic anti-dumping regulation, the parties must provide the Commission with information enabling the Commission to reach the appropriate conclusions in the course of its investigation. In that regard, the degree of effort displayed by an interested party in submitting certain information does not necessarily reflect the substantive quality of the information submitted, and, in any case, is not the only determinant thereof.

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74 Commission Implementing Regulation (EU) 2020/353 of 3 March 2020 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of steel road wheels originating in the People's Republic of China (OJ 2020 L 65, p. 9; 'the contested regulation').

75 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic anti-dumping regulation').

That assessment is backed up by Article 18(3) of the basic anti-dumping regulation, according to which, where the information provided is not 'ideal in all respects' it should nevertheless not be disregarded, provided that it is not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability. Since those conditions are cumulative, failure to satisfy only one of them precludes the application of that provision, and therefore the taking into account of the information in question.

In the present case, as regards the determination of the export price of the goods at issue, the Court finds, first of all, that the data communicated to the Commission by the applicants were not reliable. It goes on to observe that, in so far as the inadequacies of those data made it excessively difficult for the Commission to reach a reasonably accurate finding, the Commission was not required to take them into consideration, under Article 18(3) of the basic anti-dumping regulation, in order to establish an export price with regard to the applicants.

In that context, the Court also points out that, irrespective of whether the applicants had acted to the best of their ability, the main difficulty encountered by the Commission during the investigation was due to the absence of a complete and verifiable set of data on the applicants' export transactions, including, in particular, as regards the goods exported, the volumes and the values. In view of the impossibility of carrying out a correct and independent review of those data, the Commission did not err in deciding, in accordance with Article 18(1) of the basic anti-dumping regulation, to reject them in their entirety and to calculate the dumping margin in respect of the applicants on the basis of the facts available.

Lastly, the Court rejects the complaint that the Commission failed to calculate the normal value of the goods at issue even though the applicants had provided reliable data in that regard. Since no dumping margin could be established with regard to the applicants in the absence of an export price relating to them, any determination of the normal value of the goods at issue would have been superfluous. In that context, the Court rejects the applicants' argument that it would have been possible to establish their normal value in order to compare it to the constructed export price for other producers, observing that the application of such a method, in the absence of any certainty as to the identity and quantity of the type of goods exported, would inevitably have had the effect of associating values which did not correspond and, consequently, were asymmetrical, as a result of which, ultimately, the findings relating to the dumping margin would not have been reasonably correct.

The Court concludes from this that, in view of the fact that it is impossible to determine the export price on the basis of the data provided by the applicants and the lack of any purpose in establishing a normal value, the Commission did not infringe Article 18 of the basic anti-dumping regulation by using the facts available in order to determine the dumping margin with regard to the applicants.

XII. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: GRANT AGREEMENT

Judgment of the General Court (Ninth Chamber) of 13 July 2022 (Extracts), VeriGraft AB v European Innovation Council and SMEs Executive Agency, T-457/20

Link to the judgment as published in extract form

Arbitration clause – 'Horizon 2020 – Framework Programme for Research and Innovation' (2014-2020) – Grant Agreement 'Personalised Tissue-Engineered Veins as the first Cure for Patients with Chronic Venous Insufficiency – P-TEV' – Unforeseen subcontracting costs – Simplified approval procedure – Subcontracting mentioned in the periodic technical reports – Approved periodic technical reports – Eligible costs

The applicant, VeriGraft AB, is a Swedish biotechnology company specialising in the development of personalised human tissue-engineered transplants for use in regenerative medicine.

In 2017, VeriGraft and the European Union, represented by the Executive Agency for Small and Medium-sized Enterprises (EASME), concluded a Grant Agreement [76] by which VeriGraft was awarded a grant for the project 'Personalised Tissue Engineered Veins as the first Cure for Patients with Chronic Venous Insufficiency – P-TEV'. That agreement provided that the grant would reimburse 100% of the eligible costs.

Under that agreement, VeriGraft was required periodically to submit to EASME technical and financial reports. The action was divided into a first reporting period ('RP1') and a second reporting period ('RP2').

VeriGraft submitted to EASME the technical and financial reports for the P-TEV project covering RP1 and RP2. EASME informed VeriGraft that, on the basis of the reports drafted by external experts concerning those periods, EASME considered the implementation of that project to be satisfactory. However, as it took the view subsequently that certain subcontracting costs were not provided for in the Grant Agreement and were therefore ineligible, EASME informed VeriGraft that they would be recovered. It provided for that recovery to be carried out by relying, first, on the contribution of VeriGraft to the guarantee fund and, second, on a debit note.

By its action, VeriGraft claims that the subcontracting costs rejected by EASME should be regarded as eligible under the Grant Agreement and that the debit note and the recovery of a corresponding sum from the guarantee fund should be regarded as unfounded.

The General Court upholds the action brought by VeriGraft in its entirety. In its judgment, it examines the novel question of whether the European Union, represented initially by EASME, now Eismea, [77] may reject as ineligible costs linked to subcontracting contracts on the ground that they are unforeseen, where the use of those contracts had not been mentioned in the description of the project annexed to the Grant Agreement, but was justified in the periodic technical reports approved by EASME, in accordance with the accelerated approval procedure provided for in that agreement.

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76 Under the instrument to support innovation in small and medium-sized enterprises (SMEs) referred to in Article 22(2) of Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ 2013 L 347, p. 104) and defined in Council Decision 2013/743/EU of 3 December 2013 establishing the specific programme implementing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decisions 2006/971/EC, 2006/972/EC, 2006/973/EC, 2006/974/EC and 2006/975/EC (OJ 2013 L 347, p. 965).

