COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. INSTITUTIONAL PROVISIONS

1. ACCESS TO DOCUMENTS

Judgment of the General Court (Eighth Chamber) of 12 October 2022, Saure v Commission, T-524/21

Link to the judgment as published in extract form

Access to documents – Regulation (EC) No 1049/2001 – Commission correspondence with AstraZeneca and the German authorities concerning the quantity of COVID-19 vaccines and their delivery times – Exception relating to the protection of court proceedings – Documents having been produced in the context of court proceedings that were closed at the time of adoption of the decision refusing access to those documents – Exception relating to the protection of privacy and the integrity of the individual – Exception relating to the protection of commercial interests of a third party

The applicant, Mr Hans-Wilhelm Saure, is a journalist employed by the German daily newspaper *Bild*. At the beginning of 2021, he submitted an application for access [1] to copies of all the correspondence exchanged since 1 April 2020 between the Commission and, first, the company AstraZeneca plc or its subsidiaries and, second, the German federal authorities, relating to, inter alia, the quantities of COVID-19 vaccines and the delivery times offered by that company.

The Commission, initially, identified a number of documents to which access had to be refused on the basis of the protection of court proceedings, [2] given that proceedings between the European Union and AstraZeneca were pending before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium). Following the closure of those proceedings after an agreement had been reached between the parties, the Commission, after re-examining the applicant's request, adopted a second decision replacing the first. In that new decision, the Commission stated that the exception relating to the protection of court proceedings applied wholly or partially to a number of documents covered by the applicant's request for access. Furthermore, it refused access to certain documents on the basis of the protection of privacy and the integrity of the individual, the protection of commercial interests [3] and the general presumption of confidentiality by virtue of that exception.

Hearing an action for annulment against, inter alia, the second Commission decision, the General Court rules on the application of the exception relating to the protection of court proceedings and, in particular, on the duty of sincere cooperation with the judicial authorities of the Member States. It concludes that the application of that exception in the present case is unlawful and, consequently, that the second decision must be annulled in part.

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1 In accordance with 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).

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

3 Exceptions provided for in Article 4(1)(b) and the first indent of Article 4(2) of Regulation No 1049/2001 respectively.

Findings of the Court

As a preliminary point, the Court notes that the application of the exception relating to the protection of court proceedings precludes the disclosure of documents only for as long as, having regard to their content, the risk of undermining court proceedings persists. That protection is accounted for by the need to ensure, first, respect for the principle of equality of arms, in particular in order to ensure that criticism of the position of an institution in a dispute, contained in a disclosed document, is not liable unduly to influence that position and, second, the sound administration of justice and the integrity of court proceedings, in order to ensure that, throughout those proceedings, the exchanges of argument between the parties and the deliberations of the court concerned in the case take place in an entirely calm atmosphere, without external pressure on judicial activities.

In the present case, first, the Court finds that, on the date on which the second decision was adopted, the court proceedings capable of justifying the application of the exception relating to the protection of court proceedings were closed. It recalls that it is true that a document which was not drawn up in the context of specific court proceedings may be protected if, on the date on which the reply is made to that request for access, it has been produced in court proceedings. However, the legislature did not exclude the institution's litigious activities from the public's right of access and such a document is capable of being protected solely on the basis of its content.

Second, in order to assess whether the exception relating to the protection of court proceedings could no longer justify the refusal of access at issue after the closure of the judicial proceedings before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)), the Court examines whether, in the light of the content of the documents in question, the Commission has demonstrated that their disclosure would continue to undermine those proceedings. The Court finds that the Commission has failed to explain how that access could specifically and actually continue to undermine court proceedings.

Similarly, regarding the need to ensure respect for the integrity of court proceedings, it states that the exchanges of argument between the parties and the deliberations were able to take place in an entirely calm atmosphere, without any external pressure on judicial activities. Furthermore, it does not find that any other court proceedings were pending, or even imminent, at the time of adoption of the second contested decision in which arguments developed in the context of the proceedings which had been closed could have been used in support of the legal position defended by the institution.

Third, the Court rejects the Commission's argument that, by reason of the principle of sincere cooperation with the national court before which the matter had been brought, it was required to refuse access to those documents in order to comply with the requirements of the Code judiciaire belge (Belgian Judicial Code). [4] Under those requirements, a party to court proceedings is not authorised to disclose a business secret or alleged business secret of which it has become aware as a result of its participation in the proceedings, even after those proceedings have concluded, where the court has decided that such a secret should remain confidential.

First of all, the Court notes that those requirements follow from provisions transposing the directive on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure. [5] It is apparent from that directive that the Commission cannot rely on

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4 Article 871*bis* of the Belgian Judicial Code.

5 Article 9(1) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

a provision of national law transposing that directive in order to frustrate its obligations concerning access to documents.

Next, on the one hand, the Court finds that the documents at issue were in the Commission's possession before those proceedings began. On the other hand, the national court before which the matter was brought had not adopted any decision pursuant to the abovementioned provisions of the Belgian Judicial Code. It is the parties themselves which concluded an agreement under which certain documents produced in the course of those proceedings would remain confidential. In those circumstances, the Commission cannot, by means of a mere agreement concluded with a third-party company, restrict the right of an EU citizen to secure access to documents in its possession and thus circumvent its obligation, subject to certain exceptions, to provide access to those documents. Nor, in that context, can it rely on its duty of sincere cooperation with the judicial authorities of the Member States in order to justify the refusal to grant access to those documents.

Finally, the Court notes that the purpose of the provisions of the Belgian Judicial Code in question, in so far as they are designed to protect business secrets, differs from that pursued by provisions seeking to ensure compliance with the principles of equality of arms and the sound administration of justice and integrity of court proceedings. Thus, the mere fact that the documents at issue contain business secrets does not make it possible to explain how access to those documents could specifically and actually continue to undermine the court proceedings which had been closed at the time when the second contested decision was adopted.

2. PUBLIC PROCUREMENT BY THE INSTITUTIONS OF THE EUROPEAN UNION

Judgment of the General Court (Tenth Chamber) of 5 October 2022, European Dynamics Luxembourg v ECB, T-761/20

Link to the judgment as published in extract form

Public procurement – Tendering procedure – Exclusion from the procurement procedure – Abnormally low offer – Attempts to unduly influence the decision-making process – Failure to observe the rules on communication – Proportionality – Obligation to state reasons – Misuse of powers – Non-contractual liability

In a call for tenders launched by the European Central Bank (ECB) for the provision of services and works for IT application delivery, the tenders submitted by the applicant, European Dynamics Luxembourg SA, were excluded, on the basis of the rules in force, [6] on the ground that the applicant had attempted to unduly influence the ECB's decision-making process in the procurement procedure.

The General Court, hearing an action, inter alia, for annulment of that exclusion decision, provides clarification, first, as to the interpretation of the purpose of exclusion and, secondly, as regards the concept of attempting to unduly influence the contracting authority. The Court finds that the action should be dismissed in its entirety.

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6 Article 30(5)(g) of Decision (EU) 2016/245 of the European Central Bank of 9 February 2016 laying down the rules on procurement (recast) (ECB/2016/2) (OJ 2016 L 45, p. 15).

Findings of the Court

In the first place, as regards interpreting the rules under which the ECB excluded the applicant's tenders, the Court points to linguistic disparities. Accordingly, pursuant to some language versions, there exist two situations in which a candidate or tenderer may be excluded from participating in a tender. The first of those situations is that of a candidate or tenderer who contacts other candidates or tenderers with the purpose of restraining competition. The second is where a candidate or tenderer attempts in any way whatsoever to unduly influence the decision-making process in the procurement procedure.

Consequently, owing to the divergence between the various language versions, the Court interprets the contested provisions by reference to the objectives and context of the rules of which they form part.

As regards the teleological interpretation, the Court finds that the objective of the ground given for excluding the applicant's tenders is to ensure equal opportunities for candidates, in accordance with the general principles of equal access and treatment, non-discrimination and fair competition applicable to the ECB. The Court considers that those principles may be undermined not only by means of contacts between candidates or tenderers for the purpose of restraining competition, but also when a candidate or tenderer attempts, by other means, to unduly influence the decision-making process in the procurement procedure.

As far as concerns the context of the rules at issue, the Court observes that the contested provisions are similar to those of Directive 2014/24. [7] Even though the directives concerning the award of public works contracts, public supply contracts and public service contracts are not directly applicable to public contracts concluded by the EU administration, the rules or principles laid down in or derived from those directives can be relied on against that administration when they themselves simply appear to be the specific expression of fundamental rules of the Treaty and of general principles of law which are directly applicable to the EU administration. Furthermore, in accordance with the principle *patere legem quam ipse fecisti*, such rules or principles may be relied on against the EU administration if, in the exercise of its operational and institutional autonomy and within the limits of its powers, it has adopted a measure which refers directly to certain rules or principles laid down in the directives. In the present case, the Court, first, finds that the ECB has stated in the rules that are in force that it respects the general principles of procurement law as reflected inter alia in Directive 2014/24. Secondly, the Court observes that the provisions of that directive, which are similar to those of the rules adopted by the ECB, are an expression of the general principles of public procurement law, including, in particular, the principle of equal opportunities and the equal treatment of tenderers, inasmuch as the ground for exclusion laid down in those provisions is intended to prevent any attempt to unduly influence the decision-making process in a tendering procedure by any means whatsoever.

The Court holds that it is apparent from the teleological and contextual interpretation of the contested provisions that they cover two different exclusion situations, the second, contrary to what the applicant claims, being intended to apply also to communications addressed by the candidates or tenderers to the contracting authority when they are aimed at unduly influencing the decision-making process during the procurement procedure.

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7 Article 57(4)(i) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

In the second place, the Court provides clarification as to the concept of attempting to exercise undue influence. First of all, notwithstanding the absence of a definition of that concept in the ECB's decision laying down the rules on procurement, the mere fact of a candidate or tenderer trying to influence the decision-making process by various means without, however, achieving the result expected, is sufficient, in the light of the provisions on which the ECB relied, to justify the exclusion of a tender. Next, that attempt must have been made 'unduly', that is to say, in a manner contrary to the rules in force. Lastly, the attempt to exercise undue influence must concern the decision-making process, which is to be understood as the entire phase in which the contracting authority examines the tenders, from their submission, throughout all the successive stages, and up to the adoption of the decisions on exclusion, selection or award, including during the enquiries carried out by the contracting authority on price tenders appearing to be abnormally low. Such enquiries constitute a stage in the evaluation of the tenders.

II. APPROXIMATION OF LAWS: EUROPEAN UNION TRADEMARK

Judgment of the General Court (Ninth Chamber) of 12 October 2022, Shopify v EUIPO – Rossi and Others (Shoppi), T-222/21

Link to the judgment as published in extract form

EU trade mark – Cancellation proceedings – EU figurative mark Shoppi – Earlier EU word mark SHOPIFY – Relative ground for refusal – No likelihood of confusion – Article 8(1)(b) and Article 53(1)(a) of Regulation (EC) No 207/2009 (now Article 8(1)(b) and Article 60(1)(a) of Regulation (EU) 2017/1001) – Lack of enhanced distinctiveness of the earlier mark – Agreement on the withdrawal of the United Kingdom from the European Union and from Euratom (Brexit)

In 2017, Mr Rossi, Mr Vacante and Shoppi Ltd ('the interveners') obtained from the European Union Intellectual Property Office (EUIPO) registration of the EU figurative mark Shoppi for goods in the IT sector, advertising services and electronic communication services. [8] The company Shopify Inc. ('the applicant') filed with EUIPO an application for a declaration of invalidity based on the existence of a likelihood of confusion with the earlier EU word mark SHOPIFY. [9]

That application was first upheld by the Cancellation Division of EUIPO before being dismissed by its Board of Appeal, which concluded that there was no such likelihood of confusion on account, in particular, of the low distinctiveness of the earlier mark and the lack of sufficient evidence submitted by the applicant in order to demonstrate the enhanced distinctiveness of the earlier mark through use.

The applicant seeks the annulment of the decision of the Board of Appeal of EUIPO ('the contested decision'). By its judgment, the General Court dismisses that action and rules for the first time on the assessment of the enhanced distinctiveness of the earlier mark after the withdrawal of the United Kingdom from the European Union and on the necessity of examining beforehand the enforceability

8 At issue were goods in Classes 9, 35 and 38 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

9 Within the meaning of Article 8(1)(b) and Article 53(1)(a) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

of the use of the earlier mark at the time of EUIPO's decision on the application for a declaration of invalidity.

