COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
November 2022

I. INSTITUTIONAL PROVISIONS

1. EUROPEAN CITIZENS' INITIATIVE

Judgment of the General Court (Eighth Chamber) of 9 November 2022, Minority SafePack – one million signatures for diversity in Europe v Commission, T-158/21

Link to the full text of the judgment

Law governing the institutions – European citizens' initiative – 'Minority SafePack – one million signatures for diversity in Europe' – Commission communication setting out the reasons for not adopting the proposals for legal acts contained in the European citizens' initiative – Obligation to state reasons – Equal treatment – Principle of sound administration – Manifest error of assessment

The applicant, Citizens' Committee of the European Citizens' Initiative 'Minority SafePack – one million signatures for diversity in Europe', requested that the European Commission register the proposed European citizens' initiative (ECI) entitled 'Minority SafePack – one million signatures for diversity in Europe'. [1]

The aim of the proposed ECI was to invite the European Union to adopt a series of acts in order to improve the protection of persons belonging to national and linguistic minorities and to strengthen cultural and linguistic diversity in the European Union.

Following the registration of the proposed ECI by the Commission [2] and the collection of a sufficient number of signatures in support, the applicant submitted the ECI at issue to the Commission. After the European Parliament defined its position on that ECI, [3] the Commission adopted, on 14 January 2021, the communication [4] by which it refused to take the action requested in the ECI, concerning, inter alia, among the nine proposals listed:

- a recommendation of the Council on the protection and promotion of cultural and linguistic diversity in the European Union (proposal 1);
- a decision or a regulation of the Parliament and of the Council to create a centre for linguistic diversity in the field of regional and minority languages that would be financed by the European Union and responsible for promoting diversity at all levels (proposal 3);
- the amendment of EU legislation in order to guarantee approximately equal treatment for stateless persons and citizens of the European Union (proposal 6); and
- an amendment of the Audiovisual Media Services Directive, [5] to ensure freedom to provide services and the reception of audiovisual content in regions where national minorities reside (proposal 8).

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1 Pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, p. 1), repealed and replaced with effect from 1 January 2020 by Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative (OJ 2019 L 130, p. 55).

2 Commission Decision (EU) 2017/652 of 29 March 2017 on the proposed citizens' initiative entitled 'Minority SafePack – one million signatures for diversity in Europe' (OJ 2017 L 92, p. 100).

3 Parliament Resolution (2020)2846(RSP), P9_TA-PROV (2020)0370 of 17 December 2020.

4 Commission Communication C(2021) 171 final of 14 January 2021.

5 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).

By its judgment, the General Court dismisses the applicant's action for annulment of the Commission's communication. This case gives the Court the opportunity, first, to clarify that, subject to compliance with the requirements stemming from Regulation 2019/788, the principle of equal treatment does not impose on the Commission the obligation to organise an identical number of meetings with the organisers of every ECI, and, secondly, to apply the solution adopted by the Court of Justice in Préfet du Gers and Institut national de la statistique et des études économiques as regards the rights granted only to EU citizens. [6]

Findings of the Court

First, the Court finds that the Commission complied with the obligation to state reasons with regard to the contested communication. Taking into account the initiatives already undertaken by the EU institutions in the areas covered by the ECI at issue and its monitoring of the implementation of those initiatives, the Commission considered that, at that stage, no additional legal act was necessary to achieve the objectives pursued by that ECI.

Second, the Court points out that, in accordance with the principle of equal treatment, the number of meetings organised by the Commission with the organisers of an ECI may vary, depending, inter alia, on the nature or complexity of the ECI, with the result that the Commission is not required to organise an identical number of meetings with the organisers of every ECI.

Third, the Court holds that the Commission did not commit any manifest error of assessment as regards the examination of proposals 1, 3, 6 and 8 of the ECI at issue.

Thus, as regards proposal 1, the Commission was entitled to refer, in the contested communication, to the Council of Europe Charter [7] as a reason for its refusal to take the action envisaged by that proposal. The fact that the European Union is not a party to that charter does not establish that the Commission committed a manifest error of assessment, since the applicant does not dispute that the European Union regularly refers to that charter as the legal instrument defining the guidelines for the promotion and protection of regional and minority languages. Furthermore, the fact that certain Member States have not yet signed or ratified it is irrelevant to evaluate the European Union's action in this field. Similarly, the Commission cannot be required, when examining an ECI, to take into consideration only those EU acts which concern all Member States and all persons concerned by that ECI. Moreover, it is immaterial that an act, taken in isolation, does not enable the objectives pursued by an ECI to be fully achieved if all the acts and measures mentioned by the Commission in its communication are capable, collectively, of achieving those objectives.

As regards proposal 3, the Court also finds that the Commission justifiably considered that the tasks performed, the objectives pursued and the activities undertaken by the Council of Europe's European Centre for Modern Languages ('the ECML') are capable of contributing to the achievement of the objectives pursued by that proposal of strengthening awareness of the importance of, inter alia, regional or minority languages and of promoting diversity at various levels.

In that regard, the Commission was entitled to consider, in the contested communication, that maintaining and developing cooperation with another international organisation in areas corresponding to those which the applicant wished to assign to the centre for linguistic diversity, namely with the ECML, to which the majority of the Member States of the European Union have acceded and which is closely linked to the Council of Europe, is capable of contributing to the attainment of the objectives pursued by proposal 3 and of avoiding the duplication of effort and resources.

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6 Judgment of 9 June 2022, *Préfet du Gers and Institut national de la statistique et des études économiques* (C-673/20, EU:C:2022:449).

7 European Charter for Regional or Minority Languages of the Council of Europe of 5 November 1992 (*European Treaty Series* – No 148).

As regards proposal 6, in so far as the objective of that proposal is to obtain the extension of citizen-related rights to stateless persons and their families, who have been living in their country of origin for the whole of their lives, the Court points out that possession of the nationality of a Member State is an essential condition for a person to be able to acquire and retain the status of citizen of the Union and to benefit fully from the rights attaching to that status. Thus, in accordance with the judgment in *Préfet du Gers and Institut national de la statistique et des études économiques*, rights connected with the status of citizen of the Union cannot be extended to persons who do not possess the nationality of a Member State. In addition, the Commission justifiably considered that its action plan relating to integration and social cohesion [8] is capable of taking account of the need for stateless persons to be better integrated in society via better employment, education and social opportunities.