77 As of 1 April 2021.

Findings of the Court

First, the Court notes that the succinct statement of reasons provided by EASME was sufficient to enable VeriGraft to understand which costs had been rejected and why they had been refused, namely that they were linked to subcontracting activities which had not been mentioned in the annexes to the Grant Agreement.

However, in the second place, the General Court finds that the costs declared by VeriGraft, corresponding to subcontracting mentioned for the first time in the periodic technical reports for RP1 and RP2 and approved by EASME, constitute eligible costs within the meaning of the Grant Agreement.

In that respect, it points out that the Grant Agreement provides for the option of using the simplified approval procedure for subcontracts which are not included in the annexes to that agreement. It is apparent from the Grant Agreement and from the explanations contained in the Annotated Model Grant Agreement for the Horizon 2020 programme, which was available to all contractors, that the approval of a periodic technical report in which the beneficiary justified the use of subcontracts not provided for in the description of the action in that agreement has the effect of rendering the corresponding subcontracting costs eligible within the meaning of that agreement.

The General Court also stresses that, by basing itself on the reports of the panel of external experts, EASME itself indicated that the implementation of the P-TEV project, as described in the periodic technical reports for RP1 and RP2, was satisfactory and that it did not therefore take the view that the use of subcontracting mentioned in those reports raised doubts as to whether the project was still, in essence, the same as the one which had been selected or as to whether VeriGraft still had the operational capacity to carry out that project.

The General Court accordingly takes the view that EASME could not reject the subcontracting costs relating to tasks which had been foreseen as subcontracting tasks in the periodic technical reports which it had approved, on the ground that those costs corresponded to unforeseen subcontracting for the purposes of the Grant Agreement.

Furthermore, as the debit note issued by EASME and the recovery of the corresponding sum from the guarantee fund established by that agreement were based on the rejection of the subcontracting costs corresponding to unforeseen subcontracting, the General Court, relying on the finding that those subcontracting costs were eligible, concluded that there was no basis for the note and the recovery.

XIII. JUDGMENTS PREVIOUSLY DELIVERED

1. EU LAW AND NATIONAL LAW

Judgment of the Court (Grand Chamber) of 28 June 2022, Commission v Spain (Violation du droit de l'Union par le législateur), C-278/20

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Liability of Member States for harm caused to individuals by infringements of EU law – Infringement of EU law attributable to the national legislature – Infringement of the Constitution of a Member State attributable to the national legislature – Principles of equivalence and effectiveness

The principle of State liability for loss or harm caused to individuals by breaches of EU law for which the State can be held responsible is inherent in the system of the Treaties. [78] That principle applies irrespective of the body of the Member State whose action or omission is the cause of that infringement. [79] Where the three conditions for establishing the liability of the State for loss or harm caused to individuals have been met, [80] they have a right to compensation under EU law. [81] However, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness). [82]

Those two principles lie at the heart of the present case in which the European Commission has brought an action against the Kingdom of Spain for failure to fulfil its obligations. Following complaints lodged by individuals, the Commission initiated an EU Pilot procedure [83] against that Member State. That procedure concerned certain national provisions aligning the rules on the liability of the State legislature for infringements of EU law with the rules on the liability of the State legislature for infringements of the Spanish Constitution. [84] That procedure, which proved unsuccessful, was closed and the Commission initiated infringement proceedings against the Kingdom of Spain.

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78 Judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 29 and the case-law cited), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 42 and the case-law cited).

79 To that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 32 and 36), and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 46 and the case-law cited).

80 The three conditions are as follows: the rule of EU law infringed must be intended to confer rights on individuals, the breach of that rule must be sufficiently serious and there must be a direct causal link between that breach and the loss or harm sustained by the individuals.

81 Judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 30 and the case-law cited), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 44 and the case-law cited).

82 Judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 31 and the case-law cited), and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 123).

83 System used at an early stage by the Commission to attempt to clarify or resolve problems in order to avoid, where possible, the initiation of infringement proceedings against the Member State concerned.

84 Article 32(3) to (6) and the second subparagraph of Article 34(1) of Ley 40/2015 de Régimen Jurídico del Sector Público (Law 40/2015 on the legal system governing the public sector) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89411), and the third subparagraph of Article 67(1) of Ley 39/2015 del Procedimiento Administrativo Común de las Administraciones Públicas (Law 39/2015 on the common administrative procedure of the public authorities) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89343).

By its application, the Commission requested the Court of Justice to declare that, by adopting and maintaining in force those national provisions, the Kingdom of Spain has failed to fulfil its obligations under the principles of effectiveness and equivalence.

Sitting as the Grand Chamber, the Court upholds the Commission's action in part, finding that the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness by adopting and maintaining in force the contested provisions, in that they make compensation for the loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law subject to:

- the condition that there is a decision of the Court declaring that the statutory provision applied is incompatible with EU law;
- the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge;
- a limitation period of one year from the publication in the *Official Journal of the European Union* of the decision of the Court declaring that the statutory provision applied is incompatible with EU law, without covering cases in which such a decision does not exist, and
- the condition that compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date of that publication, unless otherwise provided for in that decision.

Findings of the Court

The first complaint, alleging breach of the principle of effectiveness, is upheld in part by the Court.

First of all, the Court recalls that making reparation, by a Member State, of loss or harm which it caused to an individual in breach of EU law conditional on the requirement that there must have been a prior finding by the Court of an infringement of EU law attributable to that Member State is contrary to the principle of the effectiveness of that law. Similarly, compensation for the loss or harm caused by a breach of EU law attributable to a Member State cannot be conditional on the requirement that the existence of such a breach must be clear from a preliminary ruling delivered by the Court. Consequently, in order to find that the Commission's arguments are well founded, it is not necessary to determine whether the contested provisions require a decision of the Court finding that the Kingdom of Spain has failed to fulfil one of its obligations under EU law or whether those provisions must be understood as referring to any decision of the Court from which it may be inferred that an act or omission on the part of the Spanish legislature is incompatible with EU law. Compensation for loss or damage caused by a Member State, including the national legislature, as a result of an infringement of EU law cannot, in any event and without infringing the principle of effectiveness, be made subject to the prior delivery of such a decision by the Court.

