COURT OF JUSTICE
OF THE EUROPEAN UNION

MONTHLY CASE-LAW DIGEST
August-September 2022

I. INSTITUTIONAL PROVISIONS: ACCESS TO DOCUMENTS

Judgment of the General Court (Sixth Chamber, Extended Composition) of 14 September 2022, Pollinis France v Commission, T-371/20 and T-554/20

Link to the full text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Standing Committee for Plants, Animals, Food and Feed – EFSA guidance document on the risk assessment of plant protection products on bees – Individual positions of the Member States – Refusal to grant access – Article 4(3) of Regulation No 1049/2001 – Exception relating to protection of the decision-making process

The applicant, Pollinis France, is a French non-governmental organisation whose activity concerns the protection of the environment and whose purpose is the protection of wild and honey bees and the promotion of sustainable agriculture in order to help preserve pollinators.

On 27 January 2020 and on 8 April 2020, the applicant lodged with the European Commission two requests for access [1] to certain documents concerning the Guidance Document of the European Food Safety Authority (EFSA) on the risk assessment of plant protection products on bees, adopted by the EFSA on 27 June 2013 ('the 2013 guidance document on bees').

By two decisions of 19 June 2020 and 21 July 2020, [2] the Commission refused to grant the applicant access to certain documents and granted partial access to certain other documents concerning the 2013 guidance document on bees ('the contested decisions'). The refusals to grant access were based on the exception relating to the protection of the privacy and the integrity of the individual [3] and the exception relating to the protection of the decision-making process, both of which are provided for in Regulation No 1049/2001. [4]

The applicant lodged before the General Court two actions seeking the annulment of the contested decisions.

By its judgment, the General Court, in an extended composition, annuls those decisions in that they refuse access to the documents requested on the basis of the exception relating to protection of the decision-making process. On this occasion, it rules on whether a decision-making process is to be classified as being ongoing or closed, and on the access to documents setting out the individual positions of the Member States expressed within a comitology committee.

Findings of the Court

Before turning to examine the merits of the actions, the General Court first of all clarifies the subject matter of the action for the annulment of the decision of 19 June 2020.

In the present case, that decision replaced the implied rejection decision, by providing an express response to the confirmatory request lodged by the applicant on 25 March 2020.

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

2 Commission Decisions C(2020) 4231 final of 19 June 2020 and C(2020) 5120 final of 21 July 2020.

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

4 First subparagraph of Article 4(3) of Regulation No 1049/2001.

The applicant submitted a statement of modification of the application [5] asking for the action to be henceforth regarded as seeking the annulment of that express decision.

The General Court observes that the statement of modification is not to replace the application in its entirety, but must contain the modified form of order sought and, where appropriate, the modified pleas in law and arguments and evidence offered in connection with the modification of the form of order sought. [6] In the present case, the statement on the modification supplemented the application, which was the common understanding of the parties. Accordingly, the Court finds that the subject matter of the application concerned was the Commission decision of 19 June 2020.

As to the substance, in the first place, the General Court examines whether the Commission correctly applied the exception relating to protection of a decision-making process which is ongoing. In that regard, it finds that the decision-making process to which the requested documents relate could not be regarded as ongoing at the time when the contested decisions were adopted. The General Court observes that, at that time, there was no longer any decision-making process which had the aim of implementing that 2013 guidance document on bees, and that, on the contrary, the Commission had decided, implicitly but necessarily, not to implement that 2013 guidance document and had even expressly asked the EFSA to revise it. That revision, which was still ongoing at the time that the contested decisions were adopted, meant that it was impossible to determine the content of any revised document, the form of its possible adoption or the procedure that might be followed for that purpose, and so the General Court finds that it means that the Commission's decision-making process was devoid of any object at the time when the contested decisions were adopted.

In addition, the General Court states that the review appears to have been contemplated in view of the impossibility of adopting the 2013 guidance document on bees and in order to enable the swift acceptance of a revised guidance document on bees.

It follows, according to the General Court, that the Commission's decision-making process relating to the 2013 guidance document on bees had been closed at the time when the contested decisions were adopted and that, consequently, the Commission could not validly base the contested decisions on the exception which seeks to protect the institution's decision-making process relating to a matter where the institution has not yet taken a decision.

In the second place, on the hypothesis that that exception were applicable, the General Court examines the grounds advanced by the Commission in the contested decisions. In that regard, to the extent that the Commission stated in the contested decisions that certain provisions in the Standard Rules of Procedure [7] expressly exclude the individual positions of the Member States from public access, the General Court finds that those committees are subject to the same rules as the Commission as regards public access to documents, namely those laid down in Regulation No 1049/2001, and that there are no specific rules on public access to documents as regards the work of committees. [8]

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5 In accordance with Article 86(1) and (2) of the Rules of Procedure of the General Court, where a measure the annulment of which is sought is replaced by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed or before the decision of the Court to rule without an oral part of the procedure, modify the application to take account of that new factor by introducing that modification by a separate document and within the time limit down in the sixth paragraph of Article 263 TFEU within which the annulment of the measure justifying the modification of the application may be sought.

6 Article 86(4) of the Rules of Procedure of the General Court.

7 The Standard Rules of Procedure for Committees (OJ 2011 C 206, p. 11) ('the Standard Rules of Procedure') adopted by the Commission.

8 See recital 19 and Article 9(2) of the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

Thus, the provisions of the Standard Rules of Procedure relied on by the Commission in the contested decisions cannot permit a protection of the individual positions expressed by the Member States that goes beyond that laid down by Regulation No 1049/2001. [9]

Furthermore, it follows from the case-law [10] that the EU legislation on access to documents cannot justify an institution's refusal, as a matter of principle, to grant access to documents pertaining to its deliberations on the basis that they contain information relating to positions taken by representatives of the Member States. It follows that, as regards public access to the documents inherent in the work of comitology committees, the Commission cannot take the view that the relevant legal framework excludes, as a matter of principle, public access to the individual positions of the Member States.

Moreover, the General Court observes that the provisions of the Standard Rules of Procedure relied on by the Commission in the contested decisions cannot be interpreted as precluding public access, on request, to the individual positions of the Member States. The General Court states that the fact that, according to the Standard Rules of Procedure, the summary record of the work of the committees does not mention the individual position of the Member States has no bearing on access to documents and cannot therefore prejudice public access, upon application, to documents showing those individual positions.

Thus, the General Court concludes that, contrary to what the Commission maintained in the contested decisions, the comitology procedures, and in particular the Standard Rules of Procedure, do not in themselves require access to documents showing the individual position of the Member States to be refused in order to protect the decision-making process of the committee concerned, [11] which, however, does not in any way prevent the Commission, in duly justified cases, from refusing access to documents which show the individual position of the Member States within that committee where their disclosure would be likely specifically to undermine the interests protected by the exceptions provided for by Regulation No 1049/2001. [12]

After having examined the other grounds put forward by the Commission in the contested decisions, the General Court finds that those grounds do not make it possible to establish such harm and, consequently, to justify reliance on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, even assuming it applies.

Therefore, the General Court finds that, in the contested decisions, the Commission infringed the first subparagraph of Article 4(3) of Regulation No 1049/2001 by refusing to disclose the requested documents on the ground that to do so would seriously undermine an ongoing decision-making process.

Judgment of the General Court (Third Chamber) of 28 September 2022, Agrofert v Parliament, T-174/21

Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the investigation against the former Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest – Refusal to grant access – Exception relating to protection of the purpose of inspections, investigations and audits – Interest in bringing proceedings in part ceasing to exist – No need to adjudicate in part – Obligation to state reasons

9 First subparagraph of Article 4(3) of Regulation No 1049/2001.

10 See, to that effect, judgment of 10 October 2001, *British American Tobacco International (Investments)* v *Commission* (T-111/00, EU:T:2001:250, paragraph 52 and the case-law cited).

11 Within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

12 Article 4 of Regulation No 1049/2001.

The applicant, Agrofert, a.s., is a Czech holding company which controls more than 230 companies active in various sectors of the economy, such as agriculture, food production, the chemical industry or the media. It was initially established by Mr Andrej Babiš, who was Prime Minister of the Czech Republic from 2017 to 2021. In a Parliament resolution [13] on the reopening of the investigation against the Czech Prime Minister on misuse of European funds and potential conflicts of interest, it was stated that the latter continued to control the Agrofert group after his appointment as Prime Minister. Taking the view that that statement was inaccurate and wishing to know the sources and information held by the Parliament before it adopted that resolution, the applicant submitted to the latter an application for access to several documents. [14] In its initial reply of 14 September 2020, the Parliament identified certain documents as publicly accessible and refused access to a letter sent by the Commission to the Czech Prime Minister and to a final audit report of the Commission relating to the audit on the functioning of the management and control systems in place in the Czech Republic for the purpose of preventing conflicts of interests. [15] In response to a confirmatory application, the Parliament, by decision of 15 January 2021, [16] inter alia, confirmed its refusal of access to both those documents on the basis of the exception relating to protection of the purpose of inspections, investigations and audits provided for by Regulation No 1049/2001. [17]

In an action for annulment of that decision, the Court, first, finds that the applicant's interest in bringing proceedings against the Parliament's refusal to grant it access to the Commission's final audit report has ceased to exist and, second, dismisses the action against the decision refusing access to the Commission's letter to the Czech Prime Minister.

Findings of the Court

In the first place, the Court examines whether, following the publication by the Commission of its final audit report, the applicant retained its interest in bringing proceedings, in so far as its application for annulment relates to the Parliament's refusal to grant access to that report.

It states that, following publication of that report, the Parliament's refusal to grant access to that document is no longer effective in so far as the author of the document, the Commission, decided to make it accessible to the public, and that annulment of the contested decision, in so far as it refuses access to that report, would have no additional consequence in relation to the disclosure of that document and could not procure an advantage for the applicant.

Those findings are not called into question by the fact that the Commission did not publish the full version of the final audit report. The Court points out that the effect of an application for access is to make the document in question accessible to the public and can only lead to the disclosure of its public version.

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13 European Parliament resolution 2019/2987(RSP) of 19 June 2020 on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest (OJ 2021 C 362, p. 37).

14 Under 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).

15 In accordance with Articles 72 to 75 and 125 of 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).

16 Decision A(2019) 8551 C (D 300153) of the European Parliament of 15 January 2021, by which it refused the applicant access to two documents relating to the investigation against the former Prime Minister of the Czech Republic on misuse of European funds and potential conflicts of interest.

17 Exception provided for in the third indent of Article 4(2) of Regulation No 1049/2021.

In that regard, it observes that, in deciding not to make available to the public certain information contained in the final audit report, the Commission did not rely on the exception relating to the protection of the purpose of inspections, investigations and audits laid down in Regulation No 1049/2001, but on the requirements relating to the protection of certain information, such as personal data or business secrets. It infers from this that the annulment of the Parliament's decision refusing to grant access to the final audit report, on the basis of the exception relating to the protection of the purpose of inspections, investigations and audits provided for in Regulation No 1049/2001, would not have the effect of making that data public, since the Parliament was not the author of that report and could not therefore go beyond the disclosure granted by the Commission, the author of that document. Therefore, as a result of the publication of the final audit report, the applicant obtained the only advantage which its action could have afforded it.

The Court adds that the fact that the applicant chose to apply to the Parliament for access to the final audit report and not to the institution which is the author of it cannot lead to the conclusion that the publication of that document by the Commission constitutes disclosure by a 'third party', where the Commission is the author of that document.

It concludes that the applicant's interest in bringing proceedings against the contested decision inasmuch as the Parliament refused access to the final audit report has ceased to exist.

In the second place, the Court analyses the application for partial annulment of the contested decision inasmuch as the Parliament refused the applicant access to the Commission's letter.

First, it rejects the first plea, alleging infringement of the exception relating to the protection of the purpose of inspections, investigations and audits laid down in Regulation No 1049/2001 in so far as the Parliament allegedly failed to establish that the conditions for refusing access to the Commission's letter were met.

In that regard, the Court holds that, in the present case, the purpose of the Commission's investigation, namely to ensure that a Member State's management and control systems comply with EU law, had not been achieved with the adoption of the Commission's follow-up letter. That purpose cannot be limited solely to the analysis of the systems put in place by the Member State concerned; the implementation, by the latter, of the recommendations formulated by the Commission in its audit report also constitutes a stage in the achievement of that purpose.

Thus, the protection of the purpose of investigations ensured by that exception does not come to an end with the adoption of that report or with that of the follow-up letter by which the Commission monitors the recommendations set out in that report. In both cases, discussion phases with the Member State are initiated, one concerning the initial recommendations and the other concerning those recommendations that remain open, which form part of the investigations covered by that exception.

Furthermore, the Court rejects the applicant's argument that the Parliament did not establish that disclosure of the Commission's letter could undermine the investigation. On one hand, in order to establish the link between the Commission's letter and the audit investigation at issue, the Parliament had to show only that that letter formed part of the documents relating to the ongoing investigation. On the other hand, the statement of reasons in the contested decision is sufficient to explain why disclosure of the Commission's letter was likely to undermine the purpose of the audit investigation, especially as, since the Czech Prime Minister was directly involved, it was important to respect the confidentiality of the dialogue between him and the Commission.

Second, the Court rejects the second plea, alleging failure to take into account the existence of an overriding public interest justifying disclosure of the Commission's letter. It is true that the existence of the rights of the defence is in itself a public interest. However, the fact that those rights are manifested in the present case by the applicant's subjective interest in defending itself against serious accusations made with regard to it by the Parliament implies that the interest on which the applicant relies is not a public interest but a private interest, so that the applicant has not shown that there is an overriding public interest warranting disclosure of the Commission's letter.

II. PROCEEDINGS OF THE EUROPEAN UNION: INTERVENTION

Order of the Court (Grand Chamber) of 1 August 2022, Atlas Copco Airpower and Atlas Copco v Commission, C-31/22 P(I)

Link to the full text of the order

Appeal – Intervention – State aid – Aid scheme implemented by the Kingdom of Belgium – Admission of interventions in appeal proceedings against a judgment of the General Court – Annulment of the decision of the General Court – Referral of the case back to the General Court – Decision of the General Court refusing to place on the case file written observations on the judgment effecting that referral lodged by an intervener in the appeal – Implied decision of the General Court refusing to grant an intervener in the appeal the status of intervener before the General Court – Admissibility of the appeal – Status of intervener before the General Court of an intervener in the appeal

Order of the Court (Grand Chamber) of 1 August 2022, Anheuser-Busch Inbev and Ampar v Magnetrol International and Commission, C-32/22 P(I)

Link to the full text of the order

Appeal – Intervention – State aid – Aid scheme implemented by the Kingdom of Belgium – Admission of interventions in appeal proceedings against a judgment of the General Court – Annulment of the decision of the General Court – Referral of the case back to the General Court – Decision of the General Court refusing to place on the case file written observations on the judgment effecting that referral lodged by an intervener in the appeal – Implied decision of the General Court refusing to grant an intervener in the appeal the status of intervener before the General Court – Admissibility of the appeal – Status of intervener before the General Court of an intervener in the appeal

Order of the Court (Grand Chamber) of 1 August 2022, Soudal and Esko-Graphics v Magnetrol International and Commission, C-74/22 P(I)

Link to the full text of the order

Appeal – Intervention – State aid – Aid scheme implemented by the Kingdom of Belgium – Admission of interventions in appeal proceedings against a judgment of the General Court – Annulment of the decision of the General Court – Referral of the case back to the General Court – Decision of the General Court refusing to place on the case file written observations on the judgment effecting that referral lodged by an intervener in the appeal – Implied decision of the General Court refusing to grant an intervener in the appeal the status of intervener before the General Court – Admissibility of the appeal – Status of intervener before the General Court of an intervener in the appeal – Appeal brought out of time – Excusable error

By decision of 11 January 2016, [18] the Commission classified as State aid unlawful and incompatible with the internal market the excess profit exemption scheme applied by Belgium since 2004 to the Belgian entities of groups of multinational undertakings. Consequently, the Commission ordered that the aid granted be recovered from the beneficiaries, a definitive list of which was to be drawn up by the Kingdom of Belgium following the decision.