Findings of the Court

First of all, the Court recalls that the agreement on the withdrawal of the United Kingdom from the European Union and Euratom, [10] in force since 1 February 2020, provides for a transition period from 1 February to 31 December 2020, after which EU trade mark legislation no longer applies to the United Kingdom. [11] In the present case, although the contested mark had been filed before the transition period, the contested decision was adopted after the expiry of that period.

Next, the Court refers to its case-law according to which, in the context of invalidity proceedings, the proprietor of an earlier industrial property right must establish that he or she may prohibit the use of the mark at issue, not only on the filing date of that mark, but also on the date on which EUIPO decides on the application for a declaration of invalidity. Accordingly, the Court considers that, for the evidence of enhanced distinctiveness of the earlier mark acquired through use in the United Kingdom to be relevant for the application for a declaration of invalidity of the contested mark, that use must still be capable of being relied on at the date on which EUIPO rules on the application for a declaration of invalidity. In the present case, however, the contested decision post-dating the expiry of the transition period, the Board of Appeal was obliged not to take into account the use of the earlier mark in the United Kingdom, which was no longer enforceable at that date, and thus to disregard that evidence.

In addition, the Court notes that, in the light of the fundamental principle of territoriality of intellectual property rights, [12] after the expiry of the transitional period, no conflict can arise in the United Kingdom between the contested mark and the earlier mark, since those marks are no longer protected in that territory.

Lastly, the Court considers that, while the date to be taken into account for assessing the enhanced distinctiveness of the earlier mark is the filing date of the contested trade mark application, the requirement of permanence or persistence of the prior right at the date on which EUIPO rules on the application for a declaration of invalidity is a matter of enforceability, which must be examined prior to a substantive assessment such as that of the enhanced distinctiveness of the earlier mark.

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10 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').

11 Articles 126 and 127 of the withdrawal agreement.

12 Within the meaning of Article 1(2) of Regulation 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

III. ECONOMIC AND MONETARY POLICY: PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the General Court (Fourth Chamber, Extended Composition) of 12 October 2022, Corneli v ECB, T-502/19

Link to the full text of the judgment

Economic and monetary union – Banking union – Recovery and resolution of credit institutions – Early intervention measures – Decision of the ECB to place Banca Carige under temporary administration – Action for annulment – Action brought by a shareholder – Standing to bring proceedings – Interest separate from that of the bank – Admissibility – Error of law in the determination of the legal basis – Interpretation of national law by the EU Courts in conformity with EU law – Limit – Prohibition on interpreting national law *contra legem*

The applicant, Ms Francesca Corneli, is a minority shareholder in Banca Carige SpA ('the bank'). As the bank was in financial difficulties, the European Central Bank (ECB) decided, on 1 January 2019, to place it under temporary administration. That decision was extended on three occasions, the last time until 31 January 2020.

Hearing an action for annulment of, in particular, the decision of the ECB placing the bank under temporary administration and the various extension decisions, the General Court, sitting in extended composition, rules on the interest in bringing proceedings and the standing to bring proceedings of the shareholders of that credit institution against those decisions. In that regard, the Court declares the applicant's action to be admissible as regards the decision to place the bank under temporary administration and the first extension decision ('the contested decisions'). Furthermore, for the first time, the Court interprets Articles 28 and 29 of Directive 2014/59, [13] as implemented under the rules of national law transposing them, [14] and seeks the annulment of the contested decisions.

Findings of the Court

In the first place, the Court examines the admissibility of the applicant's action and concludes that it is admissible, since the applicant has both standing to bring proceedings and an interest in bringing proceedings against the contested decisions.

First, as regards her standing to bring proceedings, the Court finds that the applicant is directly concerned by those decisions. It states that the applicant's legal situation is, in the present case, affected by the contested decisions without the intervention of an intermediate measure, since those decisions themselves alter the applicant's rights to participate, as a shareholder, in the management of the bank in accordance with the applicable rules.

Moreover, it rejects the arguments of the ECB and the Commission based on (i) the temporary nature of that effect, (ii) the fact that the most essential rights of the shareholders are not affected and (iii) the fact that the rights allegedly affected belong to the general meeting and not to the shareholders individually. In that connection, the Court notes that the right to vote allows each shareholder to

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13 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

14 Article 69-octiesdecies(1)(b) and Article 70 of decreto legislativo n. 385 – Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 – The Consolidated Law on banking and credit) of 1 September 1993 (Ordinary Supplement to GURI No 230 of 30 September 1993) ('the Consolidated Law on Banking').

participate individually in the election of members who will sit in management and supervisory bodies and that placing the bank under administration prevents them from exercising that right. Similarly, it rejects the argument that the judgment in *Trasta* [15] confirms the inadmissibility of the applicant's action, on the ground that that judgment concerned a different situation. In that case, the decision to withdraw the authorisation of the institution in question, taken by the ECB, did not directly affect the legal situation of the shareholders but rather that of the institution itself. Only the subsequent liquidation decision adopted by the national court, and which is not provided for in EU law in the event of withdrawal of authorisation, affected the shareholders' legal position.

The Court concludes, in the present case, that the legal relationship between the bank and its shareholders, of whom the applicant is one, was altered, without the intervention of any intermediate measure, by the contested decisions, which therefore directly concern her.

Second, the Court holds that the applicant is individually concerned by the contested decisions, given that she was part of a group whose members were identified or identifiable on the date of adoption of the contested decisions, since they appeared on the list, closed on that date, of shareholders liable to be affected. Furthermore, it states that the contested decisions change certain rights acquired by the applicant prior to the adoption of those decisions, namely those attaching to her shares in the bank.

As regards the applicant's legal interest in bringing proceedings, the Court notes that the applicant highlights the impact that the contested decisions have on her own rights as a shareholder of the bank. The Court considers that she thus relies on an interest in seeking the annulment of those decisions which is not the same as that of that bank but rather is a separate interest. Thus, if the contested decisions were annulled, the effect on the situation of the shareholders would not be the same as the effect produced by annulment on the situation of the bank.

In the second place, as to the substance, in the context of the examination of a plea alleging an error of law in the determination of the legal basis used to adopt the contested decisions, the Court, for the first time, interprets Articles 28 and 29 of Directive 2014/59, entitled, respectively, 'Removal of senior management and management body' and 'Temporary administrator', as implemented under the rules of national law transposing them. [16]

In the present case, the ECB had taken the decision to dissolve the bank's administration and supervisory bodies and to replace them with three extraordinary commissioners and a supervisory committee. In that respect, it had taken the view that the conditions laid down in the provisions of national law transposing Articles 28 and 29 of Directive 2014/59, that is to say, a significant deterioration in the bank's situation, were satisfied.

In that regard, the General Court rules that the measures at issue in Articles 28 and 29 of Directive 2014/59, as transposed by national law, namely the removal of the managing or supervisory bodies of banks and the dissolution of those bodies, respectively, cannot be regarded as equivalent or as alternatives. The Court holds, in that regard, that the first measure is less intrusive than the second and that the second can be adopted only if the replacement of the banks' management or supervisory bodies in accordance with the procedures of national or EU law is considered by the competent authority to be insufficient to remedy the situation. Moreover, the conditions for the application of the provisions of national law transposing those two articles also differ. In that respect, the provision transposing Article 29 does not provide for the dissolution of the managing or supervisory bodies of banks and the establishment of extraordinary administration in the event that the deterioration of the situation of the bank is particularly significant.

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15 Judgment of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923).

16 See footnote 14.

The Court observes that, in the contested decisions, the power exercised by the ECB to place the bank under temporary administration and to maintain that temporary administration was that referred to in the provision of national law transposing Article 29 of Directive 2014/59.

It follows that the ECB infringed that provision by relying, when that condition was not provided for in that provision, on the 'significant deterioration in the situation' of the bank in order to dissolve the bank's management and supervisory bodies, set up a temporary administration and maintain that temporary administration.

That finding by the Court cannot be rebutted by the argument of the ECB and the Commission that the provision of national law at issue should be read and interpreted in accordance with the EU law which it transposes, with the result that placement under temporary administration is permitted, even though the significant deterioration in the situation of the bank is not expressly referred to in that provision. Indeed, it follows from settled case-law that the obligation to interpret national law in conformity with EU law cannot serve as a basis for an interpretation which runs counter to the wording used in the national provision transposing a directive.

IV. SOCIAL POLICY

1. COORDINATION OF SOCIAL SECURITY SYSTEMS

Judgment of the Court (Second Chamber) of 13 October 2022, Raad van bestuur van de Sociale verzekeringbank (Intervals between temporary work assignments), C-713/20

Link to the full text of the judgment

Reference for a preliminary ruling – Social security for migrant workers – Regulation (EC) No 883/2004 – Article 11(3)(a) and (e) – Person residing in one Member State and employed in another Member State – Employment contract or contracts entered into with a single temporary employment agency – Temporary work assignments – Intervening periods – Determination of the legislation applicable during intervening periods between temporary work assignments – Termination of the employment relationship

From January 2013 and July 2007 respectively, X (a Netherlands national residing in Germany) and Y (a Polish national residing in Poland) began working as employed persons in the Netherlands through temporary work agencies. X had concluded a contract of employment with a temporary work agency, in the context of which she performed temporary work assignments, spaced at periods apart during which she carried out unpaid work and low-paid domestic work, also in the Netherlands. Y, for his part, had concluded successive employment contracts with a temporary employment agency, spaced several periods apart.

In July 2015, X was informed of her pension rights, from which it was apparent that, in so far as she was resident in Germany, she was insured under the Netherlands social security scheme only during the periods in which she had actually worked for the temporary employment agency in the Netherlands, but not during the intervening periods between her temporary work assignments.

In March 2016, Y, who had not worked between 1 January and 7 February 2016, was informed that he was not entitled to child benefit under the Netherlands social security scheme for January and February 2016, since he had not been working in the Netherlands on the first working day of each of those months.

Both of the interested parties brought an action before the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) against the decisions taken in respect of them. The referring court, the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands), hearing appeals against the judgments delivered by the rechtbank Amsterdam (District Court, Amsterdam), considers that those disputes concern the question whether the affiliation of the persons concerned to the Netherlands social security system ceased during the intervening periods between the

temporary work assignments. That court finds that it is necessary, for that purpose, to determine the legislation applicable during those intervening periods pursuant to Regulation No 883/2004. [17]

The Court of Justice holds that, pursuant to that regulation, [18] a person residing in a Member State who carries out, through a temporary employment agency established in another Member State, temporary work assignments in the territory of that other Member State is to be subject, during the intervening periods between those temporary work assignments, to the national legislation of the Member State in which he or she resides, provided that, by reason of the temporary contract, the employment relationship ceases during those periods.

Findings of the Court

As a preliminary point, the Court notes the principle established in Article 11(3)(a) of Regulation No 883/2004 that a person pursuing an activity as an employed or self-employed person in a Member State is to be subject to the social security legislation of that Member State. Next, as regards the question whether the persons concerned must be regarded as having pursued, during those intervening periods, an activity as an employed or self-employed person, the Court states that the expression 'activity as an employed person' is defined as an activity or equivalent situation, which is treated as such for the purposes of the social security legislation of the Member State in which that activity is pursued or the equivalent situation exists. [19]

In the present case, X carried out her activity on the basis of a fixed-term temporary employment contract, which provided that the employment relationship was to commence upon the actual commencement of her activity and end when that activity ceased. Therefore, during the intervening periods between her temporary work assignments, there was no employment relationship between X and the temporary employment agency. Furthermore, the activities carried out by X in the Netherlands during those intervening periods cannot be regarded as an activity as an employed person or an equivalent situation, for the purposes of the Netherlands legislation. As regards Y, during the intervening period between the two contracts which he had concluded with the temporary employment agency, the employment relationship between him and that undertaking had ceased.

It follows that, as a result of the cessation of their occupational activity, the persons concerned were not pursuing activity as employed persons during the intervening periods between their temporary work assignments and were not in an equivalent situation, for the purposes of the Netherlands legislation. Consequently, they did not fall within the scope of Article 11(3)(a) of Regulation No 883/2004, with the result that they were not subject to Netherlands legislation. Indeed, for the purposes of applying the legislation of the Member State of employment, the continued existence of an employment relationship is always necessary. In those circumstances, during the intervening periods, the persons concerned fell within the scope of Article 11(3)(e) of Regulation No 883/2004, [20] which constitutes a residual rule intended to apply to all persons who find themselves in a situation which is not specifically governed by other provisions of that regulation, and, therefore, were subject to the legislation of the Member State of residence.

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17 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 200, p. 1).

18 More specifically, Article 11(3)(a) and (e) thereof.

19 See Article 1(a) of Regulation No 883/2004.

20 That provision provides that any other person to whom subparagraphs (a) to (d) of Article 11(3) do not apply is to be subject to the legislation of the Member State of residence, without prejudice to other provisions of that regulation guaranteeing him or her benefits under the legislation of one or more other Member States.