Next, the Court finds that, although EU law does not preclude the application of national legislation which provides that an individual cannot obtain compensation for loss or harm which he or she has failed to prevent by exercising a legal remedy, it is only on condition that the use of that remedy does not give rise to undue hardship or may reasonably be required of the injured party. That condition is not satisfied by the contested provisions in so far as they make compensation for loss or harm caused by the legislature subject to the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge. In addition, the Court states that requiring the individual harmed, at the stage prior to the action being brought against the administrative act giving rise to the loss or harm, to have pleaded the infringement of EU law which is subsequently recognised, failing which he or she will not be able to obtain compensation for the loss or harm suffered, may amount to an excessive procedural complication, contrary to the principle of effectiveness. At such a stage, it may be excessively difficult, or even impossible, to anticipate what infringement of EU law will ultimately be recognised by the Court.

However, the Court rejects the Commission's arguments in so far as it maintains that only provisions of EU law having direct effect may be properly relied on in such an action.

Finally, according to the contested provisions, first, the limitation period for actions to establish the liability of the State legislature for infringements of EU law attributable to it begins to run on the date of publication in the Official Journal of the Court's decision finding that the Kingdom of Spain has failed to fulfil its obligations under EU law or from which it is apparent that the act or omission on the part of the legislature giving rise to that loss or harm is incompatible with EU law and, second, compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date. In that regard, the Court finds, first, that the publication of such a decision in the Official Journal cannot, without infringing the principle of effectiveness, be the only possible starting point for that limitation period, since compensation for the loss or harm caused as a result of an infringement of EU law cannot be made subject to the condition that such a decision of the Court exists and the cases in which such a decision does not exist are not covered. Secondly, the Court points out that, in the absence of relevant provisions of EU law, it is for the domestic legal system of each Member State to establish the extent of the compensation and the rules relating to the assessment of the loss or harm caused by an infringement of EU law. However, national legislation setting out the criteria for determining that extent and those rules must, in particular, respect the principle of effectiveness and therefore allow compensation for loss or harm which is commensurate with the loss or harm sustained, in that it must enable the loss or harm actually sustained to be made good in full, which the contested provisions do not allow in all cases.

Examining the second complaint, alleging infringement of the principle of equivalence, the Court holds that this is based on a misreading of its case-law and must therefore be rejected as unfounded.

The Court points out that that principle seeks to circumscribe the procedural autonomy enjoyed by the Member States when they implement EU law and EU law makes no provision in that regard. Accordingly, that principle is intended to apply, as regards State liability for infringements of EU law attributable to it, only where that liability is established on the basis of EU law. In the present case, the Commission seeks, by its second complaint, to call into question, not the conditions under which the principle of State liability for infringements of EU law attributable to that State is implemented in Spain, but the actual conditions under which the State legislature may incur liability for infringements of EU law attributable to it, as they are defined in Spanish law, which faithfully reproduces the conditions laid down in the case-law of the Court. Therefore, even if the conditions for establishing the liability of the State for infringements of EU law attributable to it are less favourable than the conditions for establishing the liability of the State legislature in the event of an infringement of the Constitution, the principle of equivalence is not intended to apply to such a situation.

The Court has, moreover, made it clear that, if Member States can make provision for their liability to be established under less restrictive conditions than those laid down by the Court, then that liability must be regarded as being established not on the basis of EU law but on the basis of national law.

XIV. BORDER CONTROLS, ASYLUM AND IMMIGRATION: HANDLING OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Judgment of the Court (First Chamber) of 30 June 2022, Valstybės sienos apsaugos tarnyba., C-72/22 PPU

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Asylum and immigration policy – Directive 2011/95/EU – Article 4 – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Articles 6 and 7 – Standards for the reception of applicants for international protection – Article 18 of the Charter of Fundamental Rights of the European Union – Directive 2013/33/EU – Article 8 – Detention of the applicant – Ground for detention – Protection of national security or public order – Detention of the applicant for having entered the territory of the European Union unlawfully

On 2 July 2021, the Republic of Lithuania declared an emergency throughout its territory. That declaration was followed, on 10 November 2021, by a declaration of a state of emergency in part of the territory due to a mass influx of migrants from, inter alia, Belarus.

On 17 November 2021, M.A., a third-country national, was arrested in Poland, together with a group of persons from Lithuania, on the ground that he had neither the travel documents nor the necessary visa to stay in Lithuania and in the European Union. M.A. was therefore handed over to the Lithuanian authorities, which detained him pending the adoption of a decision as to his legal status. In the days following that handover, he immediately made an application for international protection, which he made again in writing in January 2022. That written application was, however, rejected as inadmissible on the ground that it had not been submitted in accordance with the requirements of the Lithuanian legislation on the submission of applications for international protection in an emergency caused by the mass influx of foreigners. [85] Pursuant to that legislation, a foreigner who has entered Lithuania unlawfully is unable to make an application for international protection in that Member State. That same legislation also provides that, in such an emergency, a foreigner may be detained solely on account of having entered Lithuanian territory unlawfully.

In those circumstances, the referring court, which is hearing an appeal brought by M.A. against the decision ordering his detention, seeks to ascertain whether the Procedures [86] and Reception [87] Directives preclude such legislation.