The latter and Magnetrol International NV brought an action for annulment of that decision before the General Court, registered as Cases T-131/16 and T-263/16, respectively. Other actions for annulment were brought against that same decision by Atlas Copco Airpower NV and Atlas Copco AB, [19] by Anheuser-Busch InBev SA/NV and Ampar BVBA, [20] and by Soudal NV [21] and Esko-Graphics BVBA [22] (together, 'the applicants'). Cases T-131/16 and T-263/16 having been chosen as 'pilot' cases by the General Court, the proceedings in the other aforementioned cases were stayed until the dispute in these first two cases had been resolved.

After joining Cases T-131/16 and T-263/16, the General Court upheld the actions of the Kingdom of Belgium and of Magnetrol International NV and annulled the Commission decision. [23]

Hearing an appeal lodged by the Commission, the President of the Court of Justice admitted the intervention of the appellants in support of the form of order sought by Magnetrol International NV in the appeal proceedings.

By judgment of 16 September 2021, [24] the Court of Justice set aside the judgment of the General Court and referred the two cases back to it, reserving the costs.

Following that referral back to the General Court, the appellants lodged observations on the conclusions to be drawn from the judgment of the Court of Justice for the outcome of the proceedings in Case T-263/16 RENV.

By letters dated 6 December 2021, the Registrar of the General Court informed the appellants that, since their observations did not constitute a document provided for by the Rules of Procedure of the General Court, the President of the General Court Chamber seised of the case had decided not to place them on the file in Case T-263/16 RENV ('the contested decision').

By three orders, the Court of Justice, sitting as the Grand Chamber, allows the appeals brought by the appellants against that decision. It finds that parties whose case has been stayed by the General Court pending final resolution of a pilot case and who have been admitted to intervene in that pilot case at the appeal stage retain that status as interveners in the event that the Court of Justice sets aside the judgment of the General Court in the pilot case and refers that case back to the latter.

Findings of the Court

The Court of Justice rejects, first of all, the plea of inadmissibility based on the nature of the contested decision, in which the Commission claimed that the General Court's refusal to place on the file the appellants' observations in Case T-263/16 RENV was not open to appeal.

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18 Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (notified under document C(2015) 9837, OJ 2016 L 260, p. 61).

19 Registered as Case T-278/16.

20 Registered as Case T-370/16.

21 Registered as Case T-201/16.

22 Registered as Case T-335/16.

23 Judgment of 14 February 2019, *Kingdom of Belgium and Magnetrol International* v *Commission* (T-131/16 and T-263/16, EU:T:2019:91).

24 Judgment of 16 September 2021, *Commission* v *Belgium and Magnetrol International* (C-337/19 P, EU:C:2021:741).

In that regard, the Court of Justice notes that, despite their summary nature, the letters of the Registrar of the General Court dated 6 December 2021 must be understood as reflecting the decision of the General Court to refuse to grant the appellants the status of interveners in Case T-263/16 RENV.

As regards the appellants' right to bring an appeal against such a decision under the first paragraph of Article 57 of the Statute of the Court of Justice of the European Union, which entitles persons whose application to intervene has been dismissed by the General Court to appeal, the Court of Justice observes that it is true that the General Court did not, in this case, dismiss applications to intervene, the appellants not having lodged such applications before it. However, the scope of the decisions communicated by the Registrar of the General Court to the appellants is similar to that which would have flowed from a decision of the General Court to dismiss an application to intervene lodged by each of those appellants.

Furthermore, where the Court of Justice sets aside a decision of the General Court on appeal and refers the case back to it on the ground that the state of the proceedings does not permit final judgment to be given, it cannot reasonably be expected of an intervener in that appeal to submit a formal application to intervene before the General Court for the sole purpose of bringing an appeal against the decision dismissing that application. Such an application could, in any event, only be dismissed by the General Court as being out of time pursuant to the provisions of its Rules of Procedure.

In that context, if an intervener in the appeal were not entitled, on the basis of the first paragraph of Article 57 of the Statute of the Court of Justice, to bring an appeal against a decision of the General Court refusing it the status of intervener following the referral of the case back to that court, that party would be deprived of all judicial protection enabling it to defend its right to intervene, if necessary, before the General Court, even though the very purpose of the first paragraph of Article 57 of the said statute is to guarantee such protection. In the event that the intervener in the appeal rightly relied on its status as intervener before the General Court, no other remedy would be open to it to assert its procedural rights.

The Court rejects, next, the plea of inadmissibility raised by the Commission alleging that the appeal brought by Soudal NV and Esko-Graphics BVBA was done so out of time.

To that end, the Court notes that, although that appeal was brought outside the period of two weeks from the notification of the contested decision provided for in the first paragraph of Article 57 of the Statute of the Court, extended on account of distance by a single period of 10 days, that period may nevertheless be derogated from in the event of excusable error on the part of the party concerned. In accordance with settled case-law, that excusable nature may be found in an exceptional situation in which the party concerned was faced, as a result of the conduct of an institution – including a Court of the European Union – and in the light of the wording of the applicable rules, with genuine uncertainty as to the time limits within which an action had to be brought.

In the present case, the General Court's refusal to grant Soudal NV and Esko-Graphics BVBA, interveners in the appeal, the status of interveners in the proceedings after referral constitutes a departure from a long-standing practice followed by that court and formally endorsed in its case-law. Moreover, the letter from the Registrar of the General Court was of a summary nature, since it did not explicitly state that the General Court was denying the appellants intervener status and did not contain any specific reference to the basis of the decision adopted. Last, at the date on which the appeal was brought by Soudal NV and Esko-Graphics BVBA, the legal basis on which that appeal was to be brought – Article 56 or Article 57 of the Statute of the Court – was not clearly apparent either from the case-law of the Court of Justice or from that statute, whereas the time limit for bringing an appeal is different in the two cases: an appeal under Article 56 of the Statute of the Court of Justice must be brought within two months of the date of notification of the decision of the General Court, whereas it must be within two weeks under Article 57 of the said statute.

In the light of those factors, the Court of Justice finds that the error committed by Soudal NV and Esko-Graphics BVBA as to the time limit within which their appeal had to be brought is excusable.

After having rejected the various pleas of inadmissibility raised by the Commission, the Court examines the merits of the appeals brought by the appellants.

In that regard, the Court of Justice begins by observing that the Rules of Procedure of the General Court do not specify the status to be accorded, in proceedings following referral, to the interveners in the appeal. That being so, the examination by the General Court of a case after referral is clearly a continuation of the appeal proceedings before the Court of Justice, which is explicitly reflected in the Rules of Procedure of the General Court.

Thus, Article 217 of those Rules of Procedure allows the parties to the proceedings after referral to lodge written observations on the conclusions to be drawn from the decision of the Court of Justice for the outcome of the proceedings where the decision set aside was made after the written procedure on the substance of the case had been closed by the General Court, with a view to ensuring the continuity of debate before the EU Courts. Refusal to grant an intervener in the appeal, who has been able to establish an interest in the result of the case submitted to the Court of Justice, the status of intervener in the proceedings after referral, would have the consequence of depriving that party of any possibility of lodging observations before the General Court on the conclusions to be drawn from a decision of the Court of Justice which has, however, affected that person's interests.

Moreover, the solution adopted by the General Court in the contested decision makes the continuity of the debate in a case dependent on the decision of the Court of Justice to give final judgment in the matter itself or, on the contrary, to refer the case back to the General Court. Where the Court of Justice gives final judgment in the dispute, the intervener in the appeal may put forward its arguments before the EU Court called upon to rule on the action at first instance, whereas, if the solution adopted by the General Court were to be followed, it would be denied such a possibility in the event of referral of the case back to that court.

Furthermore, exclusion of the intervener in the appeal from the proceedings after referral appears all the more likely to affect the continuity of debate before the EU Courts since that intervener should be able to participate again, in compliance with the applicable procedural conditions, in the proceedings before the Court of Justice in the event of an appeal against the decision of the General Court taken following the referral of the case back to it.

Such an exclusion also poses a problem with regard to the costs, in so far as the Court of Justice itself is to make a decision as to the costs only where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case. On the other hand, where the Court of Justice refers the case back to the General Court, it is for that court to rule on the apportionment of the costs relating to the appeal proceedings, including those incurred or those to be reimbursed by the interveners in the appeal. Therefore, to deny them the status of party before the General Court would mean that the costs would not be paid or that the General Court must rule on forms of order relating to a person who is not a party to the proceedings before it.

The Court concludes that the Statute of the Court of Justice, respect for the procedural rights guaranteed to interveners by the Rules of Procedure of the General Court and the principle of the proper administration of justice require, in the context of a coherent articulation of the procedures before the Court of Justice and the General Court, that the parties admitted to intervene in a case at the appeal stage automatically enjoy the status of intervener before the General Court, where the case is referred back to that court following the annulment of the decision under appeal.

Accordingly, the General Court committed an error of law, which leads the Court of Justice to annul the decision of that court to refuse to place on the file in Case T-263/16 RENV the written observations lodged by the appellants and, in so doing, to refuse to grant those appellants the status of interveners in that case.

III. FREEDOM OF MOVEMENT: FREEDOM OF ESTABLISHMENT

Judgment of the Court (Grand Chamber) of 7 September 2022, Cilevičs and Others, C-391/20

Link to the full text of the judgment

Reference for a preliminary ruling – Article 49 TFEU – Freedom of establishment – Restriction – Justification – The organisation of education systems – Institutions of higher education – Obligation to provide courses of study in the official language of the Member State concerned – Article 4(2) TEU – National identity of a Member State – Defence and promotion of the official language of a Member State – Principle of proportionality

The Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) has been seised of an action by 20 members of the Latvijas Republikas Saeima (Parliament, Latvia), seeking a review of the constitutionality of certain provisions of the Latvian Law on higher education institutions.

As amended in 2018, that law seeks to promote the official language of the Republic of Latvia by requiring higher education institutions to provide their courses of study in that language. However, that law provides for four exceptions to that obligation. In the first place, courses of study pursued by foreign students in Latvia and courses of study organised as part of the cooperation provided for by EU programmes and international agreements may be taught in the official languages of the European Union. In the second place, classes may be taught in the official languages of the European Union, but may only account for one fifth of the number of credits. In the third place, linguistic and cultural studies and language courses may be taught in a foreign language. In the fourth and final place, joint courses of study may be taught in the official languages of the European Union.

In addition, the Latvian Law on higher education institutions does not apply to two private institutions, which are governed by special laws and may continue to offer courses of study in other official languages of the European Union.

By their action, the applicants submit in particular that by creating a barrier to entry to the higher education market and preventing the nationals and undertakings from other Member States from providing higher education services in foreign languages, the law in question undermines, inter alia, the freedom of establishment guaranteed by Article 49 TFEU.

The Latvian Constitutional Court expresses doubts as to whether legislation of a Member State that makes obligatory the use of the official language of that Member State in the field of higher education, including in private higher education institutions, while providing for certain exceptions to that obligation, constitutes a restriction on the freedom of establishment. It therefore decided to make a reference to the Court of Justice for a preliminary ruling in order to enable it to rule on the compatibility of the Law on higher education institutions with EU law.

In its judgment, the Grand Chamber of the Court finds that Article 49 TFEU does not preclude legislation of a Member State which, in principle, obliges higher education institutions to provide courses of study solely in the official language of that Member State. Such legislation must, however, be justified on grounds related to the protection of the national identity of that Member State, that is to say, that it must be necessary and proportionate to the protection of the legitimate aim pursued.

Findings of the Court

As a preliminary point, the Court notes that, in accordance with Article 6 TFEU, the European Union is to have competence to carry out actions to support, coordinate or supplement the actions of the Member States, including in the area of education. While EU law does not detract from the power of those Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity and, secondly, the content and organisation of vocational training, the Member States must, however, comply with EU law when exercising that power, in particular the provisions on freedom of establishment.

In the present case, the Court observes that even if nationals of other Member States may establish themselves in Latvia and provide higher education courses, such a possibility is in principle made subject to the obligation to provide those courses solely in the official language of that Member State. An obligation of that kind is such as to render less attractive the establishment of those nationals in Latvia and therefore constitutes a restriction on the freedom of establishment.

The Court, following the well-established model arising from its case-law, then examines whether there is a justification for the restriction that has been found to exist and carries out a review of compliance with the principle of proportionality. As regards the existence of an overriding reason in the public interest, the obligation at issue seeks to defend and promote the use of the official language of the Republic of Latvia, which is a legitimate objective that, in principle, justifies a restriction on the freedom of establishment. According to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the European Union must respect its rich cultural and linguistic diversity. In accordance with Article 4(2) TEU, the European Union must also respect the national identity of its Member States, which includes protection of the official language of the Member State concerned. The importance of education for the implementation of such an objective must be recognised.

As regards the proportionality of the restriction found to exist, that restriction must, in the first place, be suitable for securing the attainment of the legitimate objective pursued by the legislation at issue. To that end, that legislation can be regarded as capable of ensuring the objective of defending and promoting the Latvian language only if it genuinely reflects a concern to attain it and is implemented in a consistent and systematic manner. In view of their limited scope, the exceptions to the obligation at issue, in particular for the two higher education institutions whose operation is governed by special laws, are not such as to hinder attainment of the objective in question. In allowing certain higher education institutions to benefit from a derogation arrangement, the exceptions form part of a special kind of international university cooperation and are, therefore, not such as to render the legislation at issue in the main proceedings inconsistent.

In the second place, the restriction may not go beyond what is necessary to attain the objective pursued. Member States may thus introduce, in principle, an obligation to use their official language in higher education courses of study, provided that such an obligation is accompanied by exceptions that ensure that a language other than the official language may be used in the context of university education. In the present case, such exceptions should, in order not to exceed what is necessary for that purpose, allow the use of a language other than Latvian, at least as regards education provided in the context of European or international cooperation, and education relating to culture and languages other than Latvian.

Judgment of the Court (First Chamber) of 1 August 2022, HOLD Alapkezelő, C-352/20

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Directive 2009/65/EC – Undertakings for collective investment in transferable securities (UCITS) – Directive 2011/61/EU – Alternative investment funds – Remuneration policies and practices in respect of the senior managers of a UCITS management company or manager of an alternative investment fund – Dividends distributed to certain senior managers – Concept of 'remuneration' – Article 17(1) of the Charter of Fundamental Rights of the European Union – Right to property

In 2019, HOLD Alapkezelő Befektetési Alapkezelő Zrt. ('HOLD'), a company the regular business of which is the management of undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs), was fined by the Magyar Nemzeti Bank (National Bank of Hungary). The practice at issue concerns the payment of dividends to some of its employees, which hold, directly or via companies controlled by them, shares it issued. These are, more specifically, employees who perform the duties of managing director, investment manager or portfolio manager.

According to the National Bank of Hungary, the dividends paid to the shareholder employees could result in those employees having an interest in HOLD generating short-term profits and thereby being induced to take risks that are not compatible with the risk profile of the investment funds managed by HOLD or with its management rules and the interests of the funds' shareholders. As a result, the rules for the payment of those dividends circumvent the rules relating to remuneration policies in the financial services industry.