As regards proposal 8, the Court points out that the Audiovisual Media Services Directive already facilitates the reception and retransmission of audiovisual media services throughout the European Union, including of audiovisual content from neighbouring Member States of a given Member State, in languages likely to be of interest to persons belonging to national minorities residing in the latter. Moreover, the Commission correctly considered that the monitoring of the application of that directive is capable of contributing to achieving an objective pursued by that proposal, namely to improve access to audiovisual content of various origins and languages. Accordingly, the Commission was entitled to conclude that no amendment of that directive was necessary in order to achieve the objective pursued by proposal 8.

2. COMPETENCES OF THE EUROPEAN INSTITUTIONS

Judgment of the Court (Grand Chamber) of 22 November 2022, Commission v Council (Accession to the Geneva Act), C-24/20

Link to the full text of the judgment

Action for annulment – Council Decision (EU) 2019/1754 – Accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications – Article 3(1) TFEU – Exclusive competence of the European Union – Article 207 TFEU – Common commercial policy – Commercial aspects of intellectual property – Article 218(6) TFEU – Right of initiative of the European Commission – Modification by the Council of the European Union of the proposal from the Commission – Article 293(1) TFEU – Applicability – Article 4(3), Article 13(2) and Article 17(2) TEU – Article 2(1) TFEU – Principles of conferral of powers, of institutional balance and of sincere cooperation

By Decision 2019/1754, [9] the Council of the European Union approved the accession of the European Union to the Geneva Act [10] of the Lisbon Agreement [11] on Appellations of Origin and Geographical Indications.

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8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, entitled 'Action plan for Integration and Inclusion for 2021-2027' (COM(2020) 758 final).

9 Council Decision (EU) of 7 October 2019 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2019 L 271, p. 12; 'the contested decision').

10 Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2019 L 271, p. 15; 'the Geneva Act').

11 The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was signed on 31 October 1958, revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaty Series*, vol. 828, No 13172, p. 205; 'the Lisbon Agreement').

The Lisbon Agreement constitutes a special agreement within the meaning of the Paris Convention for the Protection of Industrial Property, [12] to which any State party to that convention may accede. Seven Member States of the European Union are parties to that agreement. Under that agreement, the States to which it applies constitute a Special Union within the framework of the Union for the Protection of Industrial Property established by the Paris Convention. The Geneva Act made it possible for the European Union to become a member of the same Special Union as the States which were parties to the Lisbon Agreement whereas the latter allowed only States to accede.

The accession of the European Union to the Geneva Act was approved on behalf of the European Union in accordance with Article 1 of the contested decision. Articles 2 and 5 of that decision make practical arrangements for the said accession. Article 3 of the contested decision authorises Member States which wish to do so to ratify or accede to the Geneva Act. As for Article 4 of that decision, it provides details concerning the representation, within the Special Union, of the European Union and of any Member State which ratifies or accedes to the Geneva Act and concerning the responsibilities which are incumbent on the European Union as regards the exercise of the rights and fulfilment of the obligations of the European Union and of those Member States arising from that act.

The Commission brought an action seeking partial annulment of the contested decision, namely of Article 3 and of Article 4 thereof to the extent that the latter article contains references to the Member States. It criticises the Council for amending its proposal [13] by introducing a provision authorising Member States which wish to do so to ratify or accede to the Geneva Act. The Commission's proposal, submitted on the basis of the provisions of the FEU Treaty concerning the implementation of the common commercial policy [14] and the procedure for the adoption of a decision concluding an international agreement in that area, [15] provided, in view of the European Union's exclusive competence, that the European Union alone would accede to the Geneva Act.

The Court of Justice, sitting as the Grand Chamber, rules on the admissibility of the action, in the light of the criteria concerning the author of the contested decision and whether the parts whose annulment is sought can be severed from the remainder of the act. Moreover, in the context of the examination of the main plea, which it upholds, the Court gives a ruling on the issue of the Member States being empowered by the Council to adopt legally binding acts, such as the accession to an international agreement, in an area falling under the exclusive competence of the European Union. The Court annuls in part the contested decision by finding that it was adopted in breach of Article 293(1) TFEU, read in conjunction with Article 13(2) TEU.

Findings of the Court

The Court of Justice rejects at the outset the argument put forward by the Italian Republic that the action is inadmissible on the ground that it is directed solely against the Council and not also against the European Parliament. It states that, under Article 218(6) TFEU, notwithstanding prior consent by the European Parliament, the Council alone is empowered to adopt a decision concluding an international agreement. The contested decision was therefore correctly signed by the President of the Council alone, that signature thus identifying the author of that decision, against which the action was to be brought.

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12 The Paris Convention for the Protection of Industrial Property was signed in Paris on 20 March 1883, last revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, vol. 828, No 11851, p. 305).

13 Commission Proposal of 27 July 2018 for a Council Decision on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (document COM(2018) 350 final).

14 Article 207 TFEU.

15 Article 218(6)(a) TFEU.

Moreover, the Court rejects the plea of inadmissibility raised by the Council, which maintained that the provisions of the contested decision which the Commission seeks to have annulled cannot be severed from the remainder of that decision and that it is therefore not possible to annul it in part.

In that context, the Court recalls that review of whether the contested provisions are severable requires consideration of their scope, in order to be able to assess objectively whether their annulment would alter the spirit and substance of the act at issue. In that regard, it notes that the substance of the contested decision consists of the accession of the European Union to the Geneva Act, approved on behalf of the European Union pursuant to Article 1 of that decision. By contrast, the provisions which the Commission seeks to have annulled intend to enable Member States which wish to do so to ratify or accede to the Geneva Act alongside the European Union. The Court notes that neither the situation where no Member State exercises that option nor the consequences flowing from it affects the legal scope of Article 1 of the contested decision or calls into question the accession of the European Union to the Geneva Act. The Court states that the fact that the Commission requested the temporary maintenance, from the date of delivery of the judgment to be delivered, of the effects of the parts of the contested decision which it seeks to have annulled as regards the Member States which are parties to the Lisbon Agreement has no bearing on the severability of the provisions of the contested decision whose annulment is sought.

As to the substance, the Court examines the main plea, alleging that, in amending the Commission's proposal by adding a provision authorising Member States which wish to do so to ratify or accede to the Geneva Act, the Council acted outside any Commission initiative, thereby infringing Article 218(6) and Article 293(1) TFEU and distorting the institutional balance established by Article 13(2) TEU.