The Court, ruling under the urgent preliminary ruling procedure, holds that the Procedures Directive [88] precludes legislation of a Member State under which, in the event of a declaration of a state of war or a state of emergency or in the event of a declaration of an emergency due to a mass influx of foreigners, illegally staying third-country nationals are, de facto, denied the opportunity of having access to the procedure for examining an application for international protection in the

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85 Chapter X2 of the Lietuvos Respublikos įstatymas 'Dėl užsieniečių teisinės padėties' (Law of the Republic of Lithuania on the legal status of foreigners) concerns the application of that law in the event of a declaration of a state of war or a state of emergency or where an emergency is declared due to a mass influx of foreigners. In that chapter, paragraph 1 of Article 140^{12} specifies the places where an application for international protection may be made.

86 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180 p. 60; 'the Procedures Directive').

87 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ 2013 L 180, p. 96; 'the Reception Directive').

88 See, more specifically, Article 6 of the Procedures Directive, concerning access to the procedure for granting international protection, and Article 7(1), which requires Member States to ensure that each adult with legal capacity has the right to make an application for international protection on his or her own behalf.

territory of that Member State. Furthermore, the Court holds that the Reception Directive [89] precludes legislation of a Member State under which, in the event of such a declaration, an applicant for asylum may be detained on the sole ground that he or she is staying in the territory of that Member State illegally.

Findings of the Court

In the first place, as regards access to the procedure for examining an application for international protection, the Court states, first of all, that all third-country nationals and stateless persons have the right to make such an application on the territory of a Member State, including at its borders or in transit zones, even if they are staying in that territory illegally. That right is intended to ensure, first, effective access to the procedure for granting international protection and, secondly, the effectiveness of the right to asylum, as guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union. Consequently, the application of national legislation such as the Lithuanian legislation at issue – which provides that a third-country national who is staying illegally is, for that sole reason, to be denied, after entering Lithuanian territory, the opportunity to submit an application for international protection in that territory – prevents that person from effectively enjoying the right to asylum.

Next, the Court declares that relying generally on breaches of public order or internal security which may be caused by the mass influx of third-country nationals does not justify such legislation under Article 72 TFEU. [90]

Lastly, the Procedures Directive [91] allows Member States to establish special procedures, applicable at their borders, for assessing the admissibility of applications for international protection in situations where the applicant's conduct tends to indicate that his or her application is manifestly unfounded or abusive. Those procedures enable Member States to exercise, at the external borders of the European Union, their responsibilities with regard to the maintenance of law and order and the safeguarding of internal security, without any need for a derogation under Article 72 TFEU.

In the second place, as regards the issue of detaining a third-country national for the sole reason that he or she entered the territory of a Member State unlawfully, the Court points out, first of all, that, under the Reception Directive, [92] an applicant for international protection may be detained only when, after an individual assessment of each case, it proves necessary and other less coercive alternative measures cannot be applied effectively. Next, that directive [93] sets out an exhaustive list of the various grounds capable of justifying detention. The fact that an applicant for international protection is staying in the territory of a Member State illegally is not one of those grounds. Consequently, a third-country national cannot be detained on that basis alone.

Lastly, as to whether such a circumstance may justify the detention of an applicant for asylum on the grounds of protecting national security or public order, [94] in the exceptional context represented by the mass influx of foreigners in question, the Court points out that the threat to national security or public order can justify the detention of an applicant only if the applicant's individual conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or the internal or external security of the Member State concerned. In that regard,

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89 See Article 8(2) and (3) of the Reception Directive, concerning the detention of an applicant for asylum.

90 As set out in that provision, 'this Title [relating to the area of freedom, security and justice] shall not 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'.

91 See, inter alia, Article 43 of the Procedures Directive.

92 See Article 8(2) of the Reception Directive.

93 See Article 8(3) of the Reception Directive.

94 See Article 8(3)(e) of the Reception Directive.

the fact that an applicant for international protection is staying illegally cannot in itself be regarded as demonstrating the existence of such a threat. In principle, therefore, such an applicant cannot constitute a threat to the national security or public order of that Member State on the sole ground that he or she is staying in a Member State illegally. That finding is without prejudice to the possibility that an illegally staying applicant for international protection may be regarded as such a threat due to specific circumstances which demonstrate that applicant's dangerousness, in addition to the fact that the applicant's stay is illegal.

XV. ECONOMIC AND SOCIAL COHESION

Judgment of the General Court (Seventh Chamber) of 22 June 2022, Italy v Commission, T-357/19

ERDF – Regional policy – Operational programmes coming under the 'Investment for growth and jobs' objective in Italy – Decision approving the financial contribution of the ERDF to the major project 'Major National Project Ultra Broadband – White Areas' – Ineligibility of the costs incurred by the beneficiary in respect of value added tax (VAT) – Article 69(3)(c) of Regulation (EU) No 1303/2013 – Concept of 'VAT that is recoverable under national VAT legislation'

In 2015, the Italian Republic adopted the 'Italian Strategy for Ultra Broadband'. That strategy included, inter alia, the objective of guaranteeing high-speed internet connection across the national territory. In particular, the strategy targeted market failure areas in which next generation broadband access networks were non-existent and where private operators had no plan to deploy such networks in the near future ('white areas').

Direct public assistance up to EUR 4 billion was planned [95] with a view to deploying the next generation broadband access networks in those white areas.

In 2017, the Italian authorities sent a request to the European Commission for a financial contribution from the European Regional Development Fund (ERDF) with a view to implementing the 'Major National Project Ultra Broadband – White Areas'. The Italian Ministry of Economic Development was designated as the beneficiary of the ERDF contribution, whereas the implementation of the project was to be the responsibility of Infratel Italia SpA ('Infratel'), an in-house company of the Italian Ministry of Economy and Finance. Accordingly, in order to build the broadband access network infrastructure and to ensure its maintenance and commercial operation, Infratel selected Open Fiber SpA as the concessionaire.