HOLD's appeal against the decision of the National Bank of Hungary adopted in that connection led to the case being brought before the Kúria (Supreme Court, Hungary). That court asks the Court about the applicability of the requirements of Directives 2009/65 [25] and 2011/61 [26] on practices and policies for the remuneration of investment managers, such as those transposed into Hungarian law, to the dividends paid in the present case.

Asked to give a preliminary ruling, the Court defines the substantive scope of those requirements. It rules that the payment of dividends to certain employees can be covered by the provisions of Directives 2009/65 and 2011/61 relating to remuneration policies and practices, [27] even if the dividends are not paid in consideration for services rendered by those employees, but by virtue of the right to property those employees have as shareholders. According to the Court, those provisions apply to such dividends where the policy for the payment thereof is such as to encourage the employees concerned to take risks detrimental to the interests of the UCITS or AIFs managed by their company and to the interests of the investors in those organisations and funds, and thereby facilitate the circumvention of the requirements flowing from those provisions.

Findings of the Court

In the first place, the Court interprets Directives 2009/65 and 2011/61 in order to determine the personal scope of the remuneration policies and practices defined by those directives. Those policies apply to any payments or benefits of any type paid in consideration for professional services rendered by employees of UCITS management companies or AIF managers which come within the personal scope of those policies and practices.

Regarding dividends of shares in a UCITS management company or AIF manager, those dividends are not, admittedly, paid by way of such consideration, but by virtue of a right derived from ownership of the shares in the company. However, in accordance with Directives 2009/65 and 2011/61, variable remuneration must not be paid through vehicles or methods that facilitate the avoidance of the requirements of those directives governing remuneration policies and practices.

When the remuneration policy encourages risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the UCITS or AIFs managed by that company or manager, or detrimental to the interests of those UCITS or AIFs and their investors, and thereby facilitates the circumvention of the requirements flowing from the provisions of Directives 2009/65 and 2011/61 relating to remuneration policies and practices, that payment must be subject to the principles governing those remuneration practices and policies. In that context, the referring court must ascertain, more specifically, whether there is a connection between the profits generated by the UCITS and AIFs, the profits generated by the company and the amounts paid by as dividends such that employees have an interest in those UCITS and AIFs generating the highest possible profits in the short term.

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25 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 (OJ 2014 L 257, p. 186).

26 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ 2011 L 174, p. 1).

27 That is to say, Articles 14 to 14b of Directive 2009/65 and Article 13(1) of, and points 1 and 2 of Annex II to, Directive 2011/61.

This would arise, for example, where a performance fee is paid by the UCITS or the AIF to the company concerned where a target return during a given reference period is exceeded and where that fee is redistributed, in whole or in part, by that company as dividends to the employees concerned or to the companies controlled by those employees, irrespective of the results generated by the UCITS or AIF after that period and, in particular, of the losses incurred by the UCITS or AIF. Other factors that must be ascertained are, inter alia, (i) the size and type of the shareholding of the employees concerned, (ii) the voting rights attached to those shares, (iii) the policy and decision-making process relating to the distribution of the profits of that company, and (iv) the potentially minor nature, compared with the professional services rendered, of the amount of the fixed remuneration paid to its employees.

In the second place, the Court states that the resulting interpretation of the directives complies with Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), which enshrines the right to property and is applicable to the ownership of shares and the right to receive dividends such as those in the present case.

The Court notes that the interpretation of Directives 2009/65 and 2011/61 does not call into question the right to property of the employees concerned in respect of the shares of the company for which they work and therefore does not constitute a deprivation of property for the purposes of the second sentence of Article 17(1) of the Charter. The fact remains that the application, which correlates with that interpretation, of the principles governing remuneration policies and practices to share dividends constitutes a regulation of the use of property within the meaning of the third sentence of Article 17(1) of the Charter. That regulation is capable of impairing the exercise of the right to property and, more specifically, the possibility for the shareholder employees concerned of deriving a benefit from that property.

Nevertheless, the resulting limitations on the rights of shareholders comply with the conditions required by the Charter. Indeed, they are provided for by law, that is, by Directives 2009/65 and 2011/61 and the national legislation transposing those directives, do not impair the very substance of the right to property, and meet objectives of general interest recognised by the European Union, namely the protection of investors and the stability of the financial system, in the light of which they appear to be proportionate.

IV. PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 1 August 2022, Vyriausioji tarnybinės etikos komisija, C-184/20

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 – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 52(1) – Directive 95/46/EC – Article 7(c) – Article 8(1) – Regulation (EU) 2016/679 – Point (c) of the first subparagraph of Article 6(1) and the second subparagraph of Article 6(3) – Article 9(1) – Processing necessary for compliance with a legal obligation to which the controller is subject – Objective of public interest – Proportionality – Processing of special categories of personal data – National legislation requiring publication on the internet of data contained in the declarations of private interests of natural persons working in the public service or of heads of associations or establishments receiving public funds – Prevention of conflicts of interest and of corruption in the public sector

By decision of 7 February 2018, the Vyriausioji tarnybinės etikos komisija (Chief Official Ethics Commission, Lithuania; 'the Chief Ethics Commission') found that the director of an establishment governed by Lithuanian law in receipt of public funds had failed to fulfil his obligation to lodge a declaration of private interests[28]

That person challenged the decision of the Chief Ethics Commission before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania). He contended in particular that, even if he were required to submit a declaration of private interests, which he disputes, its publication on the Chief Ethics Commission's website pursuant to the Law on the reconciliation of interests would adversely affect both his right to respect for private life and that of the other persons who would, as the case may be, be mentioned in his declaration. Since the Regional Administrative Court, Vilnius, had doubts as to whether the regime, established by the Law on the reconciliation of interests, governing the publication of information set out in the declaration of private interests was compatible with the GDPR,[29] it made a reference to the Court of Justice for a preliminary ruling.

In its judgment, delivered by the Grand Chamber, the Court holds, in essence, that EU law [30] precludes national legislation that provides for the publication online of the declaration of private interests that any head of an establishment receiving public funds is required to lodge, in so far as, in particular, that publication concerns certain data, that is to say, name-specific data relating to other persons mentioned, as the case may be, in the declaration, or concerns any transaction of the declarant exceeding a certain value.

Findings of the Court

First of all, the Court notes that the relevant EU legislation sets out an exhaustive and restrictive list of the cases in which processing of personal data can be regarded as lawful, one of which is processing that is necessary for compliance with a legal obligation to which the controller is subject. Since the processing at issue – namely the publication, on the Chief Ethics Commission's website, of part of the personal data set out in the declaration of private interests – is required by the Law on the reconciliation of interests, to which that authority is subject, it does fall within that case. The Court adds that, under the GDPR, such processing must be based either on EU law or on Member State law to which the controller is subject, and that that legal basis must meet an objective of general interest and be proportionate to the legitimate aim pursued, as is indeed required by the Charter.[31] In that context, first, the Court observes that the processing of personal data provided for by the Law on the reconciliation of interests is genuinely intended to meet the objective of general interest of preventing conflicts of interest and combating corruption in the public sector. Second, it points out that, in such a case, limitations on the exercise of the rights to respect for private life and to the protection of personal data, guaranteed respectively by Articles 7 and 8 of the Charter, may be allowed, provided in particular that they genuinely meet the objective of general interest pursued and are proportionate to it.

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28 An obligation laid down by the Lietuvos Respublikos viešųjų ir privačių interesų derinimo valstybinėje tarnyboje įstatymas Nr. VIII-371 (Law No VIII-371 of the Republic of Lithuania on the reconciliation of public and private interests in the public service) of 2 July 1997 (Žin., 1997, No 67-1659; 'the Law on the reconciliation of interests'), in the version in force at the material time.

29 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').

30 Article 7(c) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and point (c) of the first subparagraph of Article 6(1) and Article 6(3) of the GDPR, read in the light of Articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

31 Article 52(1) of the Charter.

Next, the Court considers whether the measure at issue is appropriate for achieving the objective of general interest pursued. In that regard, it finds that that measure appears appropriate for contributing to the achievement of such an objective. The placing online of some of the personal data contained in the declarations of private interests of public sector decision makers, in that it enables the existence of possible conflicts of interest liable to influence the performance of their duties to be revealed, is such as to induce them to act impartially. Thus, such implementation of the principle of transparency is capable of preventing conflicts of interest and corruption, of increasing the accountability of public sector actors and, therefore, of strengthening citizens' trust in their actions.

As regards the requirement of necessity, in other words whether the objective pursued might not reasonably be achieved just as effectively by other measures less restrictive of the rights to respect for private life and to the protection of personal data, the Court states that that must be assessed in the light of all the matters of fact and law specific to the Member State concerned. In that context, it also points out that the lack of human resources available to the Chief Ethics Commission for checking all the declarations of private interests that are submitted to it, upon which the Chief Ethics Commission relies in order to justify their being placed online, cannot in any event constitute a legitimate ground justifying interference with the fundamental rights guaranteed by the Charter.

Furthermore, the requirement of necessity of the processing must be examined in the light of the 'data minimisation' principle. In that regard, the Court accepts that, with a view to preventing conflicts of interest and corruption in the public sector, it may be appropriate to require information enabling the declarant to be identified and information relating to the activities of the declarant's spouse, cohabitee or partner to be set out in the declarations of private interests. However, the public disclosure, online, of name-specific data relating to the spouse, cohabitee or partner of a head of an establishment receiving public funds, and to close relatives, or other persons known by the declarant, liable to give rise to a conflict of interests, seems to go beyond what is strictly necessary. It does not appear that the objective of general interest pursued could not be achieved if reference were solely made generically to a spouse, cohabitee or partner, as the case may be, together with the relevant indication of the interests held by those persons in relation to their activities. Nor does it appear that the systematic publication, online, of the list of the declarant's transactions the value of which is greater than EUR 3 000 is strictly necessary in the light of the objectives pursued.

In the present instance, the Court concludes that there is a serious interference with the fundamental rights of data subjects to respect for private life and to the protection of personal data. Indeed, the public disclosure of the abovementioned data and information is liable to reveal information on certain sensitive aspects of the data subjects' private life and to enable a particularly detailed picture of it to be built up. In addition, that public disclosure has the effect of making those data freely accessible on the internet to a potentially unlimited number of persons. Consequently, they may be freely accessed by persons seeking simply to find out about the personal, material and financial situation of the declarant and his or her close relatives.

So far as concerns the weighing of the seriousness of that interference against the importance of the objective of general interest pursued, the Court states that in the present instance the publication online of the majority of the personal data does not meet the requirements of a proper balance. However, the publication of certain data contained in the declaration of private interests may be justified by the benefits which such transparency brings in pursuing the objective sought. That is true in particular of the data relating to the membership of the declarant – or, without being name-specific, to the membership of the declarant's spouse, cohabitee or partner – of various entities, to their activities as self-employed persons or to gifts from third parties exceeding a certain value.

Finally, the Court states that the processing of personal data that are liable indirectly to reveal sensitive information concerning a natural person is not excluded from the strengthened protection

regime, [32] since such exclusion might well compromise the effectiveness of that regime and the protection of the fundamental rights and freedoms of natural persons that it is intended to ensure. Thus, the publication on the Chief Ethics Commission's website of personal data that are liable to disclose indirectly the data subjects' sexual orientation constitutes processing of sensitive data.

V. BORDER CONTROLS, ASYLUM AND IMMIGRATION

1. ASYLUM POLICY

Judgment of the Court (Grand Chamber) of 1 August 2022, Bundesrepublik Deutschland (Child of refugees, born outside the host State), C-720/20

Link to the full text of the judgment

Reference for a preliminary ruling – Common policy on asylum – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Regulation (EU) No 604/2013 (Dublin III) – Application for international protection lodged by a minor in his or her Member State of birth – Parents of that minor who have previously obtained refugee status in another Member State – Article 3(2) – Article 9 – Article 20(3) – Directive 2013/32/EU – Article 33(2)(a) – Admissibility of the application for international protection and responsibility for examining it

The applicant, a national of the Russian Federation, was born in Germany in 2015. In March 2012, her parents and her five siblings, who also have Russian nationality, had obtained refugee status in Poland. In December 2012, they had left Poland for Germany, where they had made applications for international protection. The Republic of Poland refused to allow the German authorities' request to take back those persons on the ground that they were already beneficiaries of international protection in its territory. Subsequently, the German authorities rejected the applications for international protection as inadmissible on account of the refugee status which those persons had already obtained in Poland. Nevertheless, the applicant's family continued to reside in Germany.

In March 2018, the applicant lodged an application for international protection with the German authorities. That application was rejected as inadmissible, on the basis, inter alia, of the Dublin III Regulation. [33]

The referring court, before which an appeal against that rejection decision has been brought, has doubts as to whether the Federal Republic of Germany is the Member State responsible for examining the applicant's application and whether, if so, that Member State is entitled to reject that application as inadmissible under the Procedures Directive. [34]

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32 This regime is covered in Article 8(1) of Directive 95/46 and Article 9(1) of the GDPR and prohibits, in principle, the processing of special categories of personal data.

33 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31) ('the Dublin III Regulation').

34 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').

Specifically, that court is uncertain as to the application by analogy of certain provisions of the Dublin III Regulation and the Procedures Directive to the applicant's situation. In that regard, it seeks to ascertain, first, whether – in order to prevent secondary movements – Article 20(3) of the Dublin III Regulation, concerning, inter alia, the situation of children born after the arrival of an applicant for international protection, [35] applies to an application for international protection lodged by a minor in his or her Member State of birth where his or her parents are already beneficiaries of international protection in another Member State. Second, it is unsure whether Article 33(2)(a) of the Procedures Directive [36] applies to a minor whose parents are beneficiaries of international protection in another Member State but who is not a beneficiary of such protection himself or herself.

The Court, sitting as the Grand Chamber, answers those questions in the negative. By its judgment, it clarifies the scope of the Dublin III Regulation and the Procedures Directive in the context of secondary movements of families which are already beneficiaries of international protection in one Member State to another Member State where a new child is born.

Findings of the Court

In the first place, the Court finds that Article 20(3) of the Dublin III Regulation is not applicable by analogy to a situation in which a minor and his or her parents lodge applications for international protection in the Member State in which that minor was born, in circumstances where his or her parents are already the beneficiaries of international protection in another Member State. First, that provision presupposes that the minor's family members still have the status of 'applicant' with the result that it does not govern the situation of a minor who was born after those family members obtained international protection in a Member State other than that in which the minor was born and resides with his or her family. Second, the situation of a minor whose family members are applicants for international protection and that of a minor whose family members are already beneficiaries of such protection are not comparable in the context of the scheme established by the Dublin III Regulation. The concepts of an 'applicant' [37] and that of a 'beneficiary of international protection' [38] cover separate legal statuses governed by different provisions of that regulation. Consequently, an application by analogy of Article 20(3) to the situation of a minor whose family members are already beneficiaries of international protection would mean that both that minor and the Member State that has granted that protection to the members of his or her family would not be subject to the application of the mechanisms provided for by that regulation. The consequence of this, inter alia, would be that such a minor could be the subject of a transfer decision without a procedure for taking charge being initiated for him or her.

Furthermore, the Dublin III Regulation lays down specific rules for situations in which the procedure initiated in respect of the applicant's family members has been concluded and they are therefore allowed to reside as beneficiaries of international protection in a Member State. Specifically, Article 9 of the Dublin III Regulation provides that, in such a situation, the latter Member State is to be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing. Admittedly, that condition precludes the application of Article 9 where no such desire is expressed. That situation is likely to arise in particular where the application for international protection of the minor concerned is made following an unlawful

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35 Under that provision, which relates to the procedure for taking charge, the situation of a minor who is accompanying the applicant for international protection and meets the definition of family member is to be indissociable from that of his or her family member and is to be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interests. The same treatment is to be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

36 Under that provision, the Member States may consider an application for international protection as inadmissible if another Member State has granted international protection.