2. INVOLVEMENT OF EMPLOYEES

Judgment of the Court (Grand Chamber) of 18 October 2022, IG Metall and ver.di, C-677/20

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – European company – Directive 2001/86/EC– Involvement of employees in decision-making within the European company – Article 4(4) – European company established by means of transformation – Content of the negotiated agreement – Election of employees' representatives as members of the Supervisory Board – Election procedure providing for a separate ballot in respect of the trade union representatives

Before being transformed into a European company (SE) in 2014, SAP, a public limited-liability company governed by German law, had a supervisory board consisting, in accordance with German law, [21] of representatives of the shareholders and of the employees. Among the latter, the representatives nominated by the trade unions were elected on the basis of a ballot that was separate from that established for the election of the other Supervisory Board members representing the employees. [22] The agreement on arrangements for the involvement of employees within SAP, following the company's transformation into an SE, provides, in turn, for different rules in cases where a reduced supervisory board is established. In that case, the trade unions may nominate candidates for some of the seats for representatives of the employees allotted to the Federal Republic of Germany and elected by the employees employed in Germany, but without a separate ballot being envisaged for the election of those candidates.

Industriegewerkschaft Metall (IG Metall) and ver.di – Vereinte Dienstleistungsgewerkschaft, two trade union organisations, brought an action challenging that absence of such a separate ballot. Seised of an appeal on a point of law lodged by those trade unions, the Bundesarbeitsgericht (Federal Labour Court, Germany) decided to refer a question to the Court concerning the interpretation of Directive 2001/86. [23] According to the referring court, the agreement at issue does not meet the requirements under German law. [24] That court has doubts, however, as to whether Article 4(4) of Directive 2001/86 [25] provides a lower level of protection, in accordance with which it would have to interpret the national law.

The Court, sitting as the Grand Chamber, rules that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the

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21 Paragraph 7 of the Gesetz über die Mitbestimmung der Arbeitnehmer (Law on employee participation) of 4 May 1976 (BGBl. 1976 I, p. 1153), as amended by the Law of 24 April 2015 (BGBl. 2015 I, p. 642) ('the MitbestG').

22 Pursuant to Paragraph 16(1) of the MitbestG, the representatives of the trade unions in the Supervisory Board are to be elected by the delegates by secret ballot and in accordance with the principles of a proportional ballot.

23 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ 2001 L 294, p. 22).

24 In particular, Paragraph 21(6) of the Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company) of 22 December 2004 (BGBl. 2004 I, p. 3675, 3686), in the version in force since 1 March 2020, pursuant to which, in the case of an SE established by means of transformation, the agreement on participation is to provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE.

25 Article 4(4) of Directive 2001/86, relating to the content of the agreement on arrangements for the involvement of employees within the SE, provides that, in the case of an SE established by means of transformation, the involvement agreement is to provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE.

composition of the Supervisory Board of the company to be transformed into an SE. In the context of that ballot, it is necessary to ensure that the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

Findings of the Court

In the present case, the Court begins with a literal interpretation of Article 4(4) of Directive 2001/86 and concludes from this that, as regards the definition of employees' representatives and the level of their involvement that must be preserved, the EU legislature referred to the national law and/or practice of the Member State in which the company to be transformed into an SE has its registered office.

Thus, as regards, in particular, the participation of employees' representatives, in order to determine both the persons empowered to represent the employees and the elements that characterise the participation enabling those representatives to exercise an influence on the decisions to be taken within the company, it is necessary to refer to the assessments made in that regard by the national legislature and to the relevant national practice.

Accordingly, if a procedural element established by national law, such as a separate ballot for the election of representatives of the trade unions, constitutes an element that characterises the national system of participation of employees' representatives and is mandatory in nature, that element must be taken into account for the purposes of the involvement agreement referred to in Article 4(4) of Directive 2001/86.

According to the Court, the context of that provision bears out the literal interpretation. The EU legislature sought to reserve special treatment to SEs established by means of transformation in order to ensure that the rights as regards involvement enjoyed by employees of the company which is to be transformed into an SE under national law and/or practice would not be undermined.

The Court considers that that reading of Directive 2001/86 is also consistent with its objective. As is apparent from that directive, [26] the securing of acquired rights as regards involvement sought by the EU legislature implies not only the preservation of employees' acquired rights in the company to be transformed into an SE, but also the extension of those rights to all the employees of the SE, even in the absence of any indication to that effect in the national law. Moreover, in order to ensure the equal treatment of the trade unions, the right to nominate candidates for election as employees' representatives within a supervisory board, in the present case, cannot be reserved to the German trade unions alone.

According to the Court, the interpretation thus adopted is also borne out by the origins of Directive 2001/86. It is apparent from those origins that the system applicable to SEs established by means of transformation was the main point of controversy in the negotiations. It was only with the introduction of a provision, reproduced in Article 4(4) of that directive, covering specifically the case of the establishment of an SE by means of transformation with a view to avoiding a weakening of the level of employee involvement in the company to be transformed, that the process for the adoption of that directive was able to continue.

Lastly, the Court states that the right to nominate a certain proportion of candidates for election as employees' representatives within a supervisory board of an SE established by means of transformation, such as SAP, cannot be reserved to the German trade unions alone but must be extended to all trade unions represented within the SE, its subsidiaries and establishments, in such a way as to ensure that those trade unions are treated equally in respect of that right.

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26 In particular from recital 18 thereof, which states, inter alia, that the securing of employees' acquired rights as regards involvement in company decisions is a fundamental principle and stated aim of that directive.

V. JUDGMENTS PREVIOUSLY DELIVERED

1. CITIZENSHIP OF THE UNION: DISCRIMINATION ON GROUNDS OF NATIONALITY

Judgment of the Court (Grand Chamber) of 1 August 2022, Familienkasse Niedersachsen-Bremen, C-411/20

Link to the full text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Freedom of movement of persons – Equal treatment – Directive 2004/38/EC – Article 24(1) and (2) – Social security benefits – Regulation (EC) No 883/2004 – Article 4 – Family benefits – Exclusion of nationals of other Member States who are economically inactive during the first three months of residence in the host Member State

S and members of her family are Union citizens originating in a Member State other than the Federal Republic of Germany. In October 2019, S applied for family benefits for her children in Germany for the period from August to October 2019. The Family Allowances Fund to which the case was referred [27] found that, on 19 August 2019, S and her family had entered Germany from their Member State of origin and had taken up their residence there. However, since S had not received national income during the three months after taking up residence in Germany, she did not meet the conditions laid down by national law [28] for entitlement to the benefit claimed. The Family Allowances Fund therefore refused S's application.

S brought an action before the referring court [29] requesting that that refusal be annulled.

The referring court observes that the provision of German law on which that refusal is based treats a national of another Member State who establishes his or her habitual residence in Germany differently from a German national who establishes his or her habitual residence in Germany following a period of residence in another Member State. Pursuant to that provision, nationals of another Member State, such as S, are refused entitlement to family benefits during the first three months of their residence where they do not provide proof that they were in gainful employment in Germany. In contrast, German nationals are entitled to such benefits as from those first three months even where they are not in gainful employment.

The referring court has referred a question to the Court of Justice for a preliminary ruling as to whether that difference in treatment is compatible with EU law.

In its judgment, the Court, sitting as the Grand Chamber, held that national legislation such as that at issue in the main proceedings is contrary to the principle of equal treatment laid down by Regulation No 883/2004. [30] It adds that the possibility of derogating from the principle, on the basis of

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27 Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit (Lower Saxony and Bremen Family Allowances Fund of the Federal Employment Agency, Germany).

28 Paragraph 62(1a) of the Einkommensteuergesetz (Law on Income Tax), as amended by the Gesetz gegen illegale Beschäftigung und Sozialleistungsmissbrauch (Law against illegal work and abuse of social benefits, BGBl. 2019 I, p. 1066).

29 In the present case, the Finanzgericht Bremen (Finance Court, Bremen, Germany).

30 Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrigendum OJ 2004 L 200, p. 1).

Article 24(2) of Directive 2004/38, [31] concerns only social assistance and is not applicable to such legislation.

Findings of the Court

As a preliminary point, the Court notes that Union citizens have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than to hold a valid identity card or passport, [32] that right being maintained as long as Union citizens and their family members do not become an unreasonable burden on the social assistance system of the host Member State. [33] Therefore, a Union citizen, even economically inactive, has, if he or she complies with those two conditions, a right of residence of three months in a Member State of which he or she is not a national.

That said, the Court examines whether, where he or she is lawfully resident in the territory of the host Member State, [34] an economically inactive Union citizen may rely, for the purposes of the grant of family benefits, on the principle of equal treatment with nationals of the host Member State who are economically inactive, who return to that Member State after having made use of their right to move and reside in another Member State.

To that end, it determines, in the first place, the scope of Article 24(2) of Directive 2004/38, which allows derogation from the principle of equal treatment and the refusal to grant social assistance to nationals of other Member States who are economically inactive during the first three months of their residence in the host Member State.

As the family benefits at issue are granted independently of the individual needs of the beneficiary and are not intended to cover his or her means of subsistence, they do not fall within the scope of 'social assistance' within the meaning of that provision.

The Court adds that that provision cannot be interpreted, as regards the grant of benefits other than 'social assistance', as allowing the host Member State to derogate from the equality of treatment which must in principle be enjoyed by Union citizens lawfully residing on its territory.

As a derogation from the principle of equal treatment laid down in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is a specific expression, Article 24(2) must be interpreted strictly and in accordance with the provisions of the Treaty. There is nothing in the wording or regulatory context of the latter provision to suggest that, by that provision, the EU legislature intended to allow the host Member State to derogate from the principle of equal treatment in respect of benefits other than social assistance.

In the second place, the Court determines the scope of Article 4 of Regulation No 883/2004.

According to that regulation, [35] a Union citizen who is economically inactive and has transferred his or her habitual residence to the host Member State is subject to the legislation of that Member State, namely, in the present case, Germany, as regards the grant of family benefits. The competence of Germany to determine, in its legislation, the conditions for the grant of those benefits, must however be exercised in compliance with EU law.

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31 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2005 L 197, p. 34).

32 Article 6(1) of Directive 2004/38.

33 Article 14(1) of Directive 2004/38.

34 Under Article 6(1) of Directive 2004/38, read in conjunction with Article 14(1) thereof.

35 Article 11(3)(e) of Regulation No 883/2004.

In that regard, in accordance with Article 4 of Regulation No 883/2004, persons to whom that regulation applies are to enjoy the same social security benefits and are subject to the same obligations under the legislation of the host Member State as the nationals thereof. No provision of that regulation allows the host Member State of a national of another Member State lawfully residing in its territory to apply, on the ground that that citizen is economically inactive, a difference in treatment between that citizen and its own nationals as regards the conditions for the grant of family benefits. A Union citizen lawfully residing in the territory of a Member State other than that of which he or she is a national and having established his or her habitual residence there may therefore rely, in the host Member State, on the principle of equal treatment, laid down in Article 4 of Regulation No 883/2004, for the purpose of obtaining family benefits under the same conditions as those laid down for nationals of that Member State.

In the present case, the Court finds that national legislation such as that at issue constitutes direct discrimination of such a Union citizen. In the absence of any derogation expressly provided for in Regulation No 883/2004, such discrimination cannot be justified.

It must, however, be stated that a Union citizen, who is economically inactive and who claims, in the host Member State, the application of the principle of equal treatment as regards the conditions for the grant of family benefits, must have, during the first three months during which he or she receives, in that Member State, a residence permit in accordance with Directive 2004/38, [36] established his or her habitual residence in that Member State and does not reside there temporarily. The concept of 'residence', within the meaning of Regulation No 883/2004, means the 'actual' residence. [37] As for the concept of 'habitual residence', it reflects a question of fact submitted for assessment by the national court in the light of all the particular circumstances of the case. In that regard, the condition that an economically inactive Union citizen must have transferred his or her habitual residence to the host Member State implies that he or she has shown that his or her presence demonstrates a sufficient degree of stability, which distinguishes it from temporary residence.