According to the Italian authorities, value added tax (VAT) linked to construction costs was eligible to be covered by the ERDF funding, in so far as it is paid by the Ministry of Economic Development without the VAT being recoverable under national VAT legislation, because the Ministry is not subject to VAT and cannot deduct it. In accordance with invoicing arrangements, the concessionaire submitted to Infratel the invoices for construction costs, including VAT, and Infratel then submitted invoices for the same amounts to the Ministry of Economic Development, including VAT. That ministry paid, on the one hand, the invoices issued by Infratel, excluding VAT, and, on the other, the VAT directly to the Italian Ministry of Economy and Finance, according to the split payment system in respect of VAT provided for under national law.

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95 By Decision C(2016) 3931 final of 30 June 2016, the Commission considered that this public funding constituted State aid compatible with the internal market.

By the contested decision, [96] the Commission considered that VAT-related expenditure on the 'Major National Project Ultra Broadband – White Areas' was not eligible for the financial contribution from the ERDF. The Commission took the view that the VAT incurred by the Ministry of Economic Development for the implementation of the project did not constitute an economic burden for the beneficiary and could not be considered as non-recoverable under national VAT legislation, within the meaning of Article 69(3)(c) of Regulation No 1303/2013. [97]

The action brought by the Italian Republic against that decision is upheld by the General Court.

This case leads the Court to interpret, for the first time, Article 69(3)(c) of Regulation No 1303/2013 which provides for the exclusion, in principle, of VAT from the costs that are eligible for a contribution from the ESI Funds, except where it is non-recoverable 'under national VAT legislation'. For many public investments eligible for EU funding, VAT-related expenditure represents a significant financial burden for public authorities (in the present case, total VAT-related expenditure represented more than EUR 210 million, EUR 125 million of which could be financed by the ERDF).

Findings of the Court

The Court finds, first of all, that, by providing that VAT does not constitute a cost eligible for a contribution from the ESI Funds which takes the form of a grant, except where it is non-recoverable under national VAT legislation, Article 69(3)(c) of Regulation No 1303/2013 ensures the proper functioning of economic, social and territorial cohesion mechanisms established by that regulation.

On the one hand, the inclusion of VAT in the costs eligible for a contribution from the ESI Funds would give rise to unjust enrichment for the beneficiary of the contribution if, after having paid the VAT due on the subsidised supply of goods or provision of services, the beneficiary was able to recover it under national law. On the other hand, the exclusion of VAT from eligible costs if VAT were not recoverable would have the effect of increasing the share of funding borne by the beneficiary of the ESI Funds and could, therefore, constitute a hindrance to the achievement of operations that the funds are intended to finance.

Next, the Court finds, in view of the wording of Article 69(3)(c) of Regulation No 1303/2013 and in the light of the preparatory documents, that that provision now limits the ineligibility of VAT for a contribution from the ESI Funds to the situation where VAT is recoverable under national VAT legislation, and not by any other means. [98]

Furthermore, the Court notes that the expression 'VAT recoverable under national VAT legislation' necessarily includes deductible VAT, without however being limited to that situation alone, since other possibilities for recovery provided for by national VAT legislation could also preclude taking VAT into account in the context of a contribution from the ESI Funds.

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96 Commission Implementing Decision C(2019) 2652 final of 3 April 2019 approving the financial contribution to the major project 'Major National Project Ultra Broadband – White Areas', selected in the context of operational programmes 'POR Abruzzo FESR 2014-2020', 'Basilicata', 'POR Calabria FESR FSE', 'Campania', 'POR Emilia Romagna FESR', 'POR Lazio FESR', 'POR Liguria FESR', 'POR Lombardia FESR', 'POR Marche FESR 2014-2020', 'POR Piemonte FESR', 'POR Puglia FESR-FSE', 'POR Sardegna FESR', 'Sicilia', 'Toscana', 'POR Umbria FESR', 'POR Veneto FESR 2014-2020' and 'Enterprises and competitiveness' in Italy.

97 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320). Regulation No 1303/2013 establishes, with effect from 1 January 2014, common provisions for 'European structural and investment funds' ('ESI Funds'), which include the ERDF, and general provisions which apply to the ERDF.

98 Contrary to the situation under the law as it previously stood, pursuant to which VAT was excluded from EU funding if it was recoverable by any means (see, to that effect, judgments of 20 September 2012, *Hungary* v *Commission*, T-89/10, not published, EU:T:2012:451, and of 20 September 2012, *Hungary* v *Commission*, T-407/10, not published, EU:T:2012:453).

Lastly, the Court, on the basis of the contextual interpretation, the case-law, and the origin of the rules previously in force, from which Regulation No 1303/2013 evolved, [99] finds that the beneficiary of the ERDF contribution is the entity or person from whose perspective the recoverability of the VAT is to be assessed.

Consequently, if the VAT due by reason of the implementation of an operation subsidised by a contribution from the ESI Funds is actually and definitively borne by the beneficiary of that contribution and if the VAT is recoverable by the beneficiary under national VAT legislation, it cannot be included in the costs eligible for a contribution.

In the light of those considerations, the Court finds that the Commission's reasons on which the contested decision is based do not justify the failure to take into account, in the costs eligible for the ERDF contribution, VAT-related expenditure in implementing the 'Major National Project Ultra Broadband – White Areas'.

In the first place, the Court finds that, to implement the 'Major National Project Ultra Broadband – White Areas', the Ministry of Economic Development had the status of beneficiary within the meaning of Regulation No 1303/2013 and that it had to bear the burden of the VAT incurred in respect of the construction of the ultra broadband access network.