37 Within the meaning of Article 2(c) of the Dublin III Regulation.

38 Within the meaning of Article 2(f) of the Dublin III Regulation.

secondary movement of his or her family from one Member State to the Member State in which that application is lodged. However, that fact in no way detracts from the fact that the EU legislature laid down, in that article, a provision which specifically covers the situation concerned. Furthermore, in the light of the clear wording of Article 9, that requirement that the desire be expressed in writing cannot be derogated from.

In those circumstances, in a situation in which the persons concerned have not expressed, in writing, the desire that the Member State responsible for examining a child's application for international protection should be the Member State in which that minor's family members were allowed to reside as beneficiaries of international protection, the Member State responsible will be determined pursuant to Article 3(2) of the Dublin III Regulation. [39]

In the second place, the Court finds that Article 33(2)(a) of the Procedures Directive does not apply by analogy to an application for international protection lodged by a minor in a Member State where it is not that child himself or herself, but his or her parents, who are beneficiaries of international protection in another Member State. In that regard, the Court notes that that directive sets out an exhaustive list of the situations in which the Member States may consider an application for international protection to be inadmissible. Moreover, the provisions laying down those grounds of inadmissibility constitute a derogation from the obligation on Member States to examine the substance of all applications for international protection. It follows from the exhaustive and derogating nature of that provision that it must be interpreted strictly and cannot therefore be applied to a situation which does not correspond to its wording.

The scope *ratione personae* of that provision cannot, consequently, extend to an applicant for international protection who is not himself or herself a beneficiary of such protection.

Judgment of the Court (Grand Chamber) of 1 August 2022, Staatssecretaris van Justitie en Veiligheid (Refusal to take charge of an Egyptian unaccompanied minor), C-19/21

Link to the full text of the judgment

Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Article 8(2) and Article 27(1) – Unaccompanied minor with a relative legally present in another Member State – Refusal by that Member State of that minor's take charge request – Right to an effective remedy of that minor or of that relative against the refusal decision – Articles 7, 24 and 47 of the Charter of Fundamental Rights of the European Union – Best interests of the child

When he was still a minor, I, an Egyptian national, submitted an application for international protection in Greece, in which he expressed his wish to be united with S, his uncle, also an Egyptian national, who was legally resident in the Netherlands. In the light of those circumstances, the Greek authorities submitted a take charge request to the Netherlands authorities in respect of I, on the basis of the provision of the Dublin III Regulation [40] which provides that, where it is in the best interests of the unaccompanied minor, the Member State responsible for examining his or her application is to be

39 In accordance with that provision, where no Member State can be designated as responsible on the basis of the criteria listed in the Dublin III Regulation, the first Member State in which the application for international protection was lodged is to be responsible for examining it.

40 Article 8(2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 108) ('the Dublin III Regulation').

that where a family member who is able to take care of him or her is legally resident. However, the State Secretary [41] rejected that application, as well as the request for re-examination.

I and S also submitted an objection, which the State Secretary rejected as manifestly inadmissible on the ground that the Dublin III Regulation does not provide for the possibility for applicants for international protection to challenge a decision rejecting a take charge request. Consequently, I and S brought an action against that decision before the rechtbank Den Haag (District Court, The Hague, Netherlands), claiming that they each had the right to bring such judicial proceedings under Article 27(1) of the Dublin III Regulation. [42]

In that context, the District Court of The Hague questioned the Court of Justice concerning the legal remedies available to an unaccompanied minor, an applicant for international protection, and his or her relative, against a decision rejecting a take charge request.

The Court, sitting as the Grand Chamber, holds that Article 27(1) of the Dublin III Regulation, read in conjunction with Articles 7, 24 and 47 of the Charter of Fundamental Rights of the European Union, [43] requires the Member State to which a take charge request [44] has been made to grant a right to a judicial remedy against its refusal decision to the unaccompanied minor who applies for international protection, but not to the relative of that minor.

Findings of the Court

As a preliminary point, the Court notes that, although, based on a literal interpretation, Article 27(1) of the Dublin III Regulation appears to grant the applicant for international protection a right to a remedy only for the purpose of challenging a transfer decision, the wording of that provision nevertheless does not exclude the possibility that an unaccompanied minor applicant may also be granted a right to a remedy for the purpose of challenging a decision to refuse a take charge request based on Article 8(2) of the Dublin III Regulation.

In order to determine whether Article 27(1) of the Dublin III Regulation, read in the light of Articles 7, 24 and 47 of the Charter, requires that there be a remedy against such a decision refusing a take charge request, that provision must be interpreted taking into account not only its wording but also its objectives, its general scheme and its context, and in particular its evolution in connection with the system of which it forms part.

In that regard, the Court notes that, in accordance with the first paragraph of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy, in compliance with the conditions laid down in that article. That right corresponds to the obligation imposed on the Member States, in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

As regards the determination of the Member State responsible for examining the application for international protection and compliance with the binding responsibility criterion, set out in Article 8(2) of the Dublin III Regulation, the Court observes that the judicial protection of an unaccompanied minor applicant cannot vary depending on whether that applicant is the subject of a transfer decision, taken by the requesting Member State, or of a decision by which the requested Member State refuses the request to take charge of that applicant. Those decisions are both liable to undermine the right, which the unaccompanied minor derives from that article, to be united with a relative who can take care of him or her, for the purposes of the examination of his or her application for international

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41 The Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) ('the State Secretary').

42 That provision lays down the right of the applicant for international protection to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

43 'the Charter'.

44 On the basis of Article 8(2) of the Dublin III Regulation.

protection. It follows that the minor concerned must be allowed, in both cases, in accordance with the first paragraph of Article 47 of the Charter, to bring proceedings to plead the infringement of that right.

In the present case, in accordance with Article 27(1) of the Dublin III Regulation, if I, after arriving in Greece, had travelled to the Netherlands and made his application for international protection there, and the Greek authorities had agreed to take charge of him as the Member State of first arrival, he would undoubtedly have been entitled to bring legal proceedings against the transfer decision adopted by the Netherlands authorities, on the ground that one of his relatives was resident in the Netherlands. In such a case, he could thus effectively plead the infringement of the right he derives as an unaccompanied minor under Article 8(2) of the Dublin III Regulation. By contrast, if Article 27(1) of the Dublin III Regulation were to be interpreted literally, an applicant who remains in the Member State of entry and makes his or her application for international protection there would be deprived of that possibility since, in that situation, no transfer decision is adopted.

The Court concludes that an unaccompanied minor applicant must be able to exercise a judicial remedy, under Article 27(1) of the Dublin III Regulation, not only where the requesting Member State adopts a transfer decision, but also where the requested Member State refuses to take charge of the person concerned, in order to be able to plead an infringement of the right conferred by Article 8(2) of that regulation, particularly since that regulation seeks to ensure full respect for the fundamental rights of unaccompanied minors, guaranteed in Articles 7 and 24 of the Charter.

However, Article 27(1) of that regulation does not confer on the applicant's relative, who resides in the requested Member State, a right to a remedy against such a rejection decision. Furthermore, since neither Article 7 and Article 24(2) of the Charter nor Article 8(2) of the Dublin III Regulation confer on him any rights on which he could rely in legal proceedings, that relative also cannot derive a right to a remedy against such a decision on the basis of Article 47 of the Charter alone.

Judgment of the Court (First Chamber) of 22 September 2022, Országos Idegenrendészeti Főigazgatóság and Others, C-159/21

Link to the full text of the judgment

Reference for a preliminary ruling – Common asylum and immigration policy – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Withdrawal of the status – Directive 2013/32/EU – Common procedures for granting and withdrawing international protection – Danger to national security – Position taken by a specialist authority – Access to the file

In 2002, GM was given a custodial sentence by a Hungarian court for a drug trafficking offence. Having lodged an application for asylum in Hungary, GM was granted refugee status by judgment delivered in June 2012 by the Fővárosi Törvényszék (Budapest High Court, Hungary; 'the referring court'). By decision adopted in July 2019, the Országos Idegenrendészeti Főigazgatóság (National Directorate-General for Aliens Policing, Hungary) withdrew his refugee status and refused to grant him subsidiary protection status governed by Directives 2011/95 [45] and 2013/32, [46] while applying the principle of non-refoulement to GM. That decision was taken on the basis of a non-reasoned decision issued by two Hungarian specialist bodies, the Alkotmányvédelmi Hivatal (Constitutional Protection

45 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

46 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).

Office) and by the Terrorelhárítási Központ (Counter-terrorism Centre), in which those two authorities concluded that GM's stay constituted a danger to national security. GM brought an appeal against that decision before the referring court.

The referring court is uncertain, in particular, as to the compatibility of Hungarian legislation on access to classified information with Article 23 of Directive 2013/32, [47] which lays down the scope of the legal assistance and representation to which an applicant for international protection is entitled. The referring court also seeks to ascertain whether the Hungarian rule requiring that the determining authority base its decision on a non-reasoned opinion of the aforementioned specialist bodies, without itself being able to examine the application of the ground for exclusion from the protection at issue, is in compliance with EU law.

The Court holds, inter alia, that Directive 2013/32, [48] read in the light of the general principle relating to the right to sound administration and of Article 47 of the Charter of Fundamental Rights of the European Union, precludes national legislation which provides that, where a decision refusing an application for international protection or withdrawing that protection is based on information the disclosure of which would jeopardise the national security of the Member State in question, the person concerned or his or her adviser can access that information only after obtaining authorisation to that end, without being provided with the grounds on which such decisions are based; such information cannot be used for the purposes of subsequent administrative procedures or judicial proceedings. The Court also states that Directives 2013/32 and 2011/95 [49] preclude national legislation under which the authority responsible for examining applications for international protection is systematically required, where bodies entrusted with specialist functions linked to national security have found, by way of a non-reasoned opinion, that a person constituted a danger to that security, to refuse to grant that person subsidiary protection, or to withdraw international protection previously granted to that person, on the basis of that opinion.

Findings of the Court

As regards, in the first place, the question of the compatibility with EU law of national legislation which limits the access of the persons concerned or of their representative to the confidential information on the basis of which decisions to withdraw or refuse to grant international protection have been adopted on grounds of national security, the Court recalls that, in accordance with Directive 2013/32, [50] where Member States restrict access to information or sources the disclosure of which would jeopardise, in particular, national security or the security of those sources, the Member States must not only make access to such information or sources available to the courts having jurisdiction to rule on the lawfulness of the decision on international protection, but also establish in national law procedures guaranteeing that the rights of defence of the person concerned are respected. [51]

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47 Pursuant to paragraph 1 of that provision: 'Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.
Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:

(a) make access to such information or sources available to the authorities referred to in Chapter V; and

(b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected.
In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.'

48 More specifically, Article 23(1) of Directive 2013/32, read in conjunction with Article 45(4) of that directive.

49 More specifically, Article 4(1) and (2), Article 10(2) and (3), Article 11(2) and Article 45(3) of Directive 2013/32, read in conjunction with Article 14(4)(a) and Article 17(1)(d) of Directive 2011/95.

50 Points (a) and (b) of the second subparagraph of Article 23(1).

51 The latter obligation is based on point (b) of the second subparagraph of Article 23(1) of Directive 2013/32.

Although the Member States may, in that connection, grant access to such information to an adviser of the person concerned, such a procedure is not the only option available to the Member States to comply with that obligation. The practical arrangements of the procedures established to that end are a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that these are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness).

The Court also recalls that the rights of the defence are not absolute rights, and the right of access to the file, which is the corollary thereto may therefore be limited, on the basis of a weighing up, on the one hand, of the right to sound administration and the right to an effective remedy of the person concerned and, on the other hand, the interests relied on in order to justify the non-disclosure of an element of the file to that person, in particular where those interests relate to national security. Although that weighing up cannot lead, in the light of the necessary observance of Article 47 of the Charter of Fundamental Rights, to depriving the rights of defence of the person concerned of all effectiveness and to rendering meaningless the right to a remedy provided for in the directive itself, [52] it may, however, result in certain information in the file not being disclosed to the person concerned, where disclosure of that information is likely to jeopardise the security of the Member State concerned in a direct and specific manner.

Consequently, the second subparagraph of Article 23(1) of Directive 2013/32 cannot be interpreted as allowing the competent authorities to place that person in a situation where neither he or she nor his or her representative would be able to gain effective knowledge, where applicable in the context of a specific procedure designed to protect national security, of the substance of the decisive elements contained in that file. The Court states in that connection that where the disclosure of information placed on the file has been restricted on grounds of national security, respect for the rights of defence of the person concerned is not sufficiently guaranteed by the possibility for that person of obtaining, under certain conditions, authorisation to access that information, together with a complete prohibition on using the information thus obtained for the purposes of the administrative procedure or any judicial proceedings. Furthermore, in ensuring that the rights of the defence are sufficiently guaranteed, the power of the court having jurisdiction to have access to the file cannot replace access to the information placed on that file by the person concerned or his or her adviser.

As regards, in the second place, the compliance with EU law of the national legislation at issue, which confers a leading role on specialist national security bodies in the context of the procedure for adopting decisions to withdraw or refuse to grant international protection, the Court holds that it is for the determining authority alone to carry out, acting under the supervision of the courts, the assessment of the relevant facts and circumstances, including those relating to the application of those articles of Directive 2011/95 relating to revocation of, ending of or refusal to renew refugee status [53] and those relating to exclusion from such status. [54] That determining authority must, moreover, state in its decision the reasons which led it to adopt that decision. It cannot confine itself to giving effect to a decision, adopted by another authority, which is binding on the former authority under national legislation, and to take, on that basis alone, the decision not to grant subsidiary protection or to withdraw international protection previously granted. The determining authority must, on the contrary, have available to it all the relevant information and, in the light of that information, carry out its own assessment of the facts and circumstances with a view to determining the tenor of its decision and providing a full statement of reasons for that decision. Although some of

52 That right is provided for by Article 45(3) of Directive 2013/32.

53 Article 14 of Directive 2011/95.

54 Article 17 of Directive 2011/95.

the information used by the competent authority in conducting its assessment may in part be provided by specialist bodies responsible for national security, the scope of such information and its relevance to the decision to be taken must be freely assessed by that authority. The latter cannot therefore be required to rely on a non-reasoned opinion given by such bodies, based on an assessment the factual basis of which has not been disclosed to that authority.

Judgment of the Court (First Chamber) of 22 September 2022, Bundesrepublik Deutschland (Administrative suspension of the transfer decision), C-245/21 and C-248/21

Link to the full text of the judgment

Request for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Articles 27 and 29 – Transfer of the person concerned to the Member State responsible for the examination of his or her request – Suspension of the transfer due to the COVID-19 pandemic – Impossibility of carrying out the transfer – Judicial protection – Consequences for the time limit for transfer

During 2019, LE, MA and PB applied for asylum in Germany. However, LE had previously lodged an application for international protection in Italy and MA and PB had unlawfully entered the territory of the latter Member State, where they had been registered as applicants for international protection. Therefore, the competent German authority requested the Italian authorities to take back LE and to take charge of MA and PB on the basis of the Dublin III Regulation. [55] That authority subsequently declared the asylum applications of the persons concerned inadmissible and ordered their deportation to Italy.

In February 2020, the Italian authorities informed the German authorities that, due to the COVID-19 pandemic, transfers to and from Italy under the Dublin III Regulation would no longer take place. By decisions adopted in March 2020 and April 2020, the competent German authority suspended, until further notice, the implementation of the removal orders of the persons concerned pursuant, inter alia, to that regulation, [56] on the grounds that, in view of the development of the Covid-19 pandemic, the implementation of such transfers was not possible.