2. PROCEEDINGS OF THE EUROPEAN UNION: CONTRACTUAL DISPUTES

Judgment of the General Court (Seventh Chamber) of 13 July 2022, JC v EUCAP Somalia, T-165/20

Arbitration clause – International contract staff of EUCAP Somalia – Common Foreign and Security Policy mission – Termination of fixed-term employment contract during the probationary period – Notification of the termination of the contract by registered letter with acknowledgement of receipt – Sent to an incomplete address – Starting point of the time period for lodging an internal appeal before seeking a judicial remedy – Determination of the applicable law – Mandatory provisions of national employment law – Invalidity of the probationary period clause – Improper delivery of notice – Compensation in lieu of notice – Retroactive payment of salary – Counterclaim

36 Under Article 6(1) of Directive 2004/38, read in conjunction with Article 14(1) thereof.

37 Article 11(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1).

On 21 August 2019, the applicant, JC, signed a fixed-term employment contract with EUCAP Somalia, an EU mission aimed at helping Somalia to strengthen its maritime security capacity. [38] That contract provided for a probationary period of three months and, in the event of termination of the contract, a notice period of one month. The probationary period clause itself did not provide for notice in the event of termination of the contract during the probationary period agreed.

However, EUCAP Somalia suspended JC's effective deployment in Somalia, provided for in his employment contract, owing to concerns regarding his state of health. Later, following exchanges with JC in which EUCAP Somalia noted its duty of care, the limited medical facilities in the place of effective deployment and the reasons for the assessment that JC was physically unsuitable for the post, that mission decided to terminate JC's employment contract during the probationary period. He was informed of that decision by a letter dated 4 November 2019. However, since that first letter was sent to an incomplete address, EUCAP Somalia sent him a second letter of notification on 3 December 2019. Both letters provided for one week's notice.

On 2 January 2020, JC lodged an internal appeal before EUCAP Somalia against its decision, notified by the second letter, to terminate his employment contract. By decision of 24 January 2020, that internal appeal was dismissed. JC then brought an action before the General Court seeking, in essence, a declaration that the decision of EUCAP Somalia to terminate his employment contract, contained in the two notification letters, and, if necessary, the decision to dismiss his internal appeal, were void. He also requested that EUCAP Somalia be ordered to pay his salary retroactively.

By its judgment, the General Court upholds in part the action brought by JC. This case enables the General Court to consider what law is applicable to a contractual dispute based on Article 272 TFEU and an arbitration clause. In that regard, the General Court recalls the principle that disputes arising from the performance of a contract must be resolved on the basis of the contractual clauses, and interpreting the contract in the light of provisions of the national law applicable to the contract is justified only where there is doubt as to the content of the contract or the meaning of some of its clauses, or where the contract alone does not enable all aspects of the dispute to be resolved. The Court then supplements that rule with a new exception to the effect that the application of the clauses of the contract cannot, however, allow the parties to evade the mandatory provisions of the applicable national substantive law, which cannot be derogated from and in accordance with which the obligations under the contract have to be or have been performed. The Court also assesses the admissibility of the action, which is a contractual claim, taking into account the Charter of Fundamental Rights of the European Union ('the Charter') and, in particular, the right to effective judicial protection.

Findings of the Court

First, after pointing out that when EU institutions, bodies and agencies perform a contract, they remain subject to their obligations under the Charter and the general principles of EU law, the Court applies the right to effective judicial protection enshrined in Article 47 of the Charter, and dismisses the plea of inadmissibility raised by EUCAP Somalia, alleging that the applicant failed to exhaust the internal appeal procedure. Where a contract containing an arbitration clause stipulates that a party, before bringing an action before the General Court, must exhaust an internal appeal procedure, that procedure must be conducted under conditions which do not deprive the applicant of his or her right to effective judicial protection. In the present case, the decision to terminate the employment contract, as notified by the second letter, constitutes an individual measure which adversely affects the applicant. Thus, the appeal of 2 January 2020, lodged by the applicant pursuant to a contractual clause in that regard, must be classified as an internal appeal against that decision. In accordance with the right to effective judicial protection, account is to be taken of the date on which the applicant

38 EUCAP Somalia was established by Council Decision 2012/389/CFSP of 16 July 2012 on the European Union Capacity Building Mission in Somalia (EUCAP Somalia) (OJ 2012 L 187, p. 40), as amended by Council Decision (CFSP) 2020/663 of 18 May 2020 (OJ 2020 L 157, p. 1).

had actual knowledge of the decision to terminate his contract. That appeal was lodged within the time limit laid down for that purpose, namely within one month of the applicant having actual knowledge of the decision to terminate his employment contract, whereas EUCAP Somalia has not adduced evidence that it was lodged out of time.

Second, as regards the new exception, the Court, after holding that Belgian law was the national law applicable to the case, and relying on the mandatory provisions of the Belgian substantive employment law applicable to the employment contract, declares that the probationary period clause contained in the contract, which is a fixed-term contract, is void. It therefore precludes its application for the purpose of settling the dispute and applies a notice period of one month stipulated by the same contract.

Moreover, still applying Belgian law, the Court holds that the notice contained in the first letter is void because EUCAP Somalia sent that letter to an incomplete address. It acknowledges, however, that the second letter was properly notified. Accordingly, it finds that the termination of the employment contract between EUCAP Somalia and the applicant, stemming from that second letter, became definitively effective on the expiry of a contractual notice period of one month, and it orders EUCAP Somalia to pay the applicant the appropriate compensation.

3. AGRICULTURE AND FISHERIES

Judgment of the General Court (Ninth Chamber) of 21 September 2022, France v Commission, T-475/21

EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by France – Voluntary coupled support – Eligibility conditions – Eligible sectors and productions – Article 52(2) of Regulation (EU) No 1307/2013

In 2016, the French authorities notified the European Commission of a coupled support measure for the protein crops sector. The eligible areas for that support were those cultivated for fodder legumes either alone, in mixtures with other fodder legumes or in mixtures with other varieties, such as grasses, where legumes were predominant.

On the basis of an inquiry which it initiated, the Commission found that the conditions of eligibility for that support did not comply with EU law. In its view, as grasses were not listed among the eligible sectors and productions in Article 52(2) of Regulation No 1307/2013, [39] mixtures of legumes and grasses could not be granted coupled support. Thus, by its Implementing Decision (EU) 2021/988 [40] ('the contested decision'), the Commission excluded from European Union financing an amount of EUR 45 869 990.19 corresponding to expenditure incurred by the French Republic in respect of voluntary coupled support for the production of fodder legumes relating to claim year 2017.

After proceedings were brought by the French Republic, the General Court dismisses the action for annulment brought against the contested decision. In that connection, it interprets for the first time

39 Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608).

40 Commission Implementing Decision (EU) 2021/988 of 16 June 2021 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2021 L 218, p. 9).

the provisions of Regulation No 1307/2013 and of Regulation No 639/2014, [41] which concern the sectors and productions eligible for voluntary coupled support.

Findings of the Court

On the basis of a literal, contextual and teleological interpretation of Article 52(2) of Regulation No 1307/2013, the Court answers in the negative the question whether mixtures of agricultural products coming under one of the sectors or productions listed in that article, such as legumes, and agricultural products not coming thereunder, such as grasses, are eligible for coupled support. In doing so, it rejects the broad interpretation of eligible sectors and productions advocated by the French Republic.

Thus, first, the Court notes that Article 52(2) of Regulation No 1307/2013 contains a limitative list of sectors and productions eligible for coupled support and does not mention mixtures of products coming under the sectors or productions expressly listed and products not coming under those sectors or productions.

Second, a combined reading of the provisions of Article 52 of Regulation No 1307/2013 and Article 52 of Regulation No 639/2014 shows that the legislature intended to restrict the option for Member States to grant coupled support by introducing cumulative conditions which limit considerably the group of eligible beneficiaries and its material scope. In addition, coupled support is an aid scheme which constitutes a derogation from the other aid schemes governed by Regulation No 1307/2013 such that the conditions for its application are to be interpreted strictly.

Third, the Court holds that the objective of coupled support is not to support agricultural production in general or measures beneficial for the environment, but production in relation to certain agricultural sectors or certain specific productions which experience difficulties. Consequently, even assuming that legumes have benefits for the environment, as the French Republic asserts, that does not establish that the objective of supporting the production of fodder legumes would be effectively pursued by coupled support granted to mixtures of legumes and grasses.

Lastly, the Court rejects the interpretation proposed by the French Republic to the effect that account should be taken of the common, established practices in a Member State in order to define an agricultural 'sector' for the purposes of Article 52(2) of Regulation No 1307/2013. Such an interpretation does not, in particular, ensure legal certainty and a uniform interpretation within the European Union of the rules on coupled support. It is therefore considered to be incompatible with the requirements of clarity and predictability of the applicable legal rule. Accordingly, even assuming that mixtures of legumes and grasses constitute a common, established practice in France in the 'protein crops' sector, such crops do not come under that sector for the purposes of Article 52(2) of Regulation No 1307/2013.

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41 Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation (OJ 2014 L 181, p. 1).

4. FREEDOM OF MOVEMENT: FREEDOM OF ESTABLISHMENT

Judgment of the Court (Fourth Chamber) of 22 September 2022, W (Deductability of final losses of a non-resident permanent establishment), C-538/20

Link to the full text of the judgment

Reference for a preliminary ruling – Freedom of establishment – Articles 49 and 54 TFEU – Deduction of final losses incurred by a non-resident permanent establishment – State which has waived its power to impose taxes under a double taxation convention – Comparability of situations

W AG, a public limited company operating a securities trading bank, is resident for tax purposes in Germany. In August 2004, W opened a branch in the United Kingdom. As that branch did not make a profit, W closed it during the first half of 2007, so that the losses incurred by that establishment could not be carried forward in the United Kingdom for tax purposes.

Finanzamt B (Tax Office B, Germany) refused to take into account those losses when calculating the tax payable by W in Germany in respect of 2007. W challenged that refusal before the Hessiches Finanzgericht (Finance Court, Hesse, Germany) which, by judgment of 4 September 2018, upheld W's action.

Tax Office B brought an appeal on a point of law against that judgment before the Bundesfinanzhof (Federal Finance Court, Germany), the referring court. That court notes that, although W is liable in Germany to corporation tax and business tax in respect of its entire income, in accordance with the German legislation, [42] the losses incurred by its permanent establishment situated in the United Kingdom are excluded from the basis of assessment of its corporation tax under a double taxation convention [43] which exempts foreign profits from corporation tax, those profits being taken into account, however, for the purposes of the determination of the applicable tax rate. The same is true in respect of business tax. The referring court has doubts as to whether that exclusion is compatible with freedom of establishment since, unlike losses incurred by a permanent establishment situated in another Member State, resident companies may take into account the losses incurred by a resident permanent establishment for the determination of their taxable income.

By its judgment, the Court of Justice finds, however, that there is no restriction on freedom of establishment, since those two situations are not objectively comparable.

Findings of the Court

The Court rules that Articles 49 and 54 TFEU do not preclude a tax system of a Member State under which a company resident in that Member State may not deduct from its taxable profits the final losses incurred by its permanent establishment situated in another Member State where the Member State of residence has waived its power to tax the profits of that permanent establishment under a double taxation convention.

It is true that such a tax system establishes a difference in treatment between a resident company which has a permanent establishment situated in another Member State and a resident company which has a resident permanent establishment. Such a difference could discourage a resident

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42 Paragraph 1(1) of the Körperschaftsteuergesetz (Law on corporation tax) and the Gewerbesteuergesetz (Law on business tax), which refers to the determination of profits subject to corporation tax for the calculation of the basis of assessment for business tax.

43 Article XVIII(2) of the Convention of 26 November 1964 between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion, as amended by an addendum of 23 March 1970 (BGBl. 1966 II, p. 359; BGBl. 1967 II, p. 828, and BGBl. 1971 II, p. 46).

company from carrying on its business through a permanent establishment situated in another Member State. That difference in treatment is permissible only if it concerns situations which are not objectively comparable, or if it is justified by an overriding reason in the public interest proportionate to that objective.

In that respect, as regards measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits, companies which have a permanent establishment in another Member State are not, in principle, in a comparable situation to that of companies possessing a resident permanent establishment, except where the national tax legislation itself treats those two categories of establishment in the same way for the purposes of taking into account the losses and profits made by them.

However, where, as in the present case, the Member State in which a company is resident has waived, pursuant to a double taxation convention, the exercise of its power to tax the profits of the non-resident permanent establishment of that company, situated in another Member State, the situation of a resident company possessing such a permanent establishment is not comparable to that of a resident company possessing a resident permanent establishment in the light of the measures taken by the first Member State in order to prevent or mitigate the double taxation of resident companies' profits and, symmetrically, the double deduction of their losses.