In the first place, the Court concludes that Article 293(1) TFEU is applicable where the Council, acting on a proposal from the Commission as negotiator designated by it pursuant to Article 218(3) TFEU, adopts a decision concluding an international agreement under Article 218(6) TFEU.

In the second place, the Court examines the argument alleging breach of Article 293(1) TFEU.

To that end, it recalls, first, that that provision must be read in the light of the principle of institutional balance, characteristic of the institutional structure of the European Union, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions, as well as the principle of mutual sincere cooperation between those institutions. [16] In that regard, EU acts other than legislative acts, such as the contested decision concluding the international agreement at issue, are adopted on the basis of a Commission proposal. Under that power of initiative, the Commission promotes the general interest of the European Union and takes appropriate initiatives to that end. Article 293 TFEU, by providing, on the one hand, for a power of amendment of the proposal by the Council requiring unanimity, subject to certain exceptions, and, on the other hand, for the Commission's power to amend its proposal as long as the Council has not acted, ensures observance of the principle of institutional balance between the Commission's powers and those of the Council. Thus, the Council's power of amendment cannot extend to enabling it to distort the Commission's proposal in a manner which would prevent the objectives pursued from being achieved and deprive it of its *raison d'être*.

Accordingly, the Court then ascertains whether the amendment made by the Council has distorted the subject matter or objective of the Commission's proposal in a manner which would prevent the objectives pursued by it from being achieved.

It recalls in that regard that the subject matter of that proposal consisted of the accession of the European Union alone to the Geneva Act and that its objective was to enable the European Union to exercise properly its exclusive competence for the area covered by that act, namely the common commercial policy, based on uniform principles and conducted within the framework of the principles

16 Principles set out in Article 13(2) TEU.

and objectives of the European Union's external action, which covers the negotiation of the Geneva Act.

The Court states, moreover, that when the Treaties confer on the European Union exclusive competence in a specific area, only the European Union may legislate and adopt legally binding acts, expect where the Member States are empowered to do so by the European Union. [17] In addition, the principle of conferral of powers and the institutional framework defined in the EU Treaty to enable the European Union to exercise the powers conferred on it by the Treaties are specific characteristics of the European Union and of its law relating to the constitutional structure of the European Union.

The Court finds that, by deciding to empower Member States to ratify or accede to the Geneva Act, the Council expressed a political choice alternative to the Commission's proposal, which affects the modalities for the exercise of an exclusive competence conferred on the European Union, while such a choice forms part of the Commission's assessment of the general interest of the European Union, an assessment to which the Commission's power of initiative is inextricably linked.

The Court concludes that that empowerment by the Council distorts the subject matter and objective of the Commission's proposal, expressing its political choice to allow the European Union alone to accede to the Geneva Act and thus to exercise alone its exclusive competence in the area covered by that act.

In addition, it adds that that conclusion cannot be called into question by the fact that the authorisation provided for in Article 3 of the contested decision was granted subject to full respect of the exclusive competence of the European Union and that, in accordance with Article 4 of that decision, in order to ensure unity in the international representation of the European Union and its Member States, the Council had entrusted the Commission with the representation of the European Union and that of any Member State wishing to avail itself of that authorisation. Despite that framework, by availing themselves of that authorisation, those States, as independent subjects of international law alongside the European Union, would exercise an exclusive competence of the latter, precluding it from exercising that competence alone.

Finally, the arguments relating to the need to ensure that the European Union has voting rights in the Assembly of the Special Union and to preserve the seniority and continuity of the protection of appellations of origin registered under the Lisbon Agreement in the seven Member States which were already parties thereto cannot justify the Council's amendment. The Court holds that any difficulty which the European Union may encounter at international level in the exercise of its exclusive competence or the consequences of that exercise on the international commitments of the Member States would not, as such, authorise the Council to amend a Commission proposal to the point that it distorts its subject matter or objective, thereby infringing the principle of institutional balance which Article 293 TFEU seeks to ensure.

17 Article 2(1) TFEU.

II. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court (Grand Chamber) of 8 November 2022, Staatssecretaris van Justitie en Veiligheid and X (ex officio review of detention), C-704/20

Link to the full text of the judgment

References for a preliminary ruling – Area of freedom, security and justice – Detention of third-country nationals – Fundamental right to liberty – Article 6 of the Charter of Fundamental Rights of the European Union – Conditions governing the lawfulness of detention – Directive 2008/115/EC – Article 15 – Directive 2013/33/EU – Article 9 – Regulation (EU) No 604/2013 – Article 28 – Review of the lawfulness of detention and of the continuation of a detention measure – Ex officio review – Fundamental right to an effective judicial remedy – Article 47 of the Charter of Fundamental Rights

B, C and X, three third-country nationals, were detained in the Netherlands in the context of procedures for the purposes, respectively, of the examination of an application for international protection, of a transfer to the Member State responsible for such an examination and of a return linked to the illegal nature of the stay in the Netherlands.

The persons concerned challenged before the courts the detention measures adopted in respect of them or the continuation of those measures. Ruling at first or second instance, the referring courts raise the question of the scope of the review of the lawfulness of the measures concerned.

Any detention measure provided for by EU law – namely, by the 'Reception' Directive, [18] the Dublin III Regulation [19] and the 'Return' Directive [20] respectively – falls, in the Netherlands, within the scope of administrative procedural law, which does not in principle allow the courts to examine of their own motion whether the detention measure in question satisfies a condition of lawfulness which the person concerned has not claimed to have been infringed.

The referring courts are unsure however whether such a situation is compatible with EU law and, in particular, with the fundamental rights to liberty and an effective remedy. [21] Consequently, those courts referred questions to the Court of Justice for a preliminary ruling in order to ascertain, in essence, whether EU law requires them to examine of their own motion all the conditions that a detention measure must satisfy in order to be lawful, including those whose infringement has not been raised by the person concerned.

The Court, sitting as the Grand Chamber, holds that, under the 'Return' Directive, [22] the 'Reception' Directive [23] and the Dublin III Regulation, [24] read in conjunction with the Charter, [25] a judicial

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

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

20 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98; 'the Return Directive').