The Court then finds that the reason why the payment of VAT by the Ministry of Economic Development to another ministry, in this case the Ministry of Economy and Finance, cannot be considered to be a cost incurred by the central administration of the State cannot be upheld, in particular because such an argument would result in the automatic exclusion of VAT from the costs eligible for a contribution from the ERDF where the beneficiary is a part of the central administration of a Member State, such as a ministerial department, contrary to Article 2(10) of Regulation No 1303/2013. [100]

In the second place, the Court finds unlawful the second ground of the contested decision, relating, in essence, to the fact that the VAT-related cost should have been borne not by the Ministry of Economic Development, but by Infratel in its capacity as an 'in-house company' of the Ministry of Economic Development, since that company can then recover the VAT by deducting it. Apart from the fact that the concepts of 'internal transaction' and 'in-house company' are not provided for in the VAT Directive, [101] the Court finds, in particular, that the option given to the Member States under Article 11 of that directive to regard as a single taxable person any persons who are closely linked has not been transposed into Italian legislation with regard to entities such as the Ministry of Economic Development and Infratel, which constitute two separate legal entities.

In the third and last place, the Court finds, with regard to the third ground of the contested decision, that the mere fact that the concession fees for the ultra broadband access network paid by the concessionaire to Infratel are subject to VAT has no bearing on the real and definitive liability of the Ministry of Economic Development for VAT-related expenditure incurred for the implementation of the project in question. In that regard, the Court notes, in particular, that it does not appear from the documents in the file that the Ministry of Economic Development could recover indirectly, even in part, and pursuant to national VAT legislation, the VAT due from the concessionaire on concession fees during the operational phase of the ultra broadband access network, with the result that it could be considered that the Ministry of Economic Development itself does not bear the real and definitive burden of the VAT.

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99 In particular, Regulation No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999 (OJ 2006 L 210, p. 1).

100 In accordance with that provision, the concept of 'beneficiary' includes public bodies, irrespective of whether they belong to the central administration of a Member State or have legal personality that is separate from and autonomous of the State within whose responsibility they fall.

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

XVI. PROTECTION OF PERSONAL DATA

Judgment of the Court (First Chamber) of 22 June 2022, Leistritz, C-534/20

Link to the full 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 – Second sentence of Article 38(3) – Data protection officer – Prohibition of the dismissal, by a controller or processor, of a data protection officer or of the imposition, by a controller or processor, of a penalty on him or her for performing his or her tasks – Legal basis – Article 16 TFEU – Requirement of functional independence – National legislation prohibiting the termination of a data protection officer's employment contract without just cause

LH performed, from 1 February 2018, the duties of data protection officer within the company Leistritz AG. That company is required, under German law, to designate a data protection officer. In July 2018, Leistritz terminated LH's employment contract with notice, invoking a measure for the restructuring of its activities, under which the data protection service was to be outsourced.

The courts adjudicating on the substance, before which LH challenged the validity of the termination of her contract, ruled that that termination was invalid. In accordance with the provisions of German federal legislation, LH, in her capacity as data protection officer, could have her employment contract terminated extraordinarily only if there was just cause. The restructuring of Leistritz's activities, it was found, did not constitute such a cause.

Following the appeal brought by Leistritz before the Bundesarbeitsgericht (Federal Labour Court, Germany), that court asks whether the General Data Protection Regulation [102] allows legislation of a Member State which makes the termination of a data protection officer's employment contract subject to stricter conditions than those laid down by EU law.

By its judgment, the Court of Justice holds that the second sentence of Article 38(3) of the GDPR [103] does not preclude national legislation which provides that a controller or processor may terminate the employment contract of a data protection officer who is a member of his or her staff only if there is just cause. That reasoning is applicable even if the contractual termination is not related to the performance of that officer's tasks, in so far as such legislation does not undermine the achievement of the objectives of the GDPR.

Findings of the Court

In the first place, the Court notes that, in accordance with the second sentence of Article 38(3) of the GDPR, the prohibition of the dismissal, by a controller or processor, of a data protection officer or of the imposition, by a controller or processor, of a penalty on him or her means that that officer must be protected against any decision terminating his or her duties, by which he or she would be placed at a disadvantage or which would constitute a penalty. Thus, a measure terminating a data protection officer's employment contract taken by his or her employer and terminating the employment relationship existing between that officer and that employer may constitute such a decision. In respect of that employment relationship, the Court states that the second sentence of Article 38(3) of the GDPR applies both to the data protection officer who is a member of the staff of the controller or

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102 See, in particular, the second sentence of Article 38(3) of 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').

103 Under the second sentence of Article 38(3) of the GDPR, the data protection officer cannot be dismissed or penalised by the controller or processor for performing his or her tasks.

processor and to the person who fulfils the tasks on the basis of a service contract concluded with the latter. That provision is therefore intended to apply to the relationship between a data protection officer and a controller or processor, irrespective of the nature of the employment relationship between that officer and the latter. Furthermore, that same provision imposes a limit which consists of prohibiting the termination of a data protection officer's employment contract on a ground relating to the performance of his or her tasks. [104]

In the second place, as regards the objective pursued by the second sentence of Article 38(3) of the GDPR, that regulation [105] states that data protection officers, whether or not they are employees of the controller, should be in a position to perform their duties and tasks in an independent manner, in accordance with the objective of the GDPR. [106] Thus, the objective of ensuring the functional independence of the data protection officer [107] implies that that officer is not to receive any instructions regarding the exercise of those tasks, that he or she is to report directly to the highest level of management of the controller or processor, and that he or she is bound by secrecy or confidentiality. Consequently, the second sentence of Article 38(3) of the GDPR seeks to preserve the independence of the data protection officer, in so far as that provision protects him or her against any decision in relation to his or her duties which terminates those duties, places him or her at a disadvantage or constitutes a penalty. However, that provision is not intended to govern the overall employment relationship between a controller or a processor and staff members.