In judgments delivered in June 2020 and August 2020, the Verwaltungsgericht (Administrative Court, Germany) annulled the decisions by which the authority had declared the asylum applications of the persons concerned inadmissible and ordered their deportation. That court found that, even if Italy had been responsible for the examination of the asylum applications of the persons concerned, that responsibility had been transferred to Germany due to the expiry of the time limit for transfer provided for in the Dublin III Regulation, [57] since the expiry of that time limit had not been interrupted by the abovementioned suspension decisions.

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55 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31, 'the Dublin III Regulation').

56 Those decisions were adopted on the basis of Article 27(4) of the Dublin III Regulation, according to which Member States may provide that the competent authorities may decide, acting ex officio, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.

57 See Article 29(1) of the Dublin III Regulation, according to which the transfer of the applicant from the requesting Member State to the Member State responsible is to be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge of or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

The referring court, seized of an appeal on a point of law against those judgments, has doubts as to whether the decisions to suspend the implementation of the removal orders taken in respect of the persons concerned may have the effect of interrupting the time limit for transfer.

The Court rules that the time limit for transfer provided for by the Dublin III Regulation [58] is not interrupted where the competent authorities of a Member State adopt, on the basis of that regulation, [59] a revocable decision to suspend the implementation of a transfer decision on the ground that such implementation is materially impossible because of the Covid-19 pandemic.

Assessment of the Court

The Court states first of all that, where an appeal against a transfer decision has been granted suspensive effect by a decision taken by the competent authorities under the conditions laid down by the Dublin III Regulation, [60] the time limit for transfer runs from the final decision on that appeal, so that the transfer decision must be enforced no later than six months from the final decision on that appeal.

That solution presupposes, however, that the decision to suspend the implementation of the transfer decision was adopted by those authorities within the limits of the scope of the provision providing for that suspensive effect. [61]

With regard to that scope, the Court emphasises, on the one hand, that the application of that provision is closely linked to the lodging by the person concerned of an appeal against the transfer decision, since the suspension ordered by those authorities is to occur 'pending the outcome of the appeal'.

On the other hand, as regards the context of that provision, it forms part of the section entitled 'Procedural safeguards'. [62] In addition, that provision is contained in an article entitled 'Remedies' and follows a paragraph dealing with the suspensive effect of the action against the transfer decision, which it complements by authorising Member States to allow the competent authorities to suspend the implementation of the transfer decision in cases where its suspension following the bringing of an action does not result from the effects of legislation or a judicial decision.

Finally, as regards the objectives pursued by the Dublin III Regulation, the six-month time limit for transfers laid down in that regulation is intended to ensure that the person concerned is actually transferred as soon as possible to the Member State responsible for examining his or her application for international protection. Having regard to the effect of interrupting that time limit for transfer, which the suspension of the implementation of a transfer decision has, to interpret the provision concerned as allowing Member States to permit the competent authorities to suspend the implementation of transfer decisions on grounds which have no direct link with the judicial protection of the person concerned would risk rendering ineffective the time limit for transfer, altering the division of responsibilities between the Member States resulting from the Dublin III Regulation and substantially prolonging the processing of applications for international protection.

Therefore, the Court holds that a suspension of the implementation of a transfer decision may be ordered by the competent authorities, within the framework defined for that purpose by the Dublin III Regulation, only where the circumstances surrounding that implementation mean that the person concerned must, in order to ensure his or her effective judicial protection, be authorised to remain in the territory of the Member State which adopted that decision until a final decision on the appeal has

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58 See Article 29(1) of the Dublin III Regulation.

59 The decision is thus based on Article 27(4) of the Dublin III Regulation.

60 In accordance with Article 27(4) of the Dublin III Regulation.

61 This concerns Article 27(4) of the Dublin III Regulation.

62 Section IV of Chapter VI of the Dublin III Regulation.

been taken. Therefore, a revocable decision to suspend the implementation of a transfer decision on the ground that its implementation is materially impossible cannot be regarded as falling within that framework. The fact that the material impossibility of enforcing a transfer decision may, under the national law of the Member State concerned, mean that that decision is unlawful cannot call that conclusion into question. First, the revocable nature of a decision to suspend the implementation of a transfer decision prevents that suspension from being regarded as having been ordered pending a ruling on the appeal against the transfer decision and with the aim of guaranteeing the judicial protection of the person concerned as it cannot be excluded that the suspension may be revoked before the appeal is decided. Secondly, it is clear from various provisions of the Dublin III Regulation that the EU legislature did not consider that the material impossibility of implementing the transfer decision should be regarded as justifying the interruption or suspension of the time limit for transfer.

2. IMMIGRATION POLICY

Judgment of the Court (Grand Chamber) of 7 September 2022, Staatssecretaris van Justitie en Veiligheid (Nature du droit de séjour au titre de l'article 20 TFUE), C-624/20

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2003/109/EC – Status of third-country nationals who are long-term residents – Scope – Third-country national with a right of residence under Article 20 TFEU – Article 3(2)(e) – Residence solely on temporary grounds – Autonomous concept of EU law

E. K., a Ghanaian national with a son of Netherlands nationality, obtained, in 2013, a residence permit in the Netherlands under Article 20 TFEU, bearing the endorsement 'family member of a Union citizen'.

In 2019, she submitted an application for a long-term resident's EU residence permit based on the national legislation transposing Directive 2003/109. [63] Taking the view that the right of residence under Article 20 TFEU was temporary, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) refused her application.

E. K. brought an action against that refusal decision before the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, The Hague, sitting in Amsterdam, Netherlands), which considered the 'temporary' nature of a right of residence obtained under Article 20 TFEU.

The Court, sitting as the Grand Chamber, holds that the concept of residence 'solely on temporary grounds', within the meaning of Article 3(2)(e) of Directive 2003/109, does not cover the residence of a third-country national under Article 20 TFEU within the territory of the Member State of which the Union citizen concerned is a national and, therefore, that such residence is not excluded from the scope of Directive 2003/109.

63 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

Findings of the Court

First of all, the Court notes that the stay of a third-country national within the territory of a Member State, pursuant to Article 20 TFEU, satisfies the condition, laid down in Article 3(1) of Directive 2003/109, according to which that directive applies to third-country nationals residing legally in the territory of a Member State.

In order to determine whether such a national is, however, excluded from the scope of Directive 2003/109, pursuant to Article 3(2)(e) thereof, which refers in particular to third-country nationals residing in the territory of a Member State 'solely on temporary grounds', that provision must be interpreted taking into account not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.

In that regard, the Court considers, in the first place, that the concept of residence 'solely on temporary grounds' covers any residence in the territory of a Member State which is based solely on grounds having the objective characteristic of implying that it is strictly limited in time and is intended to be of short duration, not permitting the long-term residence of the third-country national concerned within the territory of that Member State.

In the present case, the right of residence of a third-country national under Article 20 TFEU, in his or her capacity as a family member of a Union citizen, is justified on the ground that such residence is necessary in order for that Union citizen to be able genuinely to enjoy the substance of the rights conferred by that status for as long as the relationship of dependency with that national persists. In principle, such a relationship of dependency is not intended to be of short duration, but may extend over a considerable period. Consequently, the reason for the residence effected in the territory of a Member State, pursuant to Article 20 TFEU, is not such as to prevent the long-term residence of the third-country national concerned in the territory of that Member State.

In those circumstances, the residence of a third-country national under Article 20 TFEU does not constitute residence 'solely on temporary grounds' within the meaning of Article 3(2)(e) of Directive 2003/109.

In the second place, that interpretation is supported by the principal objective of Directive 2003/109, which is the integration of third-country nationals who are settled on a long-term basis in the Member States. That integration results above all from the five-year duration of the legal and continuous residence, referred to in Article 4(1) of Directive 2003/109. In view of the relationship of dependency between a third-country national and his or her child, who is a Union citizen, the duration of that national's stay in the territory of the Member States under Article 20 TFEU is liable to be significantly longer than that duration.

In addition, a third-country national who enjoys a right of residence under Article 20 TFEU must be granted a work permit in order to enable him or her to support his or her child who is a Union citizen, as otherwise that child will be deprived of the genuine enjoyment of the substance of the rights attaching to that status. The exercise of an employment in the territory of the Member State concerned over a prolonged period is such as to ingrain that national's roots there even further.

In the third place, that interpretation is not invalidated by the context in which Article 3(2)(e) of Directive 2003/109 occurs, since a third-country national who enjoys a right of residence under Article 20 TFEU must, in order to acquire long-term resident status, satisfy the conditions laid down in that directive. Thus, he or she must provide evidence that he or she has, for himself or herself and for dependent family members, stable and regular resources which are sufficient to maintain himself or herself and the members of his or her family without recourse to the social assistance system of the Member State concerned, and sickness insurance in respect of all risks normally covered for its own nationals in that State. Likewise, the Member State concerned may require third-country nationals to comply with integration conditions in accordance with their national law.

Last, the Court specifies that the circumstance that a third-country national's right of residence under Article 20 TFEU is a right derived from those enjoyed by a Union citizen is irrelevant for the purposes of determining whether the concept of residence 'solely on temporary grounds' covers the residence of a third-country national under Article 20 TFEU within the territory of the Member State of which the Union citizen concerned is a national.

First, neither Article 3 of that directive nor any other provision of that directive makes a distinction according to whether the third-country national in question resides legally within the territory of the European Union by virtue of an autonomous right or by virtue of a right derived from those enjoyed by the Union citizen concerned. Second, the derivative nature of that right of residence does not necessarily mean that the reasons justifying the grant of such a right preclude the long-term residence of that national within the territory of that Member State.

VI. JUDICIAL COOPERATION IN CRIMINAL MATTERS: RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

Judgment of the Court (First Chamber) of 1 August 2022, Illumina, TL, C-242/22 PPU

Link to the full text of the judgment

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Directive 2010/64/EU – Right to interpretation and translation – Article 2(1) and Article 3(1) – Concept of an 'essential document' – Directive 2012/13/EU – Right to information in criminal proceedings – Article 3(1)(d) – Scope – Not implemented in domestic law – Direct effect – Charter of Fundamental Rights of the European Union – Article 47 and Article 48(2) – European Convention for the Protection of Human Rights and Fundamental Freedoms – Article 6 – Suspended prison sentence with probation – Breach of the probation conditions – Failure to translate an essential document and absence of an interpreter when that document was being drawn up – Revocation of the suspension of the prison sentence – Failure to translate the procedural acts relating to that revocation – Consequences for the validity of that revocation – Procedural defect resulting in relative nullity

In 2019, TL, a Moldovan national who does not have a command of the Portuguese language, was sentenced in Portugal to a period of imprisonment, suspended with probation. At the time he was placed under judicial investigation, TL was subject to the coercive measure provided for in the Portuguese Code of Criminal Procedure which consists of a declaration of identity and residence ('the DIR') [64] and which is accompanied by a series of obligations, including that of informing the authorities of any change of residence. TL was not assisted by an interpreter when the DIR was drawn up, nor was that document translated into a language he speaks or understands. With a view to implementing the probation scheme, the competent authorities tried unsuccessfully to contact TL at the address indicated in the DIR.

On 7 January 2021, the court that sentenced TL issued an order summoning him to appear in court to be heard in respect of his failure to comply with the conditions of the probation scheme. The notifications of that order were made in Portuguese, at the address indicated in the DIR.

Since TL did not appear on the date indicated, that court revoked, by order of 9 June 2021, the suspension of the prison sentence. That order was also notified in Portuguese, at the address indicated in the DIR. Subsequently, TL was arrested at another address and imprisoned in order to serve his sentence.

64 A DIR is established for every person under investigation. It contains that person's place of residence, place of work or any other address of that person and indicates that certain information and obligations have been communicated to him or her, such as the obligation not to change residence without notifying the new address.

In November 2021, TL brought an action seeking a declaration that the DIR and the orders relating to the revocation of the suspension of his sentence were invalid. He claimed that he could not have been contacted at the address indicated in the DIR due to a change of residence. He did not notify that change of residence because he was not aware of the obligation to do so, since he had not been provided with an interpreter when the DIR was drawn up or with a translation of that document into a language he spoke or understood. Furthermore, neither the order of 7 January 2021 nor that of 9 June 2021 were translated into such a language.

The court of first instance dismissed that action, on the ground that, although those procedural defects concerning translation and interpretation were established, they had been rectified, since TL had not invoked them within the prescribed periods. [65] The referring court, hearing an appeal against that decision, has doubts as to whether such a procedural provision is compatible with, inter alia, Directives 2010/64 [66] and 2012/13. [67]

In the context of the urgent preliminary ruling procedure, the Court of Justice holds that those directives, read in the light of the fundamental rights to a fair trial and to respect for the rights of the defence, [68] and the principle of effectiveness, preclude national legislation under which infringement of the rights to information, interpretation and translation provided for by those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof.

Findings of the Court

The Court examines the question referred in the light of Articles 2(1) [69] and Article 3(1) [70] of Directive 2010/64 and Article 3(1)(d) [71] of Directive 2012/13, read in the light of Article 47 and Article 48(2) of the Charter. These provisions give specific expression to the fundamental rights to a fair trial and to respect for the rights of the defence.

In the first place, even if these provisions have not been transposed or have not been fully transposed into the national legal system, individuals may rely on the rights arising from these provisions, since they have direct effect. Those provisions state, in a precise and unconditional manner, the content and scope of the rights of every suspected or accused person to receive interpretation services and the translation of essential documents, and to be informed of those rights.

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65 Under Article 120 of the Código do Processo Penal (Code of Criminal Procedure), nullities such as the failure to appoint an interpreter must be invoked within prescribed periods, failing which the challenge will be time-barred. Thus, in the case of the nullity of an act drawn up in the presence of the person concerned, the nullity must be invoked before the finalisation of that act. According to the Portuguese Government, that article is also applicable to the invocation of defects arising from the infringement of the right to translation of essential documents in criminal proceedings.

66 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

67 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

68 As guaranteed by Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union ('the Charter') respectively.

69 That provision requires Member States to ensure that suspects or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities.

70 In accordance with that provision, Member States are to ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

71 This provision requires Member States to ensure that suspects or accused persons are provided promptly with information concerning the right to interpretation and translation, in order to allow for those rights to be exercised effectively.

In the second place, as regards a possible infringement of those provisions in the present case, the Court finds that the three procedural acts at issue, namely the DIR, the order of 7 January 2021 summoning TL to appear and the order of 9 June 2021 revoking the suspension of the prison sentence, fall within the scope of Directives 2010/64 and 2012/13 and constitute essential documents of which a written translation should have been provided. In particular, the translation of the DIR into a language understood or spoken by TL would have been essential, since the breaches of the obligations set out in that document indirectly led to the revocation of the suspended prison sentence imposed on him.

In that respect, the application of these directives to a procedural act, the content of which determines the maintenance or revocation of a suspended sentence of imprisonment, is necessary in the light of the objective of these directives to ensure respect for the right to a fair trial, as enshrined in Article 47 of the Charter, and respect for the rights of the defence, as guaranteed by Article 48(2) of the Charter. Those fundamental rights would be infringed if a person who has been sentenced to a suspended term of imprisonment were unable to ascertain – because of the failure to translate that act or the absence of an interpreter when it was drawn up – the consequences of failing to comply with the obligations imposed on him or her by that act.

In the third place, as regards the consequences of an infringement of the rights in question, Directives 2010/64 and 2012/13 do not set out the detailed rules for the implementation of the rights which they lay down. Accordingly, those rules are a matter for the domestic legal system of the Member States in accordance with the principle of procedural autonomy, provided that they comply with the principle of equivalence and the principle of effectiveness.