21 As enshrined in Article 6 and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') respectively.

22 Article 15(2) and (3) of the 'Return' Directive.

23 Article 9(3) and (5) of the 'Reception' Directive.

24 Article 28(4) of the Dublin III Regulation.

25 Articles 6 and 47 of the Charter.

authority's review of compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law must lead that authority to raise of its own motion, on the basis of the material in the file brought to its attention, as supplemented or clarified during the adversarial proceedings before it, any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned.

Findings of the Court

In that regard, the Court states, in the first place first, that detention, which constitutes a serious interference with the right to liberty, may be ordered or extended only in compliance with the general and abstract rules laying down the conditions and procedures governing such detention. Those rules, contained in acts of EU law, [26] on the one hand, and in the provisions of national law implementing them, on the other, are the rules which determine the conditions governing the lawfulness of detention, including from the point of view of the right to liberty. In accordance with those rules, where it is apparent that the conditions governing the lawfulness of detention have not been or are no longer satisfied, the person concerned must be released immediately.

As regards, in the second place, the right of third-country nationals detained by a Member State to effective judicial protection, the Court notes that, according to the relevant rules of EU law, [27] each Member State must provide, where detention has been ordered by an administrative authority, for a 'speedy' judicial review, either *ex officio* or at the request of the person concerned, of the lawfulness of that detention. As regards the continuation of a detention measure, EU law [28] requires periodic review or supervision which must occur 'at reasonable intervals of time' and concern whether the conditions governing the lawfulness of the detention continue to be met. Thus, since EU law requires, without exception, that supervision that the conditions governing the lawfulness of the detention are satisfied must be effected 'at reasonable intervals of time', the competent authority is required to carry out that supervision of its own motion, even if the person concerned does not request it.

The EU legislature has thus not confined itself to establishing common substantive standards, but has also established common procedural standards, the purpose of which is to ensure that, in each Member State, there is a system which enables the competent judicial authority to release the person concerned, where appropriate after an examination of its own motion, as soon as it is apparent that his or her detention is not, or is no longer, lawful.

In order that such a system of protection effectively ensures compliance with the strict conditions which a detention measure is required to satisfy in order to be lawful, the competent judicial authority must be in a position to rule on all matters of fact and of law relevant to the review of that lawfulness. To that end, it must be able to take into account (i) the facts stated and the evidence adduced by the administrative authority which ordered the initial detention and (ii) any facts, evidence and observations which may be submitted to it by the person concerned. Furthermore, that authority must be able to consider any other element that is relevant for its decision by adopting, on the basis of its national law, the procedural measures which it deems necessary.

On the basis of these elements, that authority must raise, where appropriate, the failure to comply with a condition governing lawfulness arising from EU law, even if that failure has not been raised by the person concerned. That requirement is without prejudice to the obligation to invite each party to express its views on that condition in accordance with the adversarial principle.

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26 See Article 15(1), (2), second subparagraph, (4), (5) and (6) of the 'Return' Directive, Article 8(2) and (3) and Article 9(1), (2) and (4) of the 'Reception' Directive and Article 28(2), (3) and (4) of the Dublin III Regulation.

27 See the third subparagraph of Article 15(2) of the 'Return' Directive and Article 9(3) of the 'Reception' Directive, which is also applicable, on the basis of Article 28(4) of the Dublin III Regulation, in the context of the transfer procedures governed by that regulation.

28 Article 15(3) of the 'Return' Directive and Article 9(5) of the 'Reception' Directive, which is also applicable, on the basis of Article 28(4) of the Dublin III Regulation, in the context of the transfer procedures governed by that regulation.

III. 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 (Grand Chamber) of 15 November 2022, Senatsverwaltung für inneres und sport, C-646/20

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility – Divorce – Regulation (EC) No 2201/2003 – Article 2(4) and Article 21 – Concept of 'judgment' – Recognition, in a Member State, of the dissolution of a marriage agreed in an agreement between spouses and pronounced by a civil registrar of another Member State – Criterion for determining the existence of a 'judgment'

TB, who has dual German and Italian nationality, married RD, an Italian national, in 2013 in Berlin, where their marriage was entered in the register of marriages. In 2017, they initiated extrajudicial divorce proceedings before the civil registrar of Parma (Italy). In accordance with Italian law, [29] they appeared several times before that registrar in order to express and confirm their wish to dissolve their marriage. At the end of that procedure, that registrar issued TB with the certificate referred to in Article 39 of the Brussels IIa Regulation, [30] certifying her divorce from RD.

Next, TB applied for the divorce to be entered in the register of marriages of Berlin. That request gave rise to a dispute as to whether the registration of the divorce required prior recognition by the Land competent judicial authority, provided for in German law for foreign decisions in matrimonial matters. Hearing an appeal, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to refer a question on the concept of 'judgment' concerning divorce within the meaning of the Brussels IIa Regulation to the Court of Justice. In particular, the referring court asks whether the rules on recognition that that regulation lays down for judgments concerning divorce apply in the case of a divorce by extrajudicial means such as that provided for by Italian law, with the result that no prior recognition procedure is necessary in Germany.

The Court, sitting as the Grand Chamber, rules that a divorce decree drawn up by a civil registrar of a Member State, containing a divorce agreement concluded by the spouses and confirmed by them before that registrar in accordance with the conditions laid down by the legislation of that Member State, constitutes, in particular for the purposes of the application of the rule on recognition laid down in Article 21(1) of the Brussels IIa Regulation, a 'judgment' within the meaning of Article 2(4) of that regulation.

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29 Article 12 of Decreto-legge n 132 – Misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile (Decree-Law No 132 on urgent measures for out-of-court resolution and other actions to reduce the backlog in civil proceedings) of 12 September 2014 (GURI No 212 of 12 September 2014), converted into law, with amendments, by Law No 162 of 10 November 2014 (GURI No 261 of 10 November 2014) ('Decree-Law No 132/2014').

30 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) ('the Brussels IIa Regulation').

Findings of the Court

In the first place, relying in particular on the definitions of 'judgment' and 'court' referred to in Article 2(1) and (4) of the Brussels IIa Regulation, the Court notes that that regulation covers divorces which have been granted in a Member State [31] at the end of both judicial and extrajudicial proceedings, provided that the law of the Member States also confers jurisdiction in relation to divorce on extrajudicial authorities. Therefore, any judgment given by such competent extrajudicial authorities must, in principle, pursuant to Article 21 of the Brussels IIa Regulation, be automatically recognised in the other Member States.