5. PROTECTION OF PERSONAL DATA

Judgment of the Court (Grand Chamber) of 20 September 2022, VD and SR, C-339/20 and C-397/20

Link to the full text of the judgment

References for a preliminary ruling – Single Market for financial services – Market abuse – Insider dealing – Directive 2003/6/EC – Article 12(2)(a) and (d) – Regulation (EU) No 596/2014 – Article 23(2)(g) and (h) – Supervisory and investigatory powers of the Autorité des marchés financiers (AMF) – General interest objective seeking to protect the integrity of financial markets in the European Union and public confidence in financial instruments – Option open to the AMF to require the traffic data records held by an operator providing electronic communications services – Processing of personal data in the electronic communications sector – Directive 2002/58/EC – Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 11 and Article 52(1) – Confidentiality of communications – Restrictions – Legislation providing for the general and indiscriminate retention of traffic data by operators providing electronic communications services – Option for a national court to restrict the temporal effects of a declaration of invalidity in respect of provisions of national law that are incompatible with EU law – Precluded

Following an investigation by the Autorité des marchés financiers (Financial Markets Authority, France; 'AMF'), [44] criminal proceedings were brought against VD and SR, two natural persons charged with insider dealing, concealment of insider dealing, aiding and abetting, corruption and money laundering. In the course of that investigation, the AMF had used personal data from telephone calls made by VD and SR, generated on the basis of the code des postes et des communications

44 Investigation carried out under Article L.621-10 of the code monétaire et financier (Monetary and Financial Code), in the version applicable to the disputes in the main proceedings.

électroniques (Post and Electronic Communications Code), [45] in connection with the provision of electronic communications services.

In so far as the respective investigations into them was based on the traffic data provided by the AMF, VD and SR each brought an action before the cour d'appel de Paris (Court of Appeal, Paris, France), relying, inter alia, on a plea alleging infringement of Article 15(1) of the Directive on privacy and electronic communications, [46] read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Specifically, VD and SR, relying on the case-law arising from the judgment in *Tele2 Sverige and Watson and Others*, [47] challenged the fact that the AMF took the national provisions at issue as its legal basis for the collection of those data, whereas, according to them, those provisions, first, did not comply with EU law in so far as they provided for general and indiscriminate retention of connection data and, second, laid down no restrictions on the powers of the AMF's investigators to require the retained data to be provided to them.

By two judgments of 20 December 2018 and 7 March 2019, the cour d'appel de Paris (Court of Appeal, Paris) rejected the action brought by VD and SR. When it rejected the plea referred to above, the court adjudicating on the substance of the case relied, inter alia, on the fact that the Market Abuse Regulation [48] allows the competent authorities to require, in so far as permitted by national law, existing data traffic records held by operators providing electronic communications services, where there is a reasonable suspicion of an infringement of the prohibition on insider dealing and where such records may be relevant to the investigation of that infringement.

VD and SR then brought an appeal before the Cour de cassation (Court of Cassation, France), the referring court in the present cases.

In that context, that court is uncertain how to reconcile Article 15(1) of the Directive on privacy and electronic communications, read in the light of the Charter, with the requirements under Article 12(2)(a) and (d) of the Market Abuse Directive [49] and Article 23(2)(g) and (h) of the Market Abuse Regulation. That uncertainty arises from the legislative measures at issue in the main proceedings, which provide, as a preventive measure, that operators providing electronic communications services are to retain traffic data generally and indiscriminately for one year from the day of recording for the purposes of combating market abuse offences including insider dealing. Should the Court of Justice find that the legislation on the retention of the connection data at issue in the main proceedings does not comply with EU law, the referring court is uncertain as to whether that legislation retains its effects provisionally, in order to avoid legal uncertainty and to allow the data previously collected and retained to be used for the purpose of detecting insider dealing and bringing criminal proceedings in respect of it.

By its judgment, the Court, sitting as the Grand Chamber, holds that the general and indiscriminate retention of traffic data for a year from the date on which they were recorded by operators providing electronic communications services is not authorised, as a preventive measure, in order to combat market abuse offences. Furthermore, it confirms its case-law to the effect that EU law precludes a

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45 Specifically, on the basis of Article L.34-1 of the Post and Electronic Communications Code, in the version applicable to the disputes in the main proceedings.

46 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

47 Judgment of 21 December 2016, Tele2 Sverige and Watson and Others (C-203/15 and C-698/15, EU:C:2016:970).

48 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

49 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

national court from restricting the temporal effects of a declaration of invalidity which it is required to make with respect to provisions of national law that are incompatible with EU law.

Findings of the Court

The Court notes, first of all, that, in interpreting a provision of EU law, it is necessary not only to refer to its wording but also to consider its context and the objectives of the legislation of which it forms part.

As regards the wording of the provisions that are the subject of the reference for a preliminary ruling, the Court states that, while Article 12(2)(d) of the Market Abuse Directive refers to the AMF's power to 'require existing telephone and existing data traffic records', Article 23(2)(g) and (h) of the Market Abuse Regulation refers to the power of that authority to require, first, 'data traffic records held by investment firms, credit institutions or financial institutions' and, second, to require, 'in so far as permitted by national law, existing data traffic records held by a telecommunications operator'. According to the Court, it is clear from the wording of those provisions that they merely provide a framework for the AMF's power to 'require' the data available to those operators, which corresponds to access to those data. Furthermore, the reference made to 'existing' records, such as those 'held' by those operators, suggests that the EU legislature did not intend to lay down rules governing the option open to the national legislature to impose an obligation to retain such records. According to the Court, that interpretation is, moreover, supported both by the context of those provisions and by the objectives pursued by the rules of which those same provisions form part.

As regards the context of the provisions that are the subject of the questions referred, the Court observes that, although, under the relevant provisions of the Market Abuse Directive [50] and the Market Abuse Regulation, [51] the EU legislature intended to require the Member States to take the necessary measures to ensure that the competent financial authorities have a set of effective tools, powers and resources as well as the necessary supervisory and investigatory powers to ensure the effectiveness of their duties, those provisions make no mention of any option open to Member States of imposing, for that purpose, an obligation on operators providing electronic communications services to retain generally and indiscriminately traffic data, nor do they set out the conditions in which those data must be retained by those operators so that they can be submitted to the competent authorities where appropriate.

As regards the objectives pursued by the legislation at issue, the Court finds that it is apparent, first, from the Market Abuse Directive [52] and, second, from the Market Abuse Regulation [53] that the purpose of those instruments is to protect the integrity of EU financial markets and to enhance investor confidence in those markets, a confidence which depends, inter alia, on investors being placed on an equal footing and being protected against the improper use of inside information. The purpose of the prohibition on insider dealing laid down in those instruments [54] is to ensure equality between the contracting parties in stock-market transactions by preventing one of them that possesses inside information and that is, therefore, in an advantageous position vis-à-vis other investors, from profiting from that information, to the detriment of those that are unaware of it. Although, according to the Market Abuse Regulation, [55] connection data records constitute crucial, and sometimes the only, evidence to detect and prove the existence of insider dealing and market manipulation, the fact remains that that regulation makes reference only to records 'held' by

50 Article 12(1) of Directive 2003/6.

51 Article 23(3) of Regulation No 596/2014, read in the light of recital 62 of that regulation.

52 Recitals 2 and 12 to Directive 2003/6.

53 Article 1 of Regulation No 596/2014, read in the light of recitals 2 and 24 of that regulation.

54 Article 2(1) of Directive 2003/6 and Article 8(1) of Regulation No 596/2014.

55 Recital 62 of Regulation No 596/2014.

operators providing electronic communications services and to the power of that competent financial authority to 'require' those operators to send 'existing' data. Thus, it is in no way apparent from the wording of that regulation that the EU legislature intended, by that regulation, to give Member States the power to impose on operators providing electronic communications services a general obligation to retain data. It follows that neither the Market Abuse Directive nor the Market Abuse Regulation can constitute the legal basis for a general obligation to retain the data traffic records held by operators providing electronic communications services for the purposes of exercising the powers conferred on the competent financial authority under those measures.

The Court then notes that the Directive on privacy and electronic communications is the measure of reference on the retention and, more generally, the processing of personal data in the electronic communications sector, which means that the Court's interpretation, given in respect of that directive, also governs the traffic data records held by operators providing electronic communications services, which the competent financial authorities, within the meaning of the Market Abuse Directive [56] and the Market Abuse Regulation, [57] may require from those operators. The assessment of the lawfulness of the processing of records held by operators providing electronic communications services [58] must, therefore, be carried out in the light of the conditions laid down by the Directive on privacy and electronic communications and of the interpretation of that directive in the Court's case-law.

The Court finds that the Market Abuse Directive and the Market Abuse Regulation, read in conjunction with the Directive on privacy and electronic communications and in the light of the Charter, preclude legislative measures which, as a preventive measure, in order to combat market abuse offences including insider dealing, provide for the temporary, albeit general and indiscriminate, retention of traffic data, namely for a year from the date on which they were recorded, by operators providing electronic communications services.

Lastly, the Court confirms its case-law according to which EU law precludes a national court from restricting the temporal effects of a declaration of invalidity which it is required to make, under national law, with respect to provisions of national law which, first, require operators providing electronic communications services to retain generally and indiscriminately traffic data and, second, allow such data to be submitted to the competent financial authority, without prior authorisation from a court or independent administrative authority, owing to the incompatibility of those provisions with the Directive on privacy and electronic communications read in the light of the Charter. However, the Court recalls that the admissibility of evidence obtained by means of such retention is, in accordance with the principle of procedural autonomy of the Member States, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness. The latter principle requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of data in breach of EU law if the persons concerned are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.

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56 Article 11 of Directive 2003/6.

57 Article 22 of Regulation No 596/2014.

58 As provided for in Article 12(2)(d) of Directive 2003/6 and Article 23(2)(g) and (h) of Regulation No 596/2014.

6. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

Judgment of the Court (Third Chamber) of 1 August 2022, MPA (Habitual residence – Third State), C-501/20

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility – Regulation (EC) No 2201/2003 – Articles 3, 6 to 8 and 14 – Definition of 'habitual residence' – Jurisdiction, recognition, enforcement of decisions and cooperation in matters relating to maintenance obligations – Regulation (EC) No 4/2009 – Articles 3 and 7 – Nationals of two different Member States residing in a third State as members of the contract staff working in the EU Delegation to that third State – Determination of jurisdiction – *Forum necessitatis*

In 2015, two members of the contract staff of the European Commission, who were previously resident in Guinea-Bissau, moved to Togo with their minor children on account of their assignment to the EU delegation to that third State. As the mother is a Spanish national and the father a Portuguese national, the children, born in Spain, have dual Spanish and Portuguese nationality. Since the couple's de facto separation in 2018, the mother and the children have continued to reside in the matrimonial home in Togo and the father has lived in a hotel in that State.

In 2019, the mother brought divorce proceedings before a Spanish court, together with, inter alia, applications for the determination of the arrangements for exercising custody and parental responsibility in respect of the couple's minor children, as well as maintenance payments for them. However, that court declared that it lacked territorial jurisdiction since, in its view, the parties did not have their habitual residence in Spain.

On appeal by the mother, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain) decided to refer several questions to the Court of Justice for a preliminary ruling in order to enable it to rule, in the light of the particular situation of the spouses and their children, on the jurisdiction of the Spanish courts under Regulations No 2201/2003 [59] and No 4/2009. [60]

In its judgment, the Court clarifies the factors relevant to the determination of the habitual residence of the parties which is set out as a criterion for determining jurisdiction in those regulations. It also sets out the conditions under which a court seised may recognise its jurisdiction in matters relating to divorce, parental responsibility and maintenance obligations where no court of a Member State usually has jurisdiction.

Findings of the Court

The concept of the 'habitual residence' of the spouses, which is set out in the alternative heads of jurisdiction provided for in Article 3(1)(a) of Regulation No 2201/2003, must be given an autonomous and uniform interpretation. It is characterised not only by the intention of the person concerned to

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59 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

60 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1).

establish the habitual centre of his or her life in a particular place, but also by a presence which is sufficiently stable in the Member State concerned. The same definition also applies to the concept of 'habitual residence' in matters relating to maintenance obligations, within the meaning of the criteria for jurisdiction under Article 3(a) and (b) of Regulation No 4/2009; that definition must be guided by the same principle and characterised by the same elements as in the Hague Protocol on the Law Applicable to Maintenance Obligations. The status of the spouses concerned as members of the contract staff of the European Union, who are part of an EU delegation to a third State and who are alleged to enjoy diplomatic status in that third State, is not capable of constituting a decisive factor for the purposes of determining habitual residence within the meaning of the aforementioned provisions.

As to the habitual residence of the child, within the meaning of Article 8(1) of Regulation No 2201/2003 in matters of parental responsibility, this is also an autonomous concept. It requires, at the very least, physical presence in a given Member State which is not in any way temporary or intermittent and reflects some degree of integration of the child into a social and family environment. In that regard, the connecting factor of the mother's nationality and her residence, before her marriage, in the Member State of the court seised in matters of parental responsibility is not relevant for the purposes of recognising the jurisdiction of that court, whereas the fact that the minor children were born in that Member State and have the nationality of that Member State is insufficient.