As regards the principle of effectiveness, the rules laid down in national law cannot undermine the objective of these directives. First, the obligation to inform suspects and accused persons of their rights to interpretation and translation is of essential importance in order effectively to guarantee those rights. Without that information, the person concerned could not know the existence and scope of these rights or demand that they be respected. Thus, to require the person concerned by criminal proceedings conducted in a language which he or she does not speak or understand to plead that he or she has not been informed of his or her rights to interpretation and translation within a prescribed period, failing which that challenge will be time-barred, would have the effect of rendering meaningless the right to be informed and would consequently undermine that person's rights to a fair trial and to respect for the rights of the defence. That conclusion also applies, as regards the rights to interpretation and translation, where the person concerned has not been informed of the existence and scope of those rights.

Secondly, even where the person concerned has actually received that information in good time, it is also necessary that he or she be aware of the existence and content of the essential document in question and of the effects arising from it, in order to be able to invoke an infringement of his or her right to the translation of that document or of his or her right to the assistance of an interpreter when that document is being drawn up.

Accordingly, the principle of effectiveness would be undermined if the period in which, under a national procedural provision, an infringement of the rights granted by Directives 2010/64 and 2012/13 may be invoked began to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question as well as its effects.

VII. COMPETITION

1. AGREEMENTS, DECISIONS AND CONCERTED PRACTICES (ARTICLE 101 TFEU)

Judgment of the Court (First Chamber) of 1 August 2022, Daimler (Cartels – Refuse collection trucks), C-588/20

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Article 101 TFEU – Actions for damages for infringements of the provisions of EU competition law – European Commission decision finding an infringement – Settlement procedure – Products concerned by the infringement – Specialised trucks – Household refuse collection trucks

In 2016, following a settlement procedure, the European Commission found [72] that, by agreeing, first, on the prices of trucks in the European Economic Area (EEA) from 1997 to 2011 and, secondly, on the timing and the passing on of costs for the introduction of emission technologies required by EURO 3 to 6 standards, Daimler, MAN SE and Iveco Magirus AG ('the undertakings concerned') participated, with several other manufacturers of trucks, in a cartel contrary to EU rules. [73]

In the course of the settlement procedure which led to the adoption of that decision, the Commission sent the undertakings concerned a request for information in order to obtain information regarding the turnover achieved by them with products directly or indirectly linked to the cartel, with a view to determining the fine to be imposed on them. On that occasion, the Commission stated that, for the purposes of the questions posed in that request, the concept of 'trucks' covered neither specialised trucks nor used trucks.

Having purchased two household refuse collection trucks from Daimler in 2006 and 2007, the Landkreis Northeim (Northeim district) brought an action before the Landgericht Hannover (Hanover Regional Court, Germany) seeking compensation for the damage suffered as a result of the cartel found by the Commission. In its defence, Daimler claimed, inter alia, that, in accordance with the Commission's request for information, household refuse collection trucks, as specialised trucks, are not concerned by the Commission decision finding the cartel.

Thus, the Hanover Regional Court referred a question to the Court of Justice for a preliminary ruling seeking to ascertain whether specialised trucks, in particular household refuse collection trucks, fall within the scope of the products covered by the cartel found by the Commission in the decision at issue. By answering in the affirmative, the Court addresses the question of the determination of the products covered by a cartel found in a Commission decision taken following a settlement procedure.

Findings of the Court

As a preliminary point, the Court states that the products concerned by an infringement of Article 101 TFEU found in a Commission decision are determined by reference to the agreements and activities of the cartel. It is the members of the cartel which voluntarily concentrate their anticompetitive actions on the products covered by that cartel.

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72 Commission Decision C(2016) 4673 final of 19 July 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39824 – *Trucks*) ('the decision at issue').

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

Therefore, in order to determine whether household refuse collection trucks are among the products covered by the cartel found in the decision at issue, reference must be made, as a matter of priority, to the operative part and to the statement of reasons for that decision.

In that regard, the Court finds that, as is apparent from the wording of the Commission decision, that decision relates to the sale of all medium trucks and heavy trucks, both as rigid trucks as well as tractor trucks, excluding trucks for military use, since the sole criterion laid down in the decision at issue for determining whether a truck falls within that decision is its weight.

Furthermore, the Court notes that there is nothing in the decision at issue to suggest that specialised trucks are excluded from the products covered by the cartel. On the contrary, it is apparent from that decision that the cartel concerned all special and standard equipment and models and all factory-fitted options offered by the respective manufacturers which have participated in that cartel. In those circumstances, the Court concludes that specialised trucks, including household refuse collection trucks, are among the products covered by the cartel found in the decision at issue.

That conclusion cannot be called into question by the request for information sent to the undertakings concerned in the context of the settlement procedure.

In that regard, the Court observes, in the first place, that although in the context of a settlement procedure the Commission may reward the cooperation of the undertakings involved in the procedure, it does not negotiate either the question of the existence of an infringement of the EU competition rules or the appropriate sanction. Accordingly, the fact that the decision at issue was adopted in the context of such a procedure has no bearing on the determination of the scope of the anticompetitive conduct.

In the second place, the Court states that the sole purpose of a request for information is to enable the Commission to obtain the information and documentation necessary to check the actual existence and scope of a specific factual and legal situation, and not to define or specify the products concerned by the anticompetitive conduct. In the present case, the request for information sent to the undertakings concerned sought solely to determine the relevant sales for the purposes of calculating the fine.

In the third and last place, the Court observes that, although the Commission enjoys a broad discretion as regards the method for calculating fines in relation to infringements of the EU competition rules, that discretion is limited, in particular, by rules of conduct which the Commission imposed on itself.

In accordance with point 37 of the Guidelines on the method of setting fines, [74] the Commission may depart from the general methodology laid down in those guidelines for the setting of fines, in order to take account of the particularities of a given case or to achieve sufficient deterrence.

In that context, the Court considers that the Commission is not required, as the case may be, to take into account the maximum value of all sales concerned by the cartel in order to ensure that a fine is effective and a deterrent. That being so, when the Commission decides to rely on point 37 of the Guidelines on the method of setting fines and to depart from the general methodology set out in those guidelines, it must fulfil its obligation to state reasons under Article 296 TFEU. The Commission may not depart from those guidelines in an individual case without giving reasons that are compatible with EU law.

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

In the present case, it is apparent from the Commission decision that it applied point 37 of the Guidelines on the method of setting fines. The Commission had taken the view that, having regard to the magnitude of the value of sales of the undertakings concerned, the objectives of deterrence and proportionality of the fine could be achieved without using the total value of the truck sales of those undertakings. Accordingly, the Commission had decided to use only a fraction of the total value of sales for the purposes of calculating the fine.

Consequently, the fact that specialised trucks were excluded from the concept of 'trucks' in the request for information and that the Commission decided to use only a fraction of the total value of the sales for the purposes of calculating the fine does not permit the inference that specialised trucks were not among the products covered by the cartel found in the decision at issue.

2. ABUSE OF A DOMINANT POSITION (ARTICLE 102 TFEU)

Judgment of the General Court (Sixth Chamber, Extended Composition) of 14 September 2022, Google and Alphabet v Commission (Google Android), T-604/18

Link to the full text of the judgment

Competition – Abuse of dominant position – Smart mobile devices – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Concepts of multi-sided platform and market ('ecosystem') – Operating system (Google Android) – App store (Play Store) – Search and browser applications (Google Search and Chrome) – Agreements with device manufacturers and mobile network operators – Single and continuous infringement – Concepts of overall plan and conduct implemented in the context of the same infringement (product bundles, exclusivity payments and anti-fragmentation obligations) – Exclusionary effects – Rights of the defence – Unlimited jurisdiction

Google, [75] an undertaking in the information and communications technology sector specialising in internet-related products and services, derives most of its revenue from its flagship product, the search engine Google Search. Google's business model is based on the interaction between, on the one hand, a number of products and services offered to users for the most part free of charge and, on the other hand, online advertising services using data collected from those users. Google also offers the Android operating system (OS), which, according to the European Commission, was installed on approximately 80% of smart mobile devices used in Europe in July 2018.

Various complaints were submitted to the Commission regarding some of Google's business practices in the mobile internet, leading the Commission to initiate a procedure against Google in relation to Android on 15 April 2015. [76]

75 In this case, 'Google' refers jointly to Google LLC, formerly Google Inc., and to its parent company, Alphabet, Inc.

76 In June 2017, the Commission had already imposed a fine on Google of €2.42 billion for abuse of its dominant position on the market for search engines by conferring an unlawful advantage on its own comparison shopping service. That decision was largely upheld by the General Court by judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*, T-612/17 (EU:T:2021:763). Google's appeal against that judgment is currently pending before the Court of Justice (C-48/22 P - EU:C:2022:207).

By decision of 18 July 2018, [77] the Commission fined Google for having abused its dominant position by imposing anticompetitive contractual restrictions on manufacturers of mobile devices and on mobile network operators, in some cases since 1 January 2011. Three types of restriction were identified:

1. those contained in 'distribution agreements', requiring manufacturers of mobile devices to pre-install the general search (Google Search) and (Chrome) browser apps in order to be able to obtain a licence from Google to use its app store (Play Store);
2. those contained in 'anti-fragmentation agreements', under which the operating licences necessary for the pre-installation of the Google Search and Play Store apps could be obtained by mobile device manufacturers only if they undertook not to sell devices running versions of the Android operating system not approved by Google;
3. those contained in 'revenue share agreements', under which the grant of a share of Google's advertising revenue to the manufacturers of mobile devices and the mobile network operators concerned was subject to their undertaking not to pre-install a competing general search service on a predefined portfolio of devices.

According to the Commission, the objective of all those restrictions was to protect and strengthen Google's dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements. The common objective and the interdependence of the restrictions at issue therefore led the Commission to classify them as a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA).

Consequently, the Commission imposed a fine of almost €4.343 billion on Google, the largest fine ever imposed by a competition authority in Europe.

The action brought by Google is largely dismissed by the General Court, which confines itself to annulling the decision only in so far as it finds that the portfolio-based revenue share agreements referred to above constitute, in themselves, an abuse. In the light of the particular circumstances of the case, the General Court also considers it appropriate, in the exercise of its unlimited jurisdiction, to set the amount of the fine imposed on Google at €4.125 billion.

Findings of the General Court

As a first step, the General Court examines the plea alleging errors of assessment in the definition of the relevant markets and in the subsequent assessment of Google's dominant position on some of those markets. In that context, the General Court states that it is required, essentially, to ascertain, in the light of the parties' arguments and of the reasoning set out in the contested decision, whether Google's exercise of its power on the relevant markets enabled it to act to an appreciable extent independently of the various factors likely to constrain its behaviour.

In the present case, the General Court notes at the outset that the Commission identified, first of all, four types of relevant market: (i) the worldwide market (excluding China) for the licensing of smart mobile device operating systems; (ii) the worldwide market (excluding China) for Android app stores; (iii) the various national markets, within the EEA, for the provision of general search services; and (iv) the worldwide market for non OS-specific mobile web browsers. The Commission went on to find that Google held a dominant position on the first three of those markets. The General Court observes however that, in the Commission's presentation of the different relevant markets, it duly mentioned their complementarity, presenting them as being interconnected, particularly in the light of the overall strategy implemented by Google to promote its search engine by integrating it into an 'ecosystem'.

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77 Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40099 – Google Android).

Having been called upon, specifically, to rule on the definition of the boundaries of the market for the licensing of smart mobile device operating systems and the associated assessment of the position held by Google in that market, the General Court establishes, first of all, that the Commission found without objection from Google that the 'non-licensable' operating systems exclusively used by vertically integrated developers, like Apple's iOS or Blackberry, are not part of the same market, given that third-party manufacturers of mobile devices cannot obtain licences for them. Nor did the Commission err in also finding that Google's dominant position on that market was not called into question by the indirect competitive constraint exerted on that market by Apple's non-licensable operating system. The Commission also rightly concluded that the open-source nature of the licence to use the Android source code did not constitute a sufficient competitive constraint to counterbalance that dominant position.

As a second step, the General Court examines the various pleas alleging that the finding that the restrictions at issue were abusive was incorrect.

First, as regards the pre-installation conditions imposed on manufacturers of mobile devices, [78] the Commission concluded that they were abusive, distinguishing, on the one hand, the Google Search and Play Store apps bundle from the Chrome browser, Google Search and Play Store apps bundle, and finding, on the other hand, that those bundles had restricted competition during the infringement period, for which Google had been unable to demonstrate any objective justification.

In that regard, the General Court notes that, in order to substantiate the claim that a significant competitive advantage was conferred by the pre-installation conditions at issue, the Commission found that such pre-installation could give rise to a 'status quo bias' as a result of the tendency of users to use the search and browser apps available to them and apt to increase significantly and on a lasting basis the usage of the service concerned, an advantage which could not be offset by Google's rivals. According to the General Court, none of the criticisms put forward by Google can be levelled against the Commission's analysis in that respect.

Next, addressing complaints regarding the finding that the means available to Google's competitors did not enable them to counterbalance the competitive advantage derived by Google from the pre-installation conditions in question, the General Court observes that, while those conditions do not prohibit the pre-installation of competing apps, the fact remains that there is provision for such a prohibition, in respect of the devices covered, in the revenue share agreements – whether portfolio-based or the device-based revenue share agreements that replaced them – that is, more than 50% of Google Android devices sold in the EEA from 2011 to 2016, which the Commission was able to take into account as the combined effects of the restrictions in question. In addition, the Commission was also legitimately able to rely on its observation of the actual situation to support its findings, noting in that respect the limited use in practice of pre-installation or downloading of competing apps or of access to competing search services through browsers. Lastly, deeming Google's criticisms of the considerations that led the Commission to find that there was no objective justification for the bundles examined also to be ineffective, the General Court rejects in its entirety the plea by which it is alleged that the finding that the pre-installation conditions were abusive is incorrect.

Second, as regards the assessment of the sole pre-installation condition included in the portfolio-based revenue share agreements, the General Court finds, first of all, that the Commission was justified in considering the agreements at issue to constitute exclusivity agreements, in so far as the payments provided for were subject to there being no pre-installation of competing general search services on the portfolio of products concerned.

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78 In view of the similarities between the cases, the General Court refers in that respect to the judgment of 17 September 2007, *Microsoft* v *Commission*, T-201/04 (EU:T:2007:289), referred to by the Commission in the contested decision.

That being so, in view of the fact that, in finding them to be abusive, the Commission considered that those agreements were apt to encourage the manufacturers of mobile devices and the mobile network operators concerned not to pre-install such competing services, it was required, according to the case-law applicable to that type of practice, [79] to carry out an analysis of their capability to restrict competition on the merits in the light of all the relevant circumstances, including the share of the market covered by the contested practice and its intrinsic capacity to foreclose competitors at least as efficient as the dominant undertaking.

The Commission's analysis was based essentially on two elements: examination of the coverage of the contested practice, and the results of the 'as efficient competitor' test [80] which it applied. In so far as the Commission found, in relation to the first element, that the agreements in question covered a 'significant part' of the national markets for general search services, irrespective of the type of device used, the General Court considers that statement to be unsupported by the evidence which the Commission set out in the contested decision. There is a similar deficiency as regards one of the premisses of the AEC test, namely, the search query share that might be contested by a hypothetically at least as efficient competitor whose app would have been pre-installed alongside Google Search. The General Court also identifies a number of errors of reasoning relating to the assessment of essential variables of the AEC test applied by the Commission, namely, the estimate of the costs attributable to such a competitor; the assessment of the competitor's ability to obtain pre-installation of its app; and the estimate of likely revenues on the basis of the age of mobile devices in use. It follows that, as conducted by Commission, the AEC test does not support the finding of abuse resulting from the portfolio-based revenue share agreements in themselves, and the corresponding plea is accordingly upheld by the General Court.