In the second place, as regards the degree of control which must be exercised by the authority with jurisdiction in relation to divorce in order for the divorce decree which it draws up, in particular in a divorce by mutual consent, to be classified as a 'judgment', the Court states, relying on its case-law [32] on the recognition of judgments, that any public authority called upon to pronounce a 'judgment', within the meaning of Article 2(4) of the Brussels IIa Regulation, must retain control over the grant of the divorce. That condition means, in the context of divorces by mutual consent, that the public authority examines the conditions of the divorce in the light of national law and the actual existence and validity of the spouses' consent to divorce.

The Court also notes that that condition was also retained, from the point of view of continuity, in the Brussels IIb Regulation, [33] which, as a recast of the Brussels IIa Regulation, repealed the latter with effect from 1 August 2022. It follows from the legislative history of the Brussels IIb Regulation that the EU legislature did not seek to introduce new rules, but to 'clarify', on the one hand, the scope of the rule already laid down in Article 46 of the Brussels IIa Regulation on authentic instruments and agreements between parties and, on the other hand, the criterion for distinguishing the concept of 'judgment' from those of 'authentic instrument' and 'agreement between the parties', namely the criterion relating to the examination of the substance.

Therefore, where a competent extrajudicial authority approves, after an examination as to the substance of the matter, a divorce agreement, it is recognised as a 'judgment', in accordance with Article 21 of the Brussels IIa Regulation and Article 30 of the Brussels IIb Regulation. By contrast, other divorce agreements which have binding legal effects in the Member State of origin are recognised, as the case may be, as authentic instruments or agreements, in accordance with Article 46 of the Brussels IIa Regulation and Article 65 of the Brussels IIb Regulation.

In the light of those considerations, the Court finds, in the present case, that there is a 'judgment' within the meaning of Article 2(4) of the Brussels IIa Regulation.

Under Italian law, [34] the civil registrar must obtain, personally and on two occasions, within at least 30 days, the declarations made by each spouse, as a result of which he or she is satisfied that their consent to divorce is valid, free and informed. Furthermore, that registrar is to examine the content of the divorce agreement, ensuring, inter alia, that that agreement relates only to the dissolution or termination of the civil effects of the marriage, to the exclusion of any transfer of assets, and that the spouses do not have minor children or adult children who do not have legal capacity, have a severe disability or are not financially independent. If one or more of the statutory conditions laid down by Italian law are not fulfilled, the civil registrar is not entitled to pronounce a divorce under that law.

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31 Pursuant to Article 2(3) of the Brussels IIa Regulation, the term 'Member State' covers all the Member States of the European Union, with the exception of the Kingdom of Denmark.

32 Judgments of 2 June 1994, *Solo Kleinmotoren* (C-414/92, EU:C:1994:221), and of 20 December 2017, *Sahyouni* (C-372/16, EU:C:2017:988).

33 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ 2019 L 178, p. 1) ('the Brussels IIb Regulation').

34 Article 12 of Decree-Law No 132/2014.

IV. COMPETITION

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

Judgment of the Court (Second Chamber) of 10 November 2022, PACCAR and Others, C-163/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Compensation for harm caused by a practice prohibited under Article 101(1) TFEU – Collusive arrangements on pricing and gross price increases for trucks in the European Economic Area (EEA) – Directive 2014/104/EU – Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – Article 22(2) – Applicability ratione temporis – First subparagraph of Article 5(1) – Concept of relevant evidence which lies in the control of the defendant or a third party – Article 5(2) – Disclosure of specified items of evidence or relevant categories of evidence on the basis of reasonably available facts – Article 5(3) – Review of the proportionality of the request to disclose evidence – Balancing the legitimate interests of the parties and third parties – Scope of the obligations resulting from those provisions

By decision of 19 July 2016, [35] the European Commission found that, by agreeing, first, on the prices of trucks in the European Economic Area (EEA) from 1997 to 2011 and, second, on the timing and the passing on of costs for the introduction of emission technologies required by EURO 3 to EURO 6 standards, PACCAR, DAF Trucks and DAF Trucks Deutschland ('the manufacturers in question') participated, with a number of other truck manufacturers, in a cartel contrary to the EU law rules prohibiting cartels. [36]

On 25 March 2019, 45 parties claiming to have acquired trucks capable of falling within the scope of the infringement established by the decision of 19 July 2016 brought an action before the Juzgado de lo Mercantil nº 7 de Barcelona (Commercial Court No 7, Barcelona, Spain) seeking access to various items of evidence held by the manufacturers in question in order to seek compensation for the damage resulting from the infringement established by the decision of 19 July 2016. In that regard, those parties argued that it was necessary to obtain certain types or means of proof in order to quantify the artificial price increase, in particular to carry out a comparison of recommended prices before, during and after the cartel period concerned. The manufacturers in question challenged that request, arguing, inter alia, that some of the documents requested had to be drawn up on an ad hoc basis.

Given that access to the evidence referred to in the contested request was based on a provision of Spanish law [37] transposing Article 5(1) of Directive 2014/104, [38] the Commercial Court No 7, Barcelona

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35 Commission Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (AT.39824 – Trucks).

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

37 In the present case, Article 283a(a) of the Ley de Enjuiciamiento Civil (Law No 1/2000 establishing the Code of Civil Procedure) of 7 January 2000 (BOE No 7 of 8 January 2000, p. 575).

38 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

referred a question to the Court of Justice for a preliminary ruling seeking, in essence, to ascertain whether the disclosure of relevant evidence, referred to in that article, in the control of the defendant or a third party relates only to documents in their control which already exist or, in contrast, also relates to new documents that they must create by compiling or classifying data in their possession.

In its judgment, the Court held that the first subparagraph of Article 5(1) of Directive 2014/104 must be interpreted as meaning that the relevant evidence in the control of the defendant or a third party, the disclosure of which may be ordered by the national courts, is not limited to documents in their possession which already exist, but also covers those documents which the party to whom the request to disclose evidence is addressed must create *ex novo* by compiling or classifying information, knowledge or data in its possession, subject to strict compliance by those courts with their obligation under paragraphs 2 and 3 of that article to restrict the disclosure of evidence to that which is relevant, proportionate and necessary, taking into account the legitimate interests and fundamental rights of the party to whom the request is addressed.

Findings of the Court

As a preliminary point, the Court sets out the conditions for the temporal application of Article 5(1) of Directive 2014/104, noting at the outset that Article 22 of that directive expressly lays down the conditions for the temporal application of its provisions, depending on whether or not they are substantive provisions in the light of EU law.