As regards, in the third and last place, the context of the second sentence of Article 38(3) of the GDPR, the Court states that, apart from the specific protection of the data protection officer provided for in that provision, protection against the termination of the employment contract of a data protection officer employed by a controller or by a processor does not fall within the scope of rules which may be adopted on the basis of the GDPR [108] but rather within the field of social policy. The European Union and the Member States have shared competence [109] in that field. The European Union supports and complements action taken by the Member States in the field of the protection of workers in the event of termination of an employment contract by laying down minimum requirements in that regard. Therefore, each Member State is free, in the exercise of its competence, to lay down more protective specific provisions on termination of a data protection officer's employment contract, in so far as those provisions are compatible with the provisions of the GDPR. In particular, such increased protection cannot undermine the achievement of the objectives of the GDPR. That would be the case if it prevented any termination of the employment contract, by a controller or by a processor, of a data protection officer who no longer possesses the professional qualities required to perform his or her tasks or who does not fulfil those tasks in accordance

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104 Under Article 39(1)(b) of the GDPR, those tasks include, in particular, monitoring compliance with EU or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data.

105 In particular, recital 97 of the GDPR.

106 The GDPR, as is apparent from recital 10 thereof, seeks, inter alia, to ensure a high level of protection of natural persons within the European Union.

107 As is apparent from the first, second and third sentences of Article 38(3) and from Article 38(5) of the GDPR.

108 Article 16(2) TFEU, which is the legal basis for the GDPR, allows for the adoption of rules on the protection of individuals with regard to the processing of personal data and to the free movement of such data.

109 Under Article 4(2)(b) TFEU.

XVII. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION

Judgment of the General Court (Tenth Chamber) of 29 June 2022, LA International Cooperation v Commission, T-609/20

Link to the full text of the judgment

Pre-Accession Assistance Instrument – OLAF investigation – Commission decision imposing an administrative sanction – Exclusion from procurement and grant award procedures covered by the general budget of the European Union for a period of four years – Registration in the early detection and exclusion system database – Financial regulation – Unlimited jurisdiction – Proportionality of the sanction

Pursuant to Regulation No 1085/2006, [110] the European Union is to assist the countries concerned by pre-accession assistance, including the Republic of North Macedonia, in the progressive alignment with its standards and policies. In the framework of two national programmes in favour of that country, two contracts had been awarded to the applicant, LA International Cooperation Srl, and concluded in 2013 and 2015.

Following an investigation and a final report by the European Anti-Fraud Office (OLAF) into potential acts of fraud and corruption committed by the applicant, between October 2012 and January 2017, the investigating body [111] adopted a recommendation. In the light of the latter, the European Commission inter alia decided to exclude the applicant, for a period of four years, from participating in procurement and grant award procedures financed by the general budget of the European Union [112] and from participating in procedures for the award of funds under the 11th European Development Fund. [113]

Hearing an action for annulment of the Commission decision, the General Court exercises for the first time its unlimited jurisdiction to review the sanctions adopted by the Commission. [114] It also examines whether the four-year period of exclusion decided upon by the Commission is appropriate and proportionate.

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110 Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82), Article 1. The countries concerned are listed in Annexes I and II to that regulation.

111 In accordance with Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), Article 143.

112 Under the law in force, namely:

• Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1), Article 93, applicable from 22 August 2006;

• Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Regulation No 1605/2002 (OJ 2012 L 298, p. 1), Article 106(1), applicable from 1 January 2013;

• Regulation No 966/2012, as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1), Article 106(1).

113 Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund (OJ 2015 L 58, p. 17).

114 Under Article 108(11) of Regulation No 966/2012, as amended by Regulation 2015/1929.

Findings of the Court

The Court notes that it has unlimited jurisdiction which empowers it, beyond the mere review of legality, to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed.

The Court assesses whether the duration of the exclusion at issue takes into account the mitigating circumstances invoked by the applicant, namely its good cooperation during the investigation and the organisational measures it subsequently adopted.

First, the Court recalls that a contracting authority which excludes an economic operator must comply with the principle of proportionality and, in so doing, must take into account, inter alia, the seriousness of the situation, its duration and its recurrence, the intention or degree of negligence, or any other mitigating circumstances, such as the collaboration of that operator and its contribution to the investigation.

Second, it finds that the acts of corruption and grave professional misconduct committed by the applicant are very serious by their very nature. Account must be taken both of the seriousness of the acts themselves and of their impact on the European Union's financial interests.

Third, it is true that the elements relied on by the applicant in terms of its very good and full cooperation during the on-the-spot checks are established. However, the Court states that the applicant had been under an obligation to cooperate with OLAF and that, in the present case, its conduct can have only a slight impact on the degree of severity of the sanction, given the seriousness of the acts at issue.

Fourth, the Court decides not to take account of the organisational measures adopted by the applicant in 2016 since it finds that not only did they not put an end to its misconduct, which continued until January 2017, but, moreover, they had no effect at all on its conduct during the relevant period.

Fifth, the applicant's conduct constituted both acts of grave professional misconduct, incurring an exclusion measure of five years, before 1 January 2016, and of three years after that date, and acts of corruption, subject to exclusion measures of a maximum duration of five years after 1 January 2016.

In the light of all those findings and circumstances, the Court holds that an exclusion of four years is appropriate and proportionate.

XVIII. EUROPEAN CIVIL SERVICE

Order of the General Court (First Chamber) of 13 June 2022, Mendes de Almeida v Conseil, T-334/21

Link to the full text of the order

Civil service – Appointment of the European Prosecutors of the European Public Prosecutor's Office – Appointment of one of the candidates nominated by Portugal – No dispute between the Union and one of its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS – Article 270 TFEU – Manifest lack of jurisdiction

On 12 October 2017, the Council of the European Union adopted Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). [115] That regulation establishes the EPPO as a body of the European Union and sets out rules concerning its functioning.