Third, as regards the assessment of the restrictions contained in the anti-fragmentation agreements, the General Court observes, as a preliminary point, that the Commission considers such a practice to be abusive in so far as it seeks to prevent the development and market presence of devices running a non-compatible Android fork, [81] although the Commission does not dispute Google's right to impose compatibility requirements in respect only of devices on which its apps are installed.

Having established the material existence of the practice in question, the General Court also considers that the Commission was justified in accepting the ability of non-compatible Android forks to exert competitive pressure on Google. In those circumstances, in the light of the matters set out by the Commission that are relevant to establishing the impediment to the development and marketing of competing products on the market for licensable operating systems, the Commission was entitled, according to the General Court, to find that the practice in question had led to the strengthening of Google's dominant position on the market for general search services, while deterring innovation, in so far as it had limited the diversity of the offers available to users.

As a third step, the General Court examines the plea alleging infringement of the rights of the defence, by which Google seeks a declaration that its right of access to the file was infringed and that its right to be heard was not respected.

Examining, in the first place, the alleged infringement of the right of access to the file, the General Court makes clear, as a preliminary point, that Google's complaints in this respect relate to the content of a set of notes sent by the Commission in February 2018 regarding meetings which the Commission held with third parties throughout its investigation.

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79 See judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P (EU:C:2017:632)

80 'The AEC test'.

81 These are, in this instance, operating systems developed by third parties from the Android source code released by Google under an open-source licence, which covers the basic features of such a system, but not the Android apps and services owned by Google. In that context, the anti-fragmentation agreements in question defined a minimum compatibility standard for implementation of the Android source code.

Since those meetings were all interviews conducted for the purpose of collecting information relating to the subject matter of the investigation, within the meaning of Article 19 of Regulation No 1/2003, [82] the Commission was consequently required to ensure that a record was drawn up that would enable the undertaking in question, when the time came, to acquaint itself with that record and to exercise the rights of the defence. In the present case, the General Court finds that the requirements thus outlined were not met on account, on the one hand, of the time that elapsed between the interviews and the transmission of the notes concerning them and, on the other, of the summary nature of those notes. As regards the inferences to be drawn from that procedural error, the General Court nevertheless recalls that, according to the case-law, a breach of the rights of the defence may be found to have occurred, where there is such a procedural error, only if the undertaking concerned demonstrates that it would have been better able to ensure its defence had there not been that error. In the present case, the General Court considers, however, that that has not been demonstrated by the evidence disclosed to it or the arguments presented to it in that regard.

Addressing, in the second place, the alleged infringement of the right to be heard, the General Court observes that Google's criticisms in that regard constitute the procedural aspect of the complaints put forward to challenge the merits of the finding as to the abusive nature of certain revenue share agreements, in so far as they seek to challenge the denial of a hearing on the AEC test applied in that context. Given that the Commission refused Google a hearing, even though it had sent Google two letters of facts supplementing substantially the substance and scope of the approach initially set out in the statement of objections in that respect, but without adopting, as it ought to have done, a supplementary statement of objections followed by a hearing, the General Court considers that the Commission infringed Google's rights of defence and thus deprived Google of the opportunity better to ensure its defence by developing its arguments in a hearing.

The General Court adds that the value of a hearing is all the more apparent in the present case, given the deficiencies previously identified in the Commission's application of the AEC test. Consequently, the finding as to the abusive nature of the portfolio-based revenue share agreements must be annulled on that basis also.

Lastly, being required to carry out, in the exercise of its unlimited jurisdiction, an autonomous assessment of the amount of the fine, the General Court states at the outset that, while the contested decision must accordingly be annulled in part, in so far as it concludes that the portfolio-based revenue share agreements are in themselves abusive, that partial annulment does not affect the overall validity of the finding, in the contested decision, of an infringement, in the light of the exclusionary effects arising from the other abusive practices implemented by Google during the infringement period.

On the basis of its own assessment of all the circumstances relating to the penalty, the General Court rules that it is appropriate to vary the contested decision, concluding that the amount of the fine to be imposed on Google for the infringement committed is to be €4.125 billion. To that end, the General Court considers it appropriate, as did the Commission, to take account of the intentional nature of the implementation of the unlawful practices and of the value of relevant sales made by Google in the last year of its full participation in the infringement. By contrast, as regards taking into consideration the gravity and duration of the infringement, the General Court considers it appropriate, for the reasons set out in the judgment, to take account of the evolution over time of the different aspects of the infringement and of the complementarity of the practices concerned, in order to assess the impact of the exclusionary effects properly established by the Commission in the contested decision.

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

VIII. FISCAL PROVISIONS: RULES GOVERNING THE EXERCISE OF THE RIGHT TO DEDUCT VAT

Judgment of the Court (Fourth Chamber) of 15 September 2022, HA.EN., C-227/21

Link to the full text of the judgment

Reference for a preliminary ruling – Value added tax (VAT) – Directive 2006/112/EC – Right to deduct input VAT – Sale of an item of immovable property between taxable persons – Vendor subject to insolvency proceedings – National practice under which the purchaser is denied the right of deduction on the ground that he or she knew or should have known of the vendor's difficulties in paying the output tax – Fraud and abuse of rights – Conditions

In September 2007, a Lithuanian company ('the vendor company') obtained a loan from a Lithuanian bank to carry out real estate development activity. That loan was secured by a mortgage over a plot of land in Vilnius (Lithuania) on which a building was under construction.

By an assignment of claim agreement concluded in November 2015, the company HA.EN. acquired for consideration the monetary claims arising from that loan, and also the contractual mortgage. When concluding that agreement, HA.EN. confirmed, inter alia, that it had become acquainted with the vendor company's economic and financial situation and legal status, and that it was aware that the vendor company was insolvent and the subject of pending administration proceedings.

After the auction, announced by order of a bailiff in May 2016, of the item of immovable property over which HA.EN. held the mortgage was unsuccessful, HA.EN. accepted the proposal made to it of acquiring that property for its initial price of sale at the auction, and this resulted in the extinction of a part of its claims. Thus, ownership of the item of immovable property was transferred to it for the total amount of EUR 5 468 000, that is to say, a sum of EUR 4 519 008.26 together with EUR 948 991.74 in value added tax (VAT). The invoice for that transaction was entered in the respective accounts of both parties to the transfer. As the vendor company was then declared insolvent, it never paid the output tax into the public purse.

HA.EN. requested the tax authority to refund it the excess VAT resulting from deduction of the input VAT, namely EUR 948 991.74.

However, the tax authority found that, in entering into the transaction for acquisition of the immovable property at issue although it knew or should have known that the vendor company would not pay the VAT generated by that transaction into the public purse, HA.EN. had acted in bad faith and committed an abuse of rights. For that reason, the tax authority denied it the right to deduct that input VAT.

At first instance, the Lithuanian courts ruled in favour of the tax authority. However, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), before which HA.EN. brought an appeal, expressed doubts as to whether a practice of the tax authority under which the deduction of VAT is denied in instances such as the present one is permissible from the point of view of EU law.

The Court of Justice, to which a reference was then made for a preliminary ruling, holds in its judgment that Directive 2006/112, [83] read in the light of the principle of fiscal neutrality, precludes a national practice, such as the Lithuanian practice, under which, in the context of the sale of an item of immovable property between taxable persons, the purchaser is denied the right to deduct input VAT merely because he or she knew or should have known that the vendor was in financial difficulty, or even insolvent, and that that circumstance could result in the vendor not paying or not being able to pay VAT into the public purse.

Findings of the Court

The Court recalls as a preliminary point that the right to deduct input VAT is a fundamental principle of the common system of VAT – which ensures that any economic activity subject to VAT is taxed in a neutral way – and that that right in principle may not be limited. However, EU law cannot be relied on for abusive or fraudulent ends. Thus, if it is established to the requisite legal standard, in the light of objective evidence, that the right of deduction is being relied on for fraudulent or abusive ends, the national courts and authorities must refuse the right of deduction.

In that regard, the Court states first of all that a taxable person who is a judgment debtor facing financial difficulties and sells one of his or her assets in a statutory compulsory sale procedure in order to settle his or her debts, then declares the VAT due on that basis, but subsequently is unable, because of those difficulties, to pay that VAT in whole or in part, does not commit VAT fraud on that account alone. Consequently, the purchaser of such an asset, a fortiori, cannot be criticised in such circumstances on the basis that he or she knew or should have known that, in acquiring that asset, he or she was participating in a transaction connected with VAT fraud.

Next, the Court notes the two conditions which, in the sphere of VAT, must be met in order to find that an abusive practice exists: the transactions concerned must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of the VAT Directive, and it must be apparent from a number of objective factors that the essential aim of those transactions is solely to obtain that tax advantage.

In that regard, the Court holds that the very existence of the option made available to the Member States by the VAT Directive of having recourse to the reverse charge mechanism, which allows the VAT burden to be transferred to the taxable person to whom the taxable supply is made, inter alia in situations such as the one here, shows that the EU legislature did not regard deduction of the VAT paid by the purchaser of immovable property in a compulsory sale procedure as contrary to the objectives of the VAT Directive.

Furthermore, an unlawful intention on the part of a debtor whose asset is sold by way of enforcement not to pay VAT cannot be inferred merely from his or her financial difficulties. Accordingly, the view cannot be taken on that basis alone that, in carrying out a commercial transaction with that debtor, the purchaser of the asset commits an abuse of rights.

In circumstances such as those at issue in the main proceedings, the fundamental reason for which a creditor takes over immovable property may be his or her wish to recover all or part of his or her debt, by legal means available to the creditor, such as a compulsory sale procedure. In the light of the prima facie legitimate objective which that procedure pursues, the taking over in question cannot be equated to a wholly artificial arrangement that does not reflect economic reality and is set up with the sole aim of obtaining a tax advantage.

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

Finally, the Court considers the Lithuanian practice at issue in the present case to be contrary to the principle of fiscal neutrality in so far as it implies that purchasers of immovable property must bear the burden of the input VAT, in particular as the Republic of Lithuania chose not to make use of the option of setting up, for the situation here, a reverse charge mechanism intended precisely to counter the risk of insolvency of the VAT debtor. Furthermore, such a practice is liable to restrict the circle of potential purchasers and therefore runs counter to the objective pursued by the compulsory sale procedure, namely the optimal realisation of the debtor's assets in order to satisfy his or her creditors to the greatest possible extent. It also tends to isolate economic operators in financial difficulties and to hamper their ability to carry out transactions, in breach of the principle of fiscal neutrality, as that principle precludes distinctions between taxable persons on the basis of their financial situation.

IX. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (Eighth Chamber, Extended Composition) of 14 September 2022, Methanol Holdings (Trinidad) v Commission, T-744/19

Link to the full text of the judgment

Dumping – Imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States – Implementing Regulation (EU) 2019/1688 – Article 3(1) to (3) and (5) to (8) of Regulation (EU) 2016/1036 – Sales through related companies – Construction of the export price – Injury to the Union industry – Calculation of price undercutting – Causal link – Article 9(4) of Regulation 2016/1036 – Calculation of the injury margin – Injury elimination

Following a complaint, the European Commission adopted Implementing Regulation 2019/1688 [84] imposing a definitive anti-dumping duty on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America.

The applicant, Methanol Holdings (Trinidad) Ltd, is a company established in Trinidad and Tobago which produces and exports the product concerned to the European Union through a related importer. It brought an action for annulment of the contested regulation.

In dismissing that action, the General Court confirms the possibility of using constructed export prices for the purposes of calculating price undercutting. It also applies and clarifies the case-law relating to the Commission's obligation, when calculating the price undercutting margins of imports subject to anti-dumping investigations, to make a fair price comparison at the same level of trade, in order to assess the existence of injury suffered by the Union industry as a result of those imports.

84 Commission Implementing Regulation (EU) 2019/1688 of 8 October 2019 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America (OJ 2019 L 258, p. 21; 'the contested regulation').

Findings of the Court

In the first place, as regards recourse to constructed export prices for the purposes of calculating price undercutting, the Court notes that, in accordance with Article 3(2) and (3) of the basic anti-dumping regulation, [85] a determination of injury is to be based on positive evidence and is to involve an objective examination of, inter alia, the impact of the imports on prices in the Union market for like products and that, to that end, it is necessary to give consideration to whether there has been, for the dumped imports, significant price undercutting as compared with the price of a like product.

The Court goes on to point out that those provisions do not lay down any particular method for determining the effect of the dumped imports on prices of like products of the Union industry. It follows that the Commission is entitled to determine the existence of injury on the basis of constructed export prices, in accordance with Article 2(9) of the basic anti-dumping regulation, which concerns the determination of dumping.

In the present case, the Court finds, in essence, that recourse to a constructed export price was justified because the export price declared to customs by the applicant was unreliable as a result of the intra-group relationship between the applicant and its related importer.

In the second place, as regards the assessment of the price undercutting of the imports by comparison with the price of the like product of the Union industry, the Court finds that, in the price undercutting calculation carried out at the stage of the provisional implementing regulation [86] and used again in the contested regulation for the purposes of the definitive calculation, the Commission had not made a comparison at the same level of trade. Thus, with regard to the exporting producers, the Commission had reduced the prices of their sales in the European Union by the amount of selling, general and administrative ('SG&A') expenses and profit of their related trading companies in the European Union, whereas it had made no such deduction for Union industry sales via related traders.

Since that calculation methodology had been held to be contrary to Article 3(2) of the basic anti-dumping regulation by the judgment in *Jindal*, [87] the Commission, at the stage of the contested regulation, supplemented its provisional calculation with two additional calculations, which the Court examined in turn.

First of all, with regard to the first of those additional calculations, the Court notes that the Commission deducted the SG&A expenses and profit from the selling prices charged by the Union producers' related entities. In so doing, it brought the prices used for the Union producers to the same level of trade as those of the exporting producers, in accordance with its obligations.

In response to the applicant's arguments disputing that calculation, the Court states that the requirement of an objective and fair comparison does not prejudge the level of trade at which the Commission must compare prices, but means only that that comparison must be made at the same level of trade with regard to both the prices of the Union producers and those of the exporting producers.

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85 Regulation (EU) 2016/1036 of the 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').

86 Commission Implementing Regulation (EU) 2019/576 of 10 April 2019 imposing a provisional anti-dumping duty on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America (OJ 2019 L 100, p. 7).

87 Judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission* (T-301/16, EU:T:2019:234; 'the judgment in *Jindal*').

The Court also sets out the reasons why the approach adopted in *Kazchrome* [88] is not applicable to that calculation. It states, inter alia, that on that occasion that case did not relate to a deduction of SG&A expenses and profit from selling prices and that in any event, in that judgment, the Court did not rule out, in general terms, the possibility of taking into consideration, for the purposes of calculating undercutting, CIF (cost, insurance and freight) landed prices at the exporting producers' ports of customs clearance.

Next, with regard to the second additional calculation, the Court finds that the Commission excluded from the undercutting calculation the Union industry sales through related parties, that is, 40% of the sales of the parties included in the EU sample. In that regard, since the existence of price undercutting was established to the requisite legal standard in the first calculation examined and in so far as the second calculation, carried out in the alternative, does not call into question the existence of that price undercutting, the Court considers that the second additional undercutting calculation also cannot validly be relied on to call into question the lawfulness of the contested regulation.