In the present case, the Court observes that the possibility of ordering the disclosure of relevant evidence held by the defendant or a third party, under the conditions laid down in the first subparagraph of Article 5(1) of Directive 2014/104, is one of the particular powers which the national courts must have when examining disputes relating to actions for damages seeking compensation for harm suffered as a result of infringements of competition law. By that requirement, that provision seeks to remedy the information asymmetry which characterises, in principle, those disputes to the detriment of the injured party. However, its subject matter relates only to the procedural measures applicable before national courts and does not directly affect the legal situation of the parties.

In those circumstances, the first subparagraph of Article 5(1) of Directive 2014/104 is not one of the substantive provisions of that directive, within the meaning of Article 22(1) thereof, rather it numbers amongst the 'other' provisions covered by Article 22(2) of that directive, which that provision declares applicable to actions brought after 26 December 2014. It follows that the first subparagraph of Article 5(1) of Directive 2014/104 is applicable to the action brought before the referring court, since it was brought on 25 March 2019.

Taking the view, therefore, that it is necessary to provide an answer on the substance to the referring court, the Court observes, first of all, that, in so far as the wording of the first subparagraph of Article 5(1) of Directive 2014/104 leads to it being considered that a request to disclose evidence concerns only pre-existing evidence, the interpretation of that provision must also take account of its context and the objectives of the legislation of which it forms part.

As regards, first, the context of the first subparagraph of Article 5(1) of Directive 2014/104, the Court observes that the definition of the term 'evidence' in Article 2(13) of that directive, which refers to 'all types of means of proof admissible before the national court seised, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored', does not permit the inference that the evidence whose disclosure is sought necessarily corresponds to pre-existing 'documents'. In that regard, the Court considers that the reference to evidence 'in [the] control' of the defendant or a third party merely reflects a factual situation, relating to the information asymmetry referred to above, which the EU legislature intends to remedy.

According to the Court, that analysis is supported by a reading of the first subparagraph of Article 5(1) of Directive 2014/104 in the light of paragraphs 2 and 3 of that article, which require the national courts, respectively, to ensure compliance with the requirement that the request to disclose evidence must be specific and that the principle of proportionality is observed.

As regards, second, the purpose of the first subparagraph of Article 5(1) of Directive 2014/104, the Court recalls that the adoption of Directive 2014/104 started from the finding, by the EU legislature, that combating anticompetitive conduct on an initiative taken by the Commission and the national competition authorities was not sufficient to ensure full compliance with EU competition rules and,

therefore, that it was important to facilitate the possibility for the private sphere of participating in the financial penalisation and thus in the prevention of such conduct. The particular powers which the national courts must have in order to remedy the information asymmetry between the parties concerned help to achieve that objective.

From that point of view, the Court considers that to restrict at the outset evidence, the disclosure of which may be sought, only to pre-existing documents in the control of the defendant or a third party could, in certain cases, run counter to the primary objective pursued by Directive 2014/104.

Nonetheless, the Court points out, finally, that such an interpretation of the first subparagraph of Article 5(1) of Directive 2014/104 does not in any way affect the application of the balancing mechanism for the interests involved, as follows from paragraphs 2 and 3 of that article. Given that the provisions of that directive must be implemented in compliance with the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, it is for the national courts, when they receive a request to disclose evidence, to restrict the disclosure of evidence to that which is relevant, proportionate and necessary, taking into account the legitimate interests and fundamental rights of the party to whom that request is addressed, in accordance with Article 5(2) and (3) of that directive.

Judgment of the General Court (Fourth Chamber, Extended Composition) of 9 November 2022, Ferriera Valsabbia and Valsabbia Investimenti v Commission, T-655/19

Competition – Agreements, decisions and concerted practices – Market for concrete reinforcing bars – Decision finding an infringement of Article 65 CS after the expiry of the ECSC Treaty on the basis of Regulation (EC) No 1/2003 – Fixing of prices – Limiting and controlling output and sales – Decision adopted following the annulment of earlier decisions – Holding of a new hearing attended by the competition authorities of the Member States – Rights of the defence – Principle of sound administration – Reasonable time – Obligation to state reasons

Judgment of the General Court (Fourth Chamber, Extended Composition) of 9 November 2022, Feralpi v Commission, T-657/19

Competition – Agreements, decisions and concerted practices – Market for concrete reinforcing bars – Decision finding an infringement of Article 65 CS, after expiry of the ECSC Treaty, on the basis of Regulation (EC) No 1/2003 – Price fixing – Limiting and controlling output and sales – Decision taken following the annulment of earlier decisions – New hearing held in the presence of the competition authorities of the Member States – Rights of the defence – Principle of sound administration – Reasonable period – Obligation to state reasons – Proportionality – Ne bis in idem principle – Plea of illegality – Single, complex and continuous infringement – Evidence of involvement in the cartel – Public distancing – Unlimited jurisdiction

Judgment of the General Court (Fourth Chamber, Extended Composition) of 9 November 2022, T-667/19

Competition – Agreements, decisions and concerted practices – Market for concrete reinforcing bars – Decision finding an infringement of Article 65 CS, after expiry of the ECSC Treaty, on the basis of Regulation (EC) No 1/2003 – Price fixing – Limiting and controlling output and sales – Decision taken following the annulment of earlier decisions – New hearing held in the presence of the competition authorities of the Member States – Rights of the defence – Principle of sound administration – Reasonable period – Obligation to state reasons – Proportionality – Ne bis in idem principle – Plea of illegality – Evidence of involvement in the cartel – Aggravating circumstances – Repeated infringement – Mitigating circumstances – Equal treatment – Unlimited jurisdiction

By decision of 17 December 2002, the European Commission found that eight undertakings and an association of undertakings had infringed Article 65(1) of the Treaty establishing the European Coal and Steel Community ('CS') by taking part, between December 1989 and July 2000, in a cartel on the Italian market for concrete reinforcing bars having as its object or effect the fixing of prices and the limiting and control of output ('the first decision').

The Court annulled that decision because its legal basis, that is to say, Article 65(4) and (5) CS, was no longer in force at the time of its adoption, since the CS Treaty expired on 23 July 2002. The Commission therefore adopted a new decision, on 30 September and 8 December 2009, finding the same infringement but based on the EC Treaty and Regulation (EC) No 1/2003 ('the second decision').