Article 16(1) of Regulation 2017/1939 provides that each Member State participating in that enhanced cooperation must nominate three candidates for the position of European Prosecutor. Article 16(2) of that regulation states that, after having received the reasoned opinion of the selection panel [116] responsible for drawing up a shortlist of candidates, the Council is to select and appoint one of the candidates to be the European Prosecutor of the Member State in question. That provision also states that, if the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion is binding on the Council. Under Article 16(3) of that regulation, the Council, acting by simple majority, is to select and appoint the European Prosecutors for a non-renewable term of six years and may decide to extend the mandate for a maximum of three years at the end of the six-year period.

Article 96(1) of Regulation 2017/1939 provides that the Staff Regulations of Officials of the European Union ('the Staff Regulations') and the Conditions of Employment of Other Servants of the European Union ('the CEOS') apply, inter alia, to the European Prosecutors 'unless otherwise provided for in this Regulation'.

On 23 April 2019, at the end of the national selection procedure, the three candidates for the position of European Prosecutor hoping to be nominated by the Portuguese Republic were successful. The applicant, Ms Ana Carla Mendes de Almeida, was one of those candidates. The names of those three candidates, listed in alphabetical order, were communicated to the selection panel.

On 18 November 2019, after hearing those candidates, the selection panel sent its reasoned opinion to the Council and gave an order of preference concerning them, that is to say, the applicant, followed by the other two candidates.

On 27 July 2020, the Council adopted Implementing Decision 2020/1117 [117] appointing the European Prosecutors of the EPPO, and in particular Mr Moreira Alves d'Oliveira Guerra, from 29 July 2020 ('the contested decision').

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115 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ 2017 L 283, p. 1).

116 As referred to in Article 14(3) of Regulation 2017/1939.

117 Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office (OJ 2020 L 244, p. 18).

On 22 October 2020, the applicant submitted a complaint to the Council, pursuant to Article 90 of the Staff Regulations, against the contested decision. By decision of 8 March 2021 ('the decision rejecting the complaint'), the appointing authority of the Council ('the appointing authority') considered that complaint to be manifestly inadmissible based on its lack of competence to uphold it.

The applicant then brought an action under Article 270 TFEU seeking the annulment of the contested decision, in so far as it appoints Mr Moreira Alves d'Oliveira Guerra as a European Prosecutor of the EPPO and rejects her application for that position, and of the decision rejecting the complaint.

The General Court dismisses the action and provides clarification concerning the legal basis on which an action concerning the appointment of European Prosecutors must be brought, namely Article 263 TFEU, and not Article 270 TFEU. Article 270 TFEU creates a legal remedy for civil service disputes which is distinct from general legal remedies such as an action for annulment governed by Article 263 TFEU.

Findings of the Court

The Court states, first of all, that it follows from the wording of Article 270 TFEU that the jurisdiction provided for therein extends to any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS.

The Court goes on to point out that the notion of dispute between the Union and its servants has been given a wide definition by the case-law, with the result that disputes concerning persons who have the status neither of officials nor of employees, but who claim that status, are also examined within that framework. This applies to persons who are candidates for a post for which the conditions of appointment are laid down in the Staff Regulations or the CEOS.

The Court observes next that, concerning the EPPO, not all provisions of the Staff Regulations are applicable to it per se. As regards European Prosecutors, only their pay and employment conditions fall within the scope of the CEOS and within the competence of the EPPO's Authority Empowered to Conclude Contracts of Employment. The situation is different for the conditions and procedures leading to their appointment.

As those conditions and procedures are not laid down in the Staff Regulations or in the CEOS but in Article 16 of Regulation 2017/1939, which, in that regard, lays down a specific procedure with special rules, the disputes that relate to those conditions and procedures cannot be regarded as disputes between the Union and one of its servants for the purposes of Article 270 TFEU. The Court, therefore, manifestly lacks jurisdiction to hear and determine the present action against the decision to appoint a European Prosecutor on the basis of Article 270 TFEU.

Moreover, since the contested decision is not a decision falling within the Staff Regulations and the CEOS, it cannot be considered that the complaint made by the applicant against it and the decision taken by the Council to reject that complaint may fall within the scope of the Staff Regulations and the CEOS. The Court therefore also manifestly lacks jurisdiction to hear and determine the decision rejecting the complaint.

It is for the applicant to choose the legal basis of its action and not for the EU judicature itself to choose the most appropriate legal basis. It is not possible to regard the present action as having been brought on the basis of Article 263 TFEU, since the applicant has expressly invoked Article 270 TFEU.

As regards the decision rejecting the complaint, in any event and assuming the applicant intended to bring her action against that decision under Article 263 TFEU, the Court finds, inter alia, for the same reasons, that the appointing authority was not competent to hear and determine the complaint against the appointment decision lodged by the applicant on the basis of Article 90 of the Staff Regulations. It was therefore right to reject that complaint and the action is therefore, in any event, manifestly unfounded in that regard.

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 14 July 2022, Procureur général près la cour d'appel d'Angers, C-168/21, EU:C:2022:558
- Judgment of 16 June 2022, Proceedings brought by A, C-577/20, EU:C:2022:467
- Judgment of 4 May 2022, Larko Geniki Metalleftiki kai Metallourgiki AE v European Commission, T-423/14 RENV, EU:T:2022:268
- Order of 20 June 2022, Natixis/Commission, T-449/21, EU:T:2022:394
- Judgment of 13 July 2022, Tartu Agro v Commission, T-150/20, EU:T:2022:443
- Judgment of 13 July 2022, JC v EUCAP Somalia, T-165/20, EU:T:2022:453
- Judgment of 13 July 2022, Delifruit, SA v European Commission, T-629/20, EU:T:2022:448
- Judgment of 27 July 2022, RT France v Council, T-125/22, EU:T:2022:483