That interpretation of the concept of 'habitual residence' could lead, in the light of the facts of the case, to no court of a Member State having jurisdiction, under the general rules on jurisdiction contained in Regulation No 2201/2003, to rule on an application for the dissolution of matrimonial ties and in matters of parental responsibility. In such a case, Articles 7 and 14 of that regulation may allow a court seised to apply, in respect of each matter, the rules on jurisdiction under domestic law, albeit with a different scope. In matrimonial matters, such residual jurisdiction of the court of the Member State seised is excluded where the defendant is a national of another Member State, without, however, preventing the courts of the latter Member State from having jurisdiction under its domestic law. By contrast, in matters of parental responsibility, the fact that the defendant is a national of another Member State does not prevent the court of the Member State seised from recognising its jurisdiction.

Another framework is laid down in matters relating to maintenance obligations, where all the parties to the dispute do not habitually reside in a Member State. In that case, Article 7 of Regulation No 4/2009 lays down four cumulative conditions to be satisfied in order for a court of a Member State seised of an application relating to maintenance obligations to be able, on an exceptional basis, to establish that it has jurisdiction by reason of the state of necessity (*forum necessitatis*). First, the court seised must find that no court of a Member State has jurisdiction under Articles 3 to 6 of Regulation No 4/2009. Second, the dispute in question must be closely connected with a third State, which is the case where all the parties habitually reside there. Third, the condition that the proceedings in question cannot reasonably be brought or conducted or would be impossible in that third State requires that, in the light of the particular case, access to justice in the third State must be, in law or in fact, impeded, inter alia by procedural conditions that are discriminatory or contrary to the guarantees of a fair trial. Lastly, the dispute must have a sufficient connection with the Member State of the court seised, which connection may consist, inter alia, of the nationality of one of the parties.

7. TRANSPORT

Judgment of the Court (Grand Chamber) of 1 August 2022, Sea Watch, C-14/21 and C-15/21

Link to the full text of the judgment

Reference for a preliminary ruling – Activities relating to the search for and rescue of persons in danger or distress at sea carried out by a humanitarian non-governmental organisation (NGO) – Regime applicable to ships – Directive 2009/16/EC – United Nations Convention on the Law of the Sea – International Convention for the Safety of Life at Sea – Respective competences and powers of the flag State and the port State – Inspection and detention of ships

Sea Watch is a humanitarian non-profit organisation registered in Berlin (Germany). It carries out activities relating to the search for and rescue of persons in danger or distress in the Mediterranean Sea, using ships in respect of which it is both the owner and the operator. Those ships include, in particular, the ships known as '*Sea Watch 3*' and '*Sea Watch 4*' ('the ships in question'), which fly the German flag and which have been certified in Germany as 'general cargo/multipurpose' ships.

During the summer of 2020, following search and rescue operations in the international waters of the Mediterranean Sea and then the transhipment and disembarking of the rescued persons in the ports of Palermo (Italy) and Porto Empedocle (Italy), towards which the Italian authorities had requested that the ships in question be directed, those ships were subject to inspections carried out by the harbour master's offices of the ports of those two municipalities, which subsequently ordered that they be detained. Those harbour master's offices considered that the ships in question were engaged in search and rescue activities at sea although they were not certified in respect of those activities and had, as a result, taken persons on board in greater numbers than they were authorised to accommodate. In addition, they noted a number of technical and operational deficiencies, some of which, in their view, fell to be regarded as giving rise to a clear risk to safety, health or the environment and as being sufficiently serious to warrant the detention of those ships.

Following the detention of the ships in question, Sea Watch brought two actions before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy) for annulment of (i) the detention orders and (ii) the inspection reports which preceded those orders. In support of those actions, it claimed, in essence, that the harbour master's offices responsible for those measures had exceeded the powers conferred on the port State, as derived from Directive 2009/16, [61] interpreted in the light of the relevant rules of international law, and that the inspections carried out by those harbour master's offices in fact constituted a roundabout means of frustrating the search and rescue operations at sea to which it is dedicated.

In that context, the Regional Administrative Court, Sicily, considered that the disputes before it raised important and unprecedented issues concerning the legal framework and regime applicable to ships which are operated by humanitarian non-governmental organisations in order systematically to carry out activities relating to the search for and rescue of persons in danger or distress at sea ('private humanitarian assistance ships').

61 Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57), as amended by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017 (OJ 2017 L 315, p. 61).

By its judgment, delivered by the Grand Chamber, the Court of Justice interprets Directive 2009/16 for the first time, in particular in the light of the United Nations Convention on the Law of the Sea [62] and the SOLAS Convention. [63] It holds that that directive also applies to ships that systemically carry out activities relating to the search for and rescue of persons in danger or distress at sea and that the national rules transposing that directive cannot limit its applicability to ships used for commercial activities. In addition, the Court clarifies the extent and the conditions of implementation of the powers of control that can be exercised by the port State, as well as the powers of inspection and detention of ships.

Findings of the Court

As regards the applicability of Directive 2009/16, the Court holds that that directive is applicable to ships which, although classified and certified as cargo ships by the flag State, are in practice being systematically used by a humanitarian organisation for non-commercial activities relating to the search for and rescue of persons in danger or distress at sea. That directive applies, first, to any seagoing vessel which flies a flag other than that of the port State, [64] with the exception of specific categories of ships which are expressly excluded from its scope. [65] Those categories, which thus constitute exceptions, must be regarded as exhaustive and must be interpreted strictly. From that point of view, the fact that the activities actually carried out by a ship do not coincide with those in respect of which it was classified and certified has no bearing on the applicability of the directive; this is also true of the fact that those actual activities are commercial or non-commercial in nature. Secondly, Directive 2009/16 applies to such a ship when it is located, inter alia, in a port or anchorage of a Member State for the purpose of engaging in a ship/port interface there. [66]

In the light of that interpretation, the Court points out that Directive 2009/16 precludes national legislation ensuring its transposition into domestic law from limiting its applicability only to ships which are used for commercial activities. In particular, all ships which may fall within the scope of that directive, including private humanitarian assistance ships, must be able to benefit from the monitoring, inspection and detention mechanism provided for therein.

As regards the conditions for implementing the monitoring, inspection and detention mechanism [67] in respect of ships subject to the jurisdiction of the port Member State and, more specifically, private humanitarian assistance ships, the Court finds, in the first place, that Directive 2009/16 must be interpreted by taking account of the Convention on the Law of the Sea and the SOLAS Convention. It follows, in particular, that, in a situation where the master of a ship flying the flag of a State that is a party to the SOLAS Convention has implemented the duty to render assistance at sea enshrined in the Convention on the Law of the Sea, neither the coastal State, which is also a party to the first of those two conventions, nor the flag State can make use of their respective powers to ascertain whether the rules on safety at sea have been complied with in order to verify whether the presence on board of persons to whom assistance has been rendered may result in the ship in question infringing any of the provisions of that convention. [68]

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62 United Nations Convention on the Law of the Sea, concluded in Montego Bay on 10 December 1982 (*United Nations Treaty Series*, Vols 1833, 1834 and 1835, p. 3) ('the Convention on the Law of the Sea'), which entered into force on 16 November 1994. Its conclusion was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

63 International Convention for the Safety of Life at Sea, concluded in London on 1 November 1974 (*United Nations Treaty Series*, Vol. 1185, No 18961, p. 3) ('the SOLAS Convention').

64 First subparagraph of Article 3(1) of Directive 2009/16.

65 Article 3(4) of Directive 2009/16.

66 First subparagraph of Article 3(1) of Directive 2009/16.

67 Articles 11 to 13 and 19 of Directive 2009/16.

68 Article IV(b) of the SOLAS Convention.

In the second place, the Court holds that the port State may subject ships which systematically carry out search and rescue activities and which are located in one of its ports or in waters falling within its jurisdiction, having entered those waters and after all the operations relating to the transhipment or disembarking of persons to whom their masters have decided to render assistance have been completed, to an additional inspection if that State has established, on the basis of detailed legal and factual evidence, that there are serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment in view of the relevant legal provisions, having regard to the specific conditions under which those ships operate. [69] In the event of an appeal, compliance with those requirements can thus be verified by the national court. In that regard, the Court sets out the factors which may be taken into account for the purposes of that verification, namely the activities for which the ship in question is used in practice, any difference between those activities and the activities in respect of which the ship is certified and equipped, how frequently those activities are carried out, and the equipment of that ship with regard to the expected (but also the actual) number of persons on board. The Court adds that, when circumscribed in this way, the inspection of the ship concerned by the port State falls within the framework laid down by the Convention on the Law of the Sea and the SOLAS Convention.

In the third place, the Court states that, during more detailed inspections, [70] the port State has the power to take account of the fact that ships which have been classified and certified as cargo ships by the flag State are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea in the context of a control intended to assess, on the basis of detailed legal and factual evidence, whether there is a danger to persons, property or the environment, in view of the relevant provisions of international and EU law, having regard to the conditions under which those ships operate. The act of thus making the control which may be carried out by the port State conditional upon the existence of clear grounds for believing that a ship or its equipment does not comply with the rule that a ship must be maintained in conditions such as to ensure that it will remain fit to proceed to sea without danger to itself or to the persons on board is consistent with the rules of international law governing the division of powers between that State and the flag State. By contrast, the port State does not have the power to demand proof that those ships hold certificates other than those issued by the flag State or that they comply with all the requirements applicable to another classification. That would call into question the way in which the flag State has exercised its powers in the area of conferring its nationality on ships, as well as the area of classifying and certifying those ships.

In the fourth and last place, the Court holds that the port State may not detain a ship unless the deficiencies confirmed or revealed by a more detailed inspection, first, pose a clear risk to safety, health or the environment and, second, individually or together, make it impossible for the ship concerned to sail under conditions capable of ensuring safety at sea. In addition, that State may impose predetermined corrective measures relating to safety, pollution prevention and on-board living and working conditions, if they are warranted in order to rectify the deficiencies found. That being so, such corrective measures must, in each individual case, be suitable, necessary and proportionate to that end. Moreover, the adoption and implementation of those measures by the port State must be the result of cooperation between that State and the flag State, having due regard to the respective powers of those two States and, where the flag State is also a Member State, to the principle of sincere cooperation.

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69 Article 11(b) of Directive 2009/16, read in conjunction with Part II of Annex I to that directive.

70 Article 13 of Directive 2009/16.

8. COMPETITION: STATE AID

Judgment of the General Court (Sixth Chamber, Extended Composition) of 14 September 2022, Helsingin Bussiliikenne v Commission, T-603/19

Link to the judgment as published in extract form

State aid – Coach and bus transport – Equipment loan and capital loans granted by the City of Helsinki – Decision declaring the aid incompatible with the internal market and ordering its recovery – Economic continuity – Procedural rights of interested parties – Article 6(1) of Regulation (EU) 2015/1589 – Obligation to state reasons

The company Helsingin Bussiliikenne ('the former HelB'), wholly owned by the City of Helsinki (Finland), operated bus routes in the Helsinki area and offered charter transport and bus leasing services. In December 2015, the City of Helsinki sold the former HelB to the company Viikin Linja Oy. In accordance with the terms of the deed of sale, Viikin Linja Oy was renamed Helsingin Bussiliikenne Oy ('the applicant').

Having received a complaint, the Commission initiated a formal investigation procedure concerning several equipment and capital loans granted by the City of Helsinki between 2002 and 2012 in favour of the former HelB and its predecessor HKL-Bussiliikenne ('the measures at issue'). The decision initiating the procedure was published in the *Official Journal of the European Union*, [71] and interested parties were invited to submit their comments within one month of that publication. The Commission, which was informed in June 2015 of the imminent sale of the former HelB to the applicant, received no comments from the applicant.

By decision of 28 June 2019 ('the contested decision'), [72] the Commission found that the measures at issue constituted State aid incompatible with the internal market which the Republic of Finland was obliged to recover from the beneficiary. Finding that there was economic continuity between the former HelB and the applicant, the Commission extended the obligation to repay the unlawful aid to the applicant.

The applicant brought an action for annulment against that decision, which is dismissed by the Sixth Chamber, Extended Composition, of the General Court. In its judgment, the Court addresses for the first time the procedural obligations incumbent on the Commission, in the context of the formal investigation procedure provided for in Article 108(2) TFEU, to an entity which continues the economic activity of the initial beneficiary of State aid and which, because of the application of the criterion of economic continuity, is subject to the obligation to repay the aid.