That second decision, which was upheld by the General Court by judgments of 9 December 2014 ('the judgments of 9 December 2014'), was annulled by the Court of Justice. According to the Court of Justice, the General Court had erred in law in considering that the Commission was not obliged to organise a new hearing in the context of the procedure which led to the adoption of the second decision, the failure to hold such a hearing constituting an infringement of an essential procedural requirement. Thus, the Court of Justice took the view that the first hearing organised with a view to the adoption of the first decision did not meet the procedural requirements relating to the adoption of a decision on the basis of Regulation No 1/2003, since the competition authorities of the Member States had not participated in that hearing. The Court of Justice had therefore set aside the judgments of 9 December 2014 in their entirety.

Resuming the procedure at the point at which the illegality had been found to exist by the Court of Justice, the Commission organised a new hearing and, by decision of 4 July 2019 ('the contested decision'), again found the infringement forming the subject matter of the second decision. However, on account of the duration of the procedure, a 50% reduction was applied to all the fines imposed on the undertakings to which the contested decision was addressed.

Four of the eight undertakings concerned, namely Ferriera Valsabbia SpA and Valsabbia Investimenti SpA, Alfa Acciai SpA, Feralpi Holdings SpA and Ferriere Nord SpA ('the applicants'), brought actions for annulment of the contested decision, which imposed on them penalties ranging from EUR 2.2 million to EUR 5.1 million. All those actions are rejected by the Fourth Chamber (Extended Composition) of the Court, which, in that context, clarifies the conditions in which the Commission may adopt a decision imposing a penalty almost thirty years after the start of the facts constituting the infringement without prejudicing the rights of defence of the interested parties or infringing the reasonable time principle. The Court also rules on the legality of the scheme governing the interruption and suspension of limitation periods for the imposition of fines and on the conditions in which account is to be taken of repeated infringements in the calculation of the fines.

Assessment of the Court

In Cases T-655/19, T-656/19, T-657/19 and T-667/19, the Court rejects the plea in law alleging irregularities in the organisation of the new hearing by the Commission.

Recalling that the annulment of an act concluding an administrative procedure does not affect all the stages prior to its adoption but only those concerned by the grounds which justified the annulment, the Court confirms, in the present case, that it was open to the Commission to resume the procedure from the hearing stage.

In that context, the Court dismisses, in the first place, the applicant's arguments that the impartiality of the representatives of the competition authorities of the Member States sitting on the Advisory Committee was not guaranteed at the new hearing, since those representatives were aware of the first and second decisions of the Commission and of the position taken by the Court in the judgments of 9 December 2014.

In that connection, the Court observes that, when an act is annulled, it disappears from the legal order and is deemed never to have existed. Similarly, judgments of the Court disappear retroactively from the legal order if they are set aside on appeal. Accordingly, both the decisions of the Commission and the judgments of 9 December 2014 had disappeared, with retroactive effect, from the EU legal order when the Advisory Committee delivered its opinion. In addition, since knowledge of the solution adopted in case-law by the Court of Justice in its judgment setting aside the General

Court judgments is inherent in the obligation to give due effect to that judgment, a lack of impartiality of the competition authorities concerned cannot be inferred from such knowledge.

The Court rejects, in the second place, the complaint that, by failing to invite various entities which had played a significant role in the investigation of the case to the hearing, the Commission had affected the applicants' rights of defence.

With regard more specifically to the absence of the entities which, at an earlier stage in the procedure, had decided not to contest the first or second decision that had been addressed to them, the Court considers that, since that decision had become final in their regard, the Commission did not err in excluding those entities from the new hearing. As regards the absence of a third-party entity whose right to participate in the administrative procedure had been recognised in 2002, the Court takes the view that the Commission rightly found that, since that entity had taken part in the first hearing but had not attended the second organised in connection with the adoption of the first decision, it had lost its interest to intervene again.

In the third place, the Court dismisses the argument that the changes that had occurred, on account of the time that had elapsed, in the identity of the stakeholders and the structure of the market prevented the organisation of a new hearing in conditions equivalent to those which prevailed in 2002. According to the Court, the Commission had made a correct assessment in concluding, in the light of the circumstances existing at the time the procedure resumed, that the continuation of that procedure was still an appropriate solution.

The pleas in law alleging a breach of the reasonable time principle are, in turn, rejected. First, the applicants alleged that the Commission had failed to examine whether the adoption of the contested decision was still compatible with the reasonable time principle. Second, they contested the duration of the procedure that led to the adoption of that decision.

In that regard, the Court finds, in the first place, that the Commission had analysed the length of the administrative procedure before adopting the contested decision, the reasons that could explain the duration of the procedure and the consequences that may be drawn from its duration. Thus, it had complied with its obligation to take into account the requirements arising from the reasonable time principle in its assessment of whether to initiate proceedings and to adopt a decision in accordance with the competition rules.

As for the duration of the procedure, the Court observes, in the second place, that exceeding a reasonable time can entail the annulment of a decision only on the two-fold condition that the length of the procedure was unreasonable and that exceeding a reasonable time hampered the exercise of the rights of the defence.

Having regard to the importance of the case for the persons concerned, its complexity and the conduct of the applicants and of the competent authorities, the duration of the administrative stages of the procedure had not been unreasonable in the present case. Furthermore, the overall duration of the procedure was, in part, attributable to the interruptions caused by the judicial review connected with the number of actions brought before the Courts of the European Union concerning different aspects of the case. Moreover, since the applicants had had, on at least seven occasions, the opportunity to set out their views and to put forward their arguments over the entire procedure, their rights of defence had not been hampered.

In the Court's view, the Commission had also satisfied its duty to state reasons in relation to the account taken of the duration of the procedure. It had specifically justified the adoption of a new decision establishing the existence of the infringement and imposing a fine on the undertakings concerned in order to satisfy the objective of not allowing those undertakings to go unpunished and of dissuading them from committing a similar infringement in the future.

In Cases T-657/19 and T-667/19, the Court also rejects the pleas in law alleging infringement of the non bis in idem principle and those questioning the legality of the scheme governing the interruption and the suspension of the limitation period set out in Article 25(3) to (6) of Regulation No 1/2003.

As a reminder, the non bis in idem principle precludes an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.

However, where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged, that principle does not preclude the resumption of proceedings in respect of the same anti-competitive conduct where the penalties imposed by the new decision are not added to those imposed by the annulled decision but replace them.