The Court adds, for the sake of completeness, that, contrary to what is claimed by the applicant, the Commission in no way compared the Union industry's sales to independent customers, on the one hand, with the applicant's sales to related parties, on the other, since it took into account sales made by the exporting producers to independent customers, duly adjusted to CIF level. The applicant also has not shown that the adjusted price of the exporting producers did not include the same price components as those of the Union producers. The SG&A expenses and profit of the related selling entities were not taken into consideration at any point in the comparison.

Lastly, the Court notes that, in addition to undercutting and in any event, the effect of the dumped imports was to cause price suppression on the Union market and price depression. Those indicators corroborated the existence of injury to the Union industry.

Accordingly, even if the Commission erred in its provisional calculation of the undercutting margin, the additional factors taken into consideration by the Commission in its examination of the effects on prices, in the contested regulation, had the effect of neutralising that error.

X. JUDGMENTS PREVIOUSLY DELIVERED

1. WITHDRAWAL OF A MEMBER STATE FROM THE EUROPEAN UNION

Order of the General Court (Eighth Chamber) of 20 June 2022, Natixis v Commission, T-449/21

Link to the full text of the order

Action for annulment – Preliminary issue – Lack of representation by a lawyer authorised to practise solely before the courts or tribunals of the United Kingdom in one of the situations exhaustively provided for by Article 91(2) of the Agreement on the withdrawal of the United Kingdom from the Union and from Euratom – Lack of representation by a lawyer authorised to practise before the courts or tribunals of a Member State or of another State which is a party to the EEA Agreement – Article 19 of the Statute of the Court of Justice of the European Union

88 Judgment of 30 November 2011, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council and Commission* (T-107/08, EU:T:2011:704).

By application lodged on 30 July 2021, the company Natixis brought an action for annulment of the decision of the European Commission of 20 May 2021 relating to a proceeding under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area, [89] in so far as it concerns Natixis. The applicant stated that it was represented, inter alia, by two barristers and two solicitors authorised to practise before the courts of the United Kingdom.

The agreement on the United Kingdom's withdrawal from the European Union [90] provides for a transition period which ended on 31 December 2020.

By its order, the General Court dismissed the applicant's application to recognise a barrister and a solicitor as its representatives. This case thus gives the Court the opportunity to examine the various texts and provisions which must be taken into consideration in order to determine whether a lawyer authorised to practise solely before the courts of the United Kingdom may represent a party before the General Court.

Findings of the Court

In the first place, the Court recalls that, according to the third and fourth paragraphs of Article 19 of the Statute of the Court of Justice of the European Union, only a lawyer authorised to practise before the courts or tribunals of a Member State or of another State which is a party to the EEA Agreement may represent or assist a party in proceedings before the Courts of the European Union. [91] However, as regards the particular case of lawyers entitled to practise before the courts of the United Kingdom, account should be taken, beforehand, of any relevant provisions of the international agreements between the United Kingdom and the European Union, namely the Withdrawal Agreement and the Trade and Cooperation Agreement. [92]

In that regard, the Withdrawal Agreement provides for exhaustively listed cases in which a lawyer authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Courts of the European Union. [93] In the current state of the division of competencies between the Court of Justice and the General Court, such a lawyer who represented a party on 31 December 2020 may continue to represent or assist that party in an action brought before the General Court. [94] Such a lawyer may also represent or assist a party before the General Court in actions for annulment brought against decisions adopted by the EU institutions, bodies, offices and agencies before 31 December 2020 and addressed to the United Kingdom or to natural or legal persons residing or established in the United Kingdom. [95] The same applies to such decisions adopted after 31 December 2020, inter alia in the context of proceedings applying Article 101 or 102 TFEU initiated before 31 December 2020 and addressed to the United Kingdom or to natural or legal persons residing or established in the United Kingdom. Finally, a lawyer authorised to practise before the courts or tribunals of the United Kingdom may represent or assist that State before the General Court [96] in proceedings in which that State has decided to intervene. [97]

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89 Agreement on the European Economic Area (OJ 1994 L 1, p. 3, 'the EEA Agreement').

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

91 Fourth paragraph of Article 19 of the Statute of the Court of Justice of the European Union.

92 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ 2021 L 149, p. 10; 'the Trade and Cooperation Agreement').

93 Articles 87, 90 to 92 and 95 of the Withdrawal Agreement read together.

94 In accordance with Article 91(1) of the Withdrawal Agreement.

95 In accordance with the second sentence of Article 91(2) of the Withdrawal Agreement, read in conjunction with Article 95(1) and (3) thereof.

96 In accordance with the second sentence of Article 91(2) of the Withdrawal Agreement, read in conjunction with Article 90 thereof.

97 Pursuant to the point (c) of the second paragraph of Article 90 of the Withdrawal Agreement.

In the present case, the Court finds that the present action does not fall within any of those situations exhaustively provided for by the Withdrawal Agreement. The applicant is a company established in France and incorporated under French law. The fact that other addressees of the decision at issue are, for their part, established in the United Kingdom is irrelevant in that regard. In that regard, the Court notes that, according to settled case-law, a decision adopted by the Commission on the basis of Article 101 TFEU, although drafted and published as a single decision, must be regarded as a group of individual decisions establishing, in relation to each of the undertakings to which it is addressed, the breach or breaches which that undertaking has been found to have committed and, where appropriate, imposing a fine on it. Furthermore, as regards the applicant's claim that it is 'established' in the United Kingdom as an 'overseas company', it is apparent from the documents provided by the applicant that it is solely registered and not established in that State. The Court also notes that the right of representation or assistance conferred by the Withdrawal Agreement [98] on lawyers authorised to practise before the courts or tribunals of the United Kingdom applies only in the context of administrative procedures [99] to the exclusion of any subsequent court proceedings. [100]

In the second place, the Court states that the applicant cannot rely on the Trade and Cooperation Agreement between the European Union and the United Kingdom either. That agreement does not provide [101] that a party to that agreement authorises a lawyer of the other party to that agreement to supply in its territory legal services relating to EU law, which covers Article 101 TFEU, or to supply legal representation before, inter alia, the courts and other duly constituted official tribunals of a party to that agreement, including the General Court.

In the third and last place, the Court observes that the action was brought on 30 July 2021, that is to say after the expiry, on 31 December 2020, of the transition period during which EU law continued to apply to and in the United Kingdom despite its status as a third State.

Consequently, the question whether lawyers designated by the applicant authorised to practise only before the courts and tribunals of the United Kingdom must be considered to be entitled to practise before a court of a Member State or of another State which is a party to the EEA Agreement [102] can now no longer be examined having regard to the provisions or acts of EU law. [103] Therefore, such an examination must be carried out in the light of any specific legislation of a Member State unilaterally authorising those lawyers to practise before its courts and tribunals, which does not, however, exist in the present case in France.

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98 Article 94(2) of the Withdrawal Agreement.

99 Referred to in Articles 92 and 93 of the Withdrawal Agreement.

100 Laid down by Article 91 of the Withdrawal Agreement.

101 Article 193(a) and (g) of the Trade and Cooperation Agreement.

102 Fourth paragraph of Article 19, of the Statute of the Court of Justice of the European Union.

103 Including those applicable to the profession of lawyer, such as Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36), or Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

2. STATE AID

Judgment of the General Court (Third Chamber) of 13 July 2022, Tartu Agro v Commission, T-150/20

State aid – Agriculture – Lease contract for agricultural land in Estonia – Decision declaring the aid incompatible with the internal market and ordering its recovery – Advantage – Determination of the market price – Private operator principle – Complex economic assessments – Judicial review – Taking into account of all relevant factors – Duty of diligence

Tartu Agro AS is a company incorporated under Estonian law, which, in 1997, took over a State-owned agricultural property producing milk, meat and cereals. On 16 November 2000, following a restricted call for tenders, that company concluded a 25-year lease agreement with the Estonian authorities in respect of more than 3 000 ha of agricultural land. The financial terms of that agreement were two part: first, an obligation to pay annual rent equivalent, as at the date the agreement was signed, to 3.24 krooni (EEK)/ha (EUR 0.20/ha), [104] and second, the coverage of various costs, inter alia, a minimum annual investment in drainage, maintenance and soil improvement and the payment of property taxes on behalf of the lessor.

In 2014, the European Commission received a complaint alleging that Tartu Agro had been granted unlawful State aid. The Commission opened a formal investigation procedure by decision of 27 February 2017. That procedure led to the adoption, on 24 January 2020, of the contested decision, [105] whereby the Commission concluded that the Estonian authorities had granted the applicant aid by leasing agricultural land to it on preferential terms; after declaring that aid to be incompatible with the internal market, the Commission ordered its recovery.

On 24 March 2020, Tartu Agro brought an action seeking the annulment of the contested decision. By its judgment, the Court grants the applicant's claims, ruling that there were manifest errors of assessment vitiating the Commission's findings as to the preferential nature of the financial terms of the agreement at issue, and that the Commission had failed in its duty of diligence.

More specifically, the Court clarifies the evidence required for the Commission to conclude, in its examination, that the allegedly preferential terms of a transaction confer an advantage under State aid rules, where that examination is based on a comparison between the terms in question and the market price. On this occasion, the Court also notes the exact scope of the review which it is required to carry out of the complex economic assessments made by the Commission in the field of State aid.

Findings of the Court

Of the various pleas in law raised by Tartu Agro in support of the action, the Court finds it appropriate to begin by examining the pleas challenging, first, the Commission's assessment of whether the rent stipulated in the lease agreement was consistent with the market conditions, and second, how the Commission had determined the amount of the advantage.

In that context, the Court states, as a preliminary point, that, according to settled case-law, the acquisition by an undertaking of an economic advantage which it would not have obtained under normal market conditions comes within the concept of State aid.

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104 It is clear from the file that that amount was subsequently adjusted several times, reaching EEK 136/ha (EUR 8.69/ha) as from 1 January 2019.

105 Commission Decision C(2020) 252 final of 24 January 2020 on SA.39182 (2017/C) (ex 2017/NN) (ex 2014/CP) – Alleged illegal aid to AS Tartu Agro ('the contested decision').

This applies in particular to the supply of goods or services on preferential terms. In addition, the Commission has to verify – with the help of experts if necessary, or by requesting additional information – whether a State measure confers an advantage that is not consistent with the market conditions. Since the Commission is thus required to make complex economic assessments, the Court also points out that, although it is not for it to substitute its economic assessment for the Commission's when carrying out its judicial review, it is, by contrast, for it to verify that the Commission's interpretation of the economic data is based on factually accurate, reliable and consistent evidence that is capable of substantiating the Commission's conclusions drawn from it and that represents all the relevant factors of the case.

It is in the light of those principles that the Court begins its assessment of the merits of the complaints raised by Tartu Agro concerning both the consistency of the amount of the rent with the market price and the taking into account of the additional expenditure.

As regards, in the first place, the contested conclusions reached by the Commission following the comparison of the amount of rent in itself and the market conditions, the Court states, first of all, that, in finding that the rent paid by Tartu Agro had been below the market price for the entire period from 2000 to 2017, the Commission relied on two statistical studies produced by the Estonian authorities during the administrative procedure. They consisted, in the present case, first, of an expert report giving an estimate, in the form of price ranges, of the amount of rent from agricultural land rented in Estonia, by geographical area, for the period from 2000 to 2014, and second, of data published by Statistics Estonia for subsequent years.

In the present case, the Court notes, more specifically, that for each year under consideration, the Commission compared the rent paid by Tartu Agro with the average amount obtained from the price ranges and data contained in those studies.

In the Court's view, that analysis is too general and insufficiently nuanced to demonstrate that the price of the rent at issue was not consistent with the normal market conditions. In particular, the Commission failed to take sufficient account, inter alia, of the prices corresponding to the lower end of the price ranges used, the extent of the margin of error, the context at the time the agreement at issue was concluded and the characteristics of the land in question. In those circumstances, the Court concludes that the analysis complained of did not allow the Commission to substantiate, in a manner that was sufficiently convincing and coherent, the price that is as close as possible to the market value, as it was required to do.

Moreover, the Court finds that in its assessment, the Commission failed to take into account another expert report produced by the Estonian authorities during the administrative procedure, thus failing in its duty of diligence when exercising its broad discretion.

Lastly, the Court considers that the Commission's assessment of the quantification of the advantage is also subject to similar criticism.

In those circumstances, the Court holds that the examination of whether the amount of the rent in itself is consistent with the market conditions and the part of the assessment relating to the quantification of the corresponding advantage are vitiated by a manifest error of assessment and a breach of the Commission's duty of diligence.

As regards, in the second place, the taking into account of the additional expenditure imposed on Tartu Agro by the agreement at issue, according to the second part of its financial terms, the Court states that, in its assessment, the Commission took into account only half the amount of the annual investment in drainage systems and half the amount of annual taxes charged to the party concerned, before concluding that, even with those additional amounts, the rent paid by Tartu Agro remained below the market price throughout the period under consideration. In that regard, the Court finds, first of all, that it is not apparent from the information set out in the contested decision in order to justify the Commission's choice of approach that the Commission took into account the relevant information contained in two of the abovementioned reports produced by the Estonian Government.

Furthermore, the Court considers the partial taking account of the investment in drainage systems to be insufficiently precise. Lastly, the Court finds that in its analysis, the Commission failed to verify

whether the Estonian Government acted in a way comparable to a private operator by imposing the additional expenditure at issue on Tartu Agro.

In those circumstances, the Court rules that both the Commission's examination that takes into account the additional expenditure stipulated in the agreement at issue and the part of the assessment relating to the quantification of the corresponding advantage are also vitiated by a manifest error of assessment and a breach of the Commission's duty of diligence.

Accordingly, the General Court finds that the complaints raised by Tartu Agro in that regard are well founded and annuls the contested decision in its entirety, without deeming it necessary to rule on the other pleas in law raised in support of the action.

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 16 June 2022, Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists), C-577/20, EU:C:2022:467
- Judgment of 14 July 2022, Procureur général près la cour d'appel d'Angers, C-168/21, EU:C:2022:558
- Judgment of 1 August 2022, Familienkasse Niedersachsen-Bremen, C-411/20, EU:C:2022:602
- Judgment of 1 August 2022, MPA (Habitual residence – Third State), C-501/20, EU:C:2022:619
- Judgment of 1 August 2022, Sea Watch, C-14/21 and C-15/21, EU:C:2022:604
- Judgment of 13 September 2022, Banka Slovenije, C-45/21, EU:C:2022:670
- Judgment of 20 September 2022, SpaceNet and Telekom Deutschland, C-793/19 and C-794/19, EU:C:2022:702
- Judgment of 20 September 2022, VD and SR, C-339/20 and C-397/20, EU:C:2022:703
- Judgment of 22 September 2022, W (Deductability of final losses of a non-resident permanent establishment), C-538/20, EU:C:2022:717
- Judgement of 4 May 2022, Larko v Commission, T-423/14 RENV, EU:T:2022:268
- Judgment of 13 July 2022, JC v EUCAP Somalia, T-165/20, EU:T:2022:453
- Judgment of 13 July 2022, Delifruit v Commission, T-629/20, EU:T:2022:448
- Judgment of 27 July 2022, RT France v Council, T-125/22, EU:T:2022:483
- Judgment of 7 September 2022, BNetzA v ACER, T-631/19, EU:T:2022:509
- Judgment of 7 September 2022, JCDecaux Street Furniture Belgium v Commission, T-642/19, EU:T:2022:503
- Judgment of 7 September 2022, OQ v Commission, T-713/20, EU:T:2022:513
- Judgment of 14 September 2022, Helsingin Bussiliikenne v Commission, T-603/19, EU:T:2022:555
- Judgment of 21 September 2022, Portugal v Commission (Madeira Free Zone), T-95/21, EU:T:2022:567
- Judgment of 21 September 2022, France v Commission, T-475/21, EU:T:2022:568