Findings of the Court

In support of its action for annulment, the applicant complained, inter alia, that the Commission had not given it the opportunity to be heard before the contested decision was adopted. According to the applicant, the Commission was required, following the transfer of the former HelB, to correct or supplement the decision to initiate the formal investigation procedure or, at least, allow it to submit its comments.

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71 Decision C(2015) 80 final of 16 January 2015 on measure SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) – Finland – Helsingin Bussiliikenne Oy (OJ 2015 C 116, p. 22).

72 Commission Decision (EU) 2020/1814 of 28 June 2019 on State aid SA.33846 – (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy (OJ 2020 L 404, p. 10).

The Court begins by recalling that, under Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589, [73] the Commission is obliged, when it decides to initiate the formal investigation procedure in respect of an aid measure, to give interested parties an opportunity to submit their comments. That obligation creates a right for those parties to be involved in the administrative procedure followed by the Commission, to an extent appropriate to the circumstances of the case. While it thus guarantees the opportunity for views to be made known, that obligation does not, however, create rights of defence for the benefit of interested parties.

As regards, next, the applicant's argument that the Commission ought to have corrected and broadened the decision to initiate the formal investigation procedure in order to enable it to submit comments properly following the takeover of the former HelB, the Court notes that the Commission is under an obligation to rectify only where there is a discrepancy between the opening decision and the final decision, particularly on facts or a legal classification of those facts decisive for the examination of the measures at issue.

In examining the aid exclusively with regard to the former HelB, which had been clearly identified as the beneficiary of the measures at issue in the decision to initiate the formal investigation procedure, the Commission did not alter its analysis either of the beneficiary or of the existence of aid or its compatibility with the internal market. The fact that, in the contested decision, the obligation to recover the unlawful aid is extended to the applicant in accordance with the criterion of economic continuity cannot, in that context, be equated with an alteration of the beneficiary of the aid at issue, or to an extension of the subject matter of the procedure.

By contrast, the Court upholds the applicant's argument that the Commission had not sufficiently involved it in the formal investigation procedure. Given that the Commission, having been informed of the transfer process since June 2015, had decided to examine the question of economic continuity between the former HelB and the applicant, it should have involved the applicant, as the actual beneficiary of the measures at issue, in that procedure. By failing to put the applicant in a position to submit its comments on the question of economic continuity, the Commission violated its procedural right guaranteed by Article 108(2) TFEU.

In that regard, the Court points out, however, that that failure to respect the applicant's procedural right to be involved in the formal investigation procedure constitutes not a breach of an essential procedural requirement, but a procedural irregularity, which can entail the annulment of the contested decision in whole or in part only if it is shown that in the absence of such irregularity the decision being challenged might have been substantively different. The applicant has not established that, had it been given the opportunity, by being involved in the procedure, to submit the comments that it would have wished to forward on the question of economic continuity, those comments would have been capable of altering the Commission's assessment in that regard. The Court therefore also rejects its complaint alleging violation of procedural rights.

Judgment of the General Court (Eighth Chamber) of 21 September 2022, Portugal v Commission (Madeira Free Zone), T-95/21

State aid – Madeira Free Zone – Aid scheme implemented by Portugal – Decision finding that the scheme does not comply with Decisions C(2007) 3037 final and C(2013) 4043 final, declaring it to be incompatible with the internal market, and ordering the recovery of aid paid under that scheme – Concept of State aid – Existing aid within the meaning of Article 1(b)(i) and (ii) of Regulation (EU) 2015/1589 – Recovery – Legitimate expectations – Legal certainty – Principle of sound administration – Absolute impossibility of implementation – Limitation period – Article 17 of Regulation 2015/1589

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73 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

In order to promote regional development and diversification of the economic structure of the island of Madeira, the Portuguese Republic established an aid scheme for a defined area on that island, called the Madeira Free Zone (MFZ).

That scheme, first approved by the European Commission in 1987 as compatible regional aid, was amended in 2002 ('Regime II'). In 2007, the Commission authorised a third scheme which was further amended in 2013 [74] ('Regime III').

Regime III, as approved by the Commission, took the form of a reduction in corporate income tax on profits resulting from activities effectively and materially performed in Madeira, exemption from municipal and local taxes as well as exemption from taxes on the transfer of immovable property for the setting up of a business in the MFZ, up to maximum aid amounts based on taxable base ceilings determined in the light of the number of jobs maintained by the beneficiary.

On completion of a monitoring exercise of that scheme for 2012 and 2013, the Commission decided to initiate the formal investigation procedure provided for under Article 108(3) TFEU.

At the conclusion of that procedure, the Commission found, by decision of 4 December 2020, [75] that Regime III, as implemented by Portugal, differed substantially from the scheme authorised by the 2007 and 2013 decisions. Classifying that scheme as 'new aid' which had been unlawfully implemented and was incompatible with the internal market, the Commission ordered recovery of the aid from the beneficiaries.

The action for annulment brought by the Portuguese Republic against that decision is dismissed by the General Court.

Findings of the Court

In the first place, the Court rejects the various complaints challenging the classification of Regime III, as implemented by the Portuguese Republic, as 'new aid'.

First, the Portuguese Republic argued that the MFZ had been created before its accession to the European Economic Community (EEC) on 1 January 1986 and that the aid scheme adopted for the MFZ had not been substantially altered since that date. Accordingly, the Portuguese Republic took the view that the Commission should have classified Regime III, as implemented, as 'existing aid', that is to say aid which was put into effect before, and is still applicable after, its accession.

In that regard, the Court recalls that all aid, that is to say aid schemes and individual aid, which is not existing aid, including substantial alterations to existing aid, must be regarded as 'new aid'. In order to assess whether such alterations are substantial, it is necessary to examine whether they affect the constituent elements of the scheme in question, such as the class of beneficiaries, the objective of the financial support or the source and amount of that support.

In the present case, the alterations made by Regimes II and III to the original aid scheme were substantial in that they concerned, inter alia, the exclusion of certain activities from the scope of that scheme and an increase of the maximum taxable base ceilings to which the income tax reduction applied.

In response to the Portuguese Republic's argument that the alterations in question merely restricted the scope of the original MFZ scheme, the Court notes, in addition, that the assessment of whether an alteration is substantial is separate from the question whether that alteration results in an extension or restriction of the scope of the aid in question. For the purposes of that assessment, it is important only to ascertain whether the alteration may affect the actual substance of the original scheme.

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74 Commission Decisions of 27 June 2007 in Case N421/2006 and of 2 July 2013 in Case SA.34160 (2011/N) ('the 2007 and 2013 decisions').

75 European Commission Decision C(2020) 8550 final of 4 December 2020 on aid scheme SA.21259 (2018/C) (ex 2018/NN) implemented by Portugal in favour of the Madeira Free Zone (MFZ) – Regime III ('the contested decision').

Accordingly, the Court confirms that substantial alterations made to the original aid scheme after 1 January 1986 precluded classification as 'existing aid', without it being necessary to determine whether that scheme had actually been put into effect before Portugal's accession to the EEC.

Secondly, the Portuguese Republic contested the Commission's finding that Regime III had been implemented in breach of the 2007 and 2013 decisions and therefore constituted new aid which was unlawfully implemented.

In that regard, the Court recalls that an authorised aid scheme is no longer covered by the decision which authorised it and, accordingly, constitutes 'new aid', where the Member State concerned implements the aid scheme in a manner which differs substantially from that provided for in the planned aid scheme notified to the Commission and, therefore, from that taken into consideration by the Commission for the purpose of finding the notified scheme to be compatible with the internal market.

In that context, the Portuguese Republic claimed, in particular, that the Commission had made errors of fact and of law and had infringed its obligation to state reasons in finding, in the contested decision, that the 2007 and 2013 decisions allowed aid under Regime III to be granted only in respect of profits resulting from activities carried on in Madeira, to the exclusion of profits resulting from activities carried on outside that region by companies registered in the MFZ.

That argument is rejected by the Court, which confirms that the Commission was entitled to find that only 'activities effectively and materially performed in Madeira' gave rise to entitlement to the aid authorised by the 2007 and 2013 decisions.

Furthermore, the Court points out that the Guidelines on national regional aid for 2007-2013, [76] in the light of which the Commission had approved Regime III, state that operating aid may be granted, exceptionally, in outermost regions, such as the Autonomous Region of Madeira, provided that (i) it is justified in terms of its contribution to regional development and its nature and (ii) its level is proportional to the handicaps it seeks to alleviate. Accordingly, only activities affected by the handicaps and therefore by the additional costs specific to those regions are eligible for such aid. Activities performed outside those regions and therefore not affected by those additional costs, even though they are carried out by companies established in those regions, must be excluded from the aid scheme.

The Court also rejects the Portuguese Republic's argument that the interpretation adopted by the Commission was contrary to a commentary by the Committee on Fiscal Affairs of the Organisation for Economic Cooperation and Development (OECD) and to the Commission's earlier decision-making practice. Although the Commission may take into consideration texts adopted within the framework of the OECD, it cannot be bound by them, in particular in the application of EU rules on State aid. Similarly, the question whether a Commission decision is lawful must be assessed solely in the context of Article 107 TFEU and not in the light of an alleged earlier decision-making practice of the Commission.

In the second place, the Court rejects the Portuguese Republic's plea based on the supposed impossibility of recovering the aid unlawfully granted on the ground, essentially, that the contested decision did not enable it to determine the amounts to be recovered 'without undue difficulty'.

Even though the Portuguese Republic is entitled to rely on the principle that 'no one is obliged to do the impossible', it has not established to the requisite legal standard that recovery of the aid in question was objectively and absolutely impossible, from the moment of adoption of the contested decision. Moreover, administrative and practical difficulties which arise owing to the large number of aid recipients do not warrant regarding recovery as technically impossible.

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76 Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13).

In the third place, as regards the complaint based on the limitation period for recovery of some of the aid paid, the Court notes that, where a Commission decision has found an aid scheme to be unlawful and incompatible with the internal market, the mere fact that some individual aid paid under that scheme is subject to a limitation period for recovery cannot result in annulment of that decision. In that regard, it is for the national authorities under an obligation immediately and effectively to recover that aid to determine, having regard to the particular circumstances of each beneficiary of an aid scheme, whether each of those beneficiaries must actually repay that aid.

Judgment of the General Court (First Chamber) of 19 October 2022, Greece v Commission, T-850/19

State aid – Activities linked to the production, processing and marketing of agricultural products – State aid schemes established by Greece in the form of interest subsidies and State guarantees on existing loans and new loans in order to make good the damage caused by natural disasters or exceptional occurrences – Decision declaring the aid schemes incompatible with the internal market and unlawful and ordering recovery of the aid paid – Aid limited to affected geographical areas – Advantage – Selective nature – Principle of sound administration – Duration of the procedure – Legitimate expectation – Limitation period – Article 17 of Regulation (EU) 2015/1589

In 2014, the European Commission received a complaint concerning aid granted by the Hellenic Republic to Sogia Ellas, a company operating in the agricultural products processing sector, consisting of interest subsidies and State guarantees on existing loans and new loans. That aid formed part of a package of State measures designed to support undertakings established in areas of Greece which had been affected by serious fires in 2007.

Following that complaint, the Commission initiated an investigation procedure concerning non-notified aid in the Greek agricultural sector.

By decision of 7 October 2019 [77] ('the contested decision'), the Commission found that the aid schemes implemented by the Hellenic Republic in the agricultural sector in the form of interest subsidies and guarantees linked to the fires of 2007 ('the measures at issue') constituted unlawful State aid incompatible with the internal market and ordered the recovery of that aid.

The action for annulment brought by the Hellenic Republic against that decision is dismissed by the General Court. In that context, the Court provides clarification on the application of Article 107(1) and (2)(b) TFEU concerning aid granted following a natural disaster.

Findings of the Court

In the first place, the Court recalls that, in order for State measures to be classified as State aid for the purposes of Article 107(1) TFEU, they must, among other conditions, confer a selective advantage on the beneficiaries.

As to whether the measures at issue conferred an advantage, the Court confirms the Commission's finding that the beneficiaries could not have secured the advantage derived from the measures at issue under normal market conditions.

Against that backdrop, the Court rejects the Hellenic Republic's argument that the measures at issue, which were granted in the context of a market crisis, fall within the remit of the State's social responsibility and therefore meet a long-term economic rationality test. In that regard, the Court points out that the concept of 'normal market conditions' refers to the possibility for the undertaking

77 Commission Decision (EU) 2020/394 of 7 October 2019 concerning the measures SA.39119 (2016/C) (ex 2015/NN) (ex 2014/CP) implemented by the Hellenic Republic in the form of interest subsidies and guarantees linked to the fires of 2007 (OJ 2020 L 76, p. 4).

to obtain on the market the same advantage as that which it derives from the aid, not to the assessment of whether the market is operating as usual or is in crisis. To interpret it otherwise would be tantamount to determining the existence of an advantage on the basis of the grounds for or objective of the aid, which would call into question the objective nature of the concept of 'advantage'.

In addition, there is no provision in Article 107(1) TFEU that exempts from the classification as State aid a measure which is granted by a Member State in the exercise of its public powers and which meets a long-term economic rationality test or falls within the remit of its social responsibility. All the same, such considerations may be taken into account when assessing the compatibility of a measure with the internal market, under Article 107(2) and (3) TFEU.

The Court considers, moreover, that the Commission was justified in finding that the measures at issue were selective, since the advantages they conferred did not apply to all undertakings in Greece. An advantage limited to undertakings established in the part of a Member State affected by fires may give rise to a selective measure, as it favours certain undertakings over others within that State.

The alleged legitimacy of the objectives pursued by the measures at issue is not sufficient to obviate their selectivity, otherwise Article 107(2)(b) TFEU, which classifies aid to make good the damage caused by natural disasters or exceptional occurrences as State aid compatible with the internal market, would be deprived of all substance.

Furthermore, by simply pointing out that the purpose of the measures at issue was to deal, on an ad hoc basis, with the aftermath of the fires in the affected areas, without however providing a description of the system relating to those measures, the Hellenic Republic also failed to establish that the differentiation introduced by the measures resulted from the nature or general scheme of the system of which they formed part and therefore fell outside the scope of Article 107(1) TFEU.

In the second place, as to whether the measures at issue are compatible with the internal market under Article 107(2)(b) TFEU, the Court notes that only economic disadvantages directly caused by natural disasters or exceptional occurrences qualify for compensation pursuant to that provision. It follows that two conditions must be met if that exception is to apply, namely, first, there must be a direct link between the damage caused by the natural disaster and the State aid and, second, there must be an as precise as possible assessment of the damage sustained by the producers concerned.

In the light of those clarifications, the Court observes that the Hellenic Republic made the grant of the measures at issue conditional on the place of establishment of the beneficiaries in the affected localities, without verifying whether those beneficiaries had actually suffered damage as a result of the 2007 fires. It is not possible, based on proof alone of a place of establishment in the affected localities, to verify whether the beneficiaries suffered damage as a result of the fires or to check whether the amount of the measures granted exceeded the losses actually sustained by the beneficiaries. Accordingly, the Court concludes that the measures at issue do not satisfy the conditions for the application of Article 107(2)(b) TFEU.

That conclusion cannot be called into question by the extent of the damage or the urgency with which the Hellenic Republic had to take the measures at issue.

As regards the situation of emergency invoked by the Hellenic Republic, the Court states that the Hellenic Republic failed to show that it was absolutely impossible for it to assess the losses actually sustained as a result of the 2007 fires. As for the extent of the damage and the fact that representatives of the EU institutions acknowledged that damage, the Court makes clear that those representatives' statements on the relevant events are not such as to exempt the measures at issue from having to satisfy the conditions for the application of Article 107(2)(b) TFEU. Moreover, since the aid schemes in question did not contain any methodology for assessing as precisely as possible the damage suffered on account of the 2007 fires and did not determine the eligible costs on the basis of that damage, there was nothing to prove that the amount of aid received by the beneficiaries was in fact equal to the losses sustained individually by them as a result of those fires.

In the third place, as regards the limitation period and its interruption, the Court recalls the case-law according to which the Commission, when it sends a request for information to a Member State, is informing that State that it has in its possession information concerning unlawful aid and, if necessary, that that aid will have to be repaid. Therefore, the simplicity of the request for information

does not have the consequence of depriving it of legal effect as a measure capable of interrupting the limitation period provided for in Article 17 of Regulation 2015/1589.

In the present case, the letter by which the Commission sent a request for information to the Hellenic Republic informing that State that it was in possession of information concerning unlawful aid and, if necessary, that that aid would have to be repaid was, in the absence of any change in the subject matter of the investigation during the investigation procedure, such as to interrupt the ten-year period provided for in Article 17(1) of Regulation 2015/1589.

In that connection, since that limitation period applies only to relations between the Commission and the Member State to which the aid recovery decision is addressed, the Court rejects the Hellenic Republic's argument that the Commission's power to recover aid is time-barred with regard to undertakings other than the one specifically named in the request for information sent to the Member State.

Finally, in the fourth and last place, as regards the infringement of the principle of the protection of legitimate expectations alleged by the Hellenic Republic, the Court notes that the Member State concerned cannot plead such an infringement when it did not notify the aid schemes in question in good time.

In the light of those considerations, the Court dismisses the action in its entirety.

9. ECONOMIC AND MONETARY POLICY: EUROPEAN SYSTEM OF CENTRAL BANKS

Judgment of the Court (Grand Chamber) of 13 September 2022, Banka Slovenije, C-45/21

Link to the full text of the judgment

Reference for a preliminary ruling – European System of Central Banks – National Central Bank – Directive 2001/24/EC – Reorganisation and winding up of credit institutions – Compensation for damage resulting from the adoption of reorganisation measures – Article 123 TFEU and Article 21.1 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank – Prohibition of monetary financing of Member States in the euro area – Article 130 TFEU and Article 7 of that protocol – Independence – Disclosure of confidential information

Following the global financial crisis, national legislative provisions authorised the Banka Slovenije (Central Bank of Slovenia) to cancel certain financial instruments where to maintain them would lead to the likelihood of insolvency for a credit institution and threaten the financial system as a whole. [78] Subsequently, a law established two separate and alternative liability regimes in respect of that central bank for damage caused to former holders of cancelled financial instruments.

First, that liability may be incurred where it is established that the cancellation of a financial instrument did not constitute a necessary measure or where the principle that no creditor may be more disadvantaged than in the event of failure has been infringed. The Central Bank of Slovenia may

78 This concerns reorganisation measures under Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 15). The Court has previously ruled on two occasions in a context relating to those Slovenian reorganisation measures and their implementation, but on questions that are very different from those raised in the present case (judgments of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, and of 17 December 2020, *Commission* v *Slovenia (ECB Archives)*, C-316/19, EU:C:2020:1030).

however be discharged of its liability by establishing that it or the persons it authorised to act on its behalf acted with due care. Second, natural persons who hold a cancelled financial instrument and whose annual income is below a certain threshold may obtain flat-rate compensation from that central bank.

The law provides that the costs arising from the application of those liability regimes are to be financed, first, through recourse to special reserves into which the profits made by the Central Bank of Slovenia as from 1 January 2019 are to be paid, then through the use of up to 50% of its general reserves and finally, through borrowing from the Slovenian authorities.

The Central Bank of Slovenia lodged an application for review of the constitutionality of that law with the Ustavno sodišče (Constitutional Court, Slovenia), claiming, inter alia, that the liability regimes it introduces are incompatible with EU law. It is in that context that the referring court decided to ask the Court, inter alia, whether those regimes are compatible with two fundamental principles governing the action of the European System of Central Banks (ESCB), namely the prohibition of monetary financing [79] and the principle of the independence of central banks. [80]

By its Grand Chamber judgment, the Court holds that the prohibition of monetary financing does not preclude a liability regime linked to the infringement, by a central bank, of rules governing the exercise of a function conferred on it by national law, to the extent that that central bank is held liable only where it or the persons authorised to act on its behalf acted in serious breach of their duty to exercise due care. By contrast, that prohibition precludes a regime under which a central bank incurs liability solely on account of the cancellation of financial instruments. Furthermore, the principle of independence precludes a liability regime which may mean that a national central bank is held liable for such sums as might impair its ability to perform its tasks effectively and which are financed in accordance with the abovementioned arrangements.

Findings of the Court

In the first place, the Court examines the compatibility of liability regimes such as those referred to in the request for a preliminary ruling with the prohibition of monetary financing. In that regard, it notes at the outset that the implementation of measures for the reorganisation of credit institutions, within the meaning of Directive 2001/24, does not constitute a task for the ESCB, in general, or for the national central banks, in particular. That being so, the ESCB represents, in EU law, a novel legal construct which brings together national institutions, namely the national central banks, and an EU institution, namely the European Central Bank, and causes them to cooperate closely with each other. In that highly integrated system in which they constitute both national authorities and authorities acting under the ESCB, the national central banks may perform functions other than those specified in the Protocol on the ESCB and the ECB. [81] Such functions are however performed under their own liability, since the specific rules for incurring that liability are determined in accordance with national law. Accordingly, it is for the Member State concerned to define the conditions in which the liability of its central bank may be incurred as a result of the implementation by that bank of a reorganisation measure, within the meaning of Directive 2001/24, where that central bank has been designated as the authority empowered to implement such a measure. However, in exercising that power, the Member States are required to comply with the obligations arising under EU law.

In that regard, EU law prohibits national central banks from any financing of public sector obligations in respect of third parties. It cannot be excluded that the liability of a national central bank, from its own funds, on account of the exercise of a function conferred on it by national law can be classified as

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79 Set out in Article 123 TFEU and Article 21 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank ('the Protocol on the ESCB and the ECB').

80 Deriving from Article 130 TFEU and Article 7 of the Protocol on the ESBC and the ECB.

81 In accordance with Article 14.4 of the Protocol on the ESCB and the ECB.

entailing such financing. However, such liability cannot be regarded as constituting, in all circumstances, such financing.

Thus, the liability of a national central bank where that bank has infringed the rules governing the exercise of a function conferred on it by national law cannot, in principle, be regarded as involving the financing of public sector obligations vis-à-vis third parties. In that situation, the compensation of injured third parties is the consequence of the actions of that central bank and not the assumption of a pre-existing obligation towards third parties incumbent on the other public authorities. Moreover, such financing does not normally result directly from measures adopted by those other public authorities and does not therefore allow them, in principle to incur expenditure by avoiding the impetus to comply with a sound budgetary policy. [82] That being so, in view of the high degree of complexity and urgency characterising the implementation of reorganisation measures within the meaning of Directive 2001/24, such liability cannot be incurred without requiring that the infringement of the duty to exercise due care alleged against that central bank be serious.

By contrast, a liability regime which applies solely because the national central bank has exercised a function conferred on it by national law, even if it has complied fully with the rules imposed on it, entails the financing of a public sector obligation vis-à-vis third parties. While it is open to the national legislature to guarantee compensation for the inevitable consequences of decisions taken by its central bank in accordance with the choices made by that legislature, it must be stated that it thus establishes a payment obligation which derives directly from its political choices, and not from the way in which the central bank performs its functions. The payment, from its own funds, of such compensation by the central bank must therefore be regarded as leading it to be responsible, in place of the other public authorities, for the financing of public sector obligations under the national legislation of that Member State.

In the second place, the Court clarifies the scope of the principle of the independence of national central banks in the event of liability being incurred for such sums as might impair their ability to perform their tasks effectively. It is true that the establishment of a liability regime in the context of the exercise of a function conferred on them by national law is not, in itself, incompatible with the independence of the central banks. However, the national rules put in place for that purpose cannot place the central bank concerned in a situation which in any way undermines its ability to carry out independently a task falling within the scope of the ESCB.

In order to participate in one of the ESCB's fundamental tasks, namely the implementation of the European Union's monetary policy, the establishment of reserves by the national central banks appears essential. In that context, a levy on the general reserves of a national central bank, in an amount likely to affect its ability to carry out its tasks effectively under the ESCB, combined with an inability to restore those reserves independently, because all its profits are systematically allocated to reimbursement of damage which it has caused, is liable to place that central bank in a situation of dependence on political authorities, in breach of EU law. That is thus particularly true where a national central bank has a legal obligation to take out a loan from other public authorities of the Member State to which it belongs, where sources of financing linked to reserves have been exhausted.

Since the legislation such as that at issue in the main proceedings has precisely those characteristics, it potentially exposes the central bank to political pressure, whereas Article 130 TFEU and Article 7 of the Protocol on the ESCB and the ECB are intended, on the contrary, to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives ascribed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law.

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82 Contrary to the objective of Article 123(1) TFEU.

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 20 September 2022, SpaceNet and Telekom Deutschland, C-793/19 and C-794/19, EU:C:2022:702
- Judgment of 28 October 2022, Generalstaatsanwaltschaft München (Extradition and ne bis in idem), C-435/22 PPU, EU:C:2022:852
- Judgment of 4 May 2022, Larko v Commission, T-423/14 RENV, EU:T:2022:268
- 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 26 October 2022, The Bazooka Companies / EUIPO – Bilkiewicz (Shape of a baby's bottle), T-273/21, EU:T:2022:675