In that regard, the General Court observes that both the first and the second decision had been annulled without a definitive position being adopted on the substance. In addition, even if, in its judgments of 9 December 2014, the General Court had ruled on the substantive pleas in law raised by the applicants, those judgments had been set aside in their entirety by the Court of Justice. Furthermore, the penalties imposed by the contested decision had taken the place of those imposed by the second decision which, themselves, had replaced the penalties imposed by the first decision. On that basis, the General Court concludes that the Commission had not infringed the non bis in idem principle by adopting the contested decision.

Raising a plea of illegality of the applicable scheme governing the interruption and suspension of the limitation period, the applicants further contested the absence of an absolute maximum period, defined by the EU legislature, beyond which any proceedings by the Commission would be precluded, notwithstanding any suspensions or interruptions of the initial limitation period.

In accordance with Article 25 of Regulation No 1/2003, the five-year limitation period for the imposition of fines or periodic penalty payments is to be suspended during appeal proceedings brought before the Court of Justice against the Commission's decision, in which case that period is extended by the period of the suspension. In the General Court's view, that system is the result of a compromise arrived at by the EU legislature between two separate objectives, namely: the need to ensure legal certainty and the requirement to ensure respect for the law by pursuing, establishing and penalising infringements of EU law. In striking that balance, the EU legislature did not, however, exceed the margin of discretion afforded to it within that context.

According to the General Court, while the limitation period is suspended in the event of an action brought before the Courts of the European Union, the fact remains that that option requires, in order to be taken up, that steps are taken by the undertakings themselves. Accordingly, the EU legislature cannot be criticised for the fact that, after a number of actions were brought by the undertakings concerned, the decision reached at the end of the procedure was adopted after a certain period of time. Furthermore, individuals complaining of the unreasonable length of a procedure can contest that duration by seeking the annulment of the decision adopted at the end of that procedure, once provided that the exercise of the rights of the defence was hampered by exceeding the reasonable period. If exceeding that period does not give rise to an infringement of such rights, the individuals can then bring an action for damages before the EU judicature.

In the context of Cases T-657/19 and T-667/19, the Court, exercising its unlimited jurisdiction, considers that account should be taken, for the purpose of determining the amount of the fines imposed on the applicants, of the weakening of their deterrent effect because of the period of almost twenty years that has elapsed between the end of the infringement and the adoption of the contested decision, thus confirming, by a substitution of grounds, the need to impose a fine on those applicants. In that regard, it considers that the 50% reduction of that amount, as granted by the Commission, was appropriate to that end.

Lastly, in Case T-667/19, the Court rejects the plea in law raised by Ferriere Nord SpA, alleging the illegality of the increase in the amount of the fine imposed for repeated infringements.

With regard to the respect for the rights of defence of Ferriere Nord SpA, the Court observes that, when the Commission intends to impute an infringement of competition law to a legal person and considers, in that context, using against it the existence of repeated infringements as an aggravating circumstance, the statement of objections addressed to that person must contain all the information necessary for the person to defend itself, in particular that information capable of demonstrating that the conditions for a finding of repeated infringements are satisfied.

In the light of an examination of all the circumstances that surrounded the case, the Court finds that the Commission's intention to take into account, in connection with repeated infringements, the decision imposing a penalty previously addressed to Ferriere Nord SpA was sufficiently foreseeable.

Moreover, that undertaking had had the opportunity to submit its observations on that point in the course of the procedure which led to the adoption of the contested decision.

As for the complaints based on the time elapsed between the two infringements taken into account in respect of a repeated infringement, the Court clarifies that, although no limitation period precludes a finding of repeated infringement, the fact remains that, in order to comply with the principle of proportionality, the Commission cannot take into consideration previous decisions penalising an undertaking without any time limit. That said, given the short period that had elapsed between the two infringements at issue (three years and eight months), the Commission was right to consider that an increase in the basic amount of the fine in respect of repeated infringement was justified, having regard to the propensity of Ferriere Nord SpA to infringe competition rules, notwithstanding the fact that the investigation took a certain amount of time.

In the light of the foregoing, the actions brought by the applicants are dismissed in their entirety.

2. STATE AID

Judgment of the Court (Grand Chamber) of 8 November 2022, Fiat Chrysler Finance Europe and Ireland v Commission, C-885/19 P and C-898/19 P

Link to the full text of the judgment

Appeal – State aid – Aid implemented by the Grand Duchy of Luxembourg – Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery – Tax ruling – Advantage – Selectivity – Arm's length principle – Reference framework – National law applicable – 'Normal' taxation

Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd ('FFT'), is part of the Fiat/Chrysler automobile group and provides treasury and financing services to the Fiat/Chrysler group companies established in Europe. With its head office located in Luxembourg, FFT had requested from the Luxembourg tax authorities approval of an advance transfer pricing agreement. Following that request, the Luxembourg tax authorities issued a tax ruling endorsing a method for the determination of FFT's remuneration, as an integrated company, for the financial services provided to other Fiat/Chrysler group companies, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis.

By decision of 21 October 2015 [39] ('the decision at issue'), the Commission found that that tax ruling constituted operating aid incompatible with the internal market within the meaning of Article 107 TFEU. Moreover, it found that the Grand Duchy of Luxembourg had not notified it, in accordance with Article 108(3) TFEU of the plan relating thereto and therefore had not complied with the standstill obligation laid down in Article 108(3) TFEU. Accordingly, the Commission ordered the recovery of that unlawful and incompatible aid.

The Grand Duchy of Luxembourg and FFT both brought an action for the annulment of that decision. In dismissing those actions, [40] the General Court upheld, in particular, the Commission's approach, according to which, in the case of a tax system which pursues the objective of taxing the profits of all resident companies, whether integrated or not, the application of the arm's length principle for the

39 Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1).

40 Judgment of 24 September 2019, *Luxembourg and Fiat Chrysler Finance Europe* v *Commission* (T-755/15 and T-759/15, EU:T:2019:670).

purposes of defining the reference system is justified independently of whether that principle has been incorporated into national law.

Hearing two appeals, brought this time by FFT and Ireland, the Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court, then, giving final judgment in the matter, also annuls the decision at issue. In that context, it provides further clarification as to whether tax rulings granted by the tax authorities of the Member States endorsing methodologies for determining transfer pricing may constitute State aid within the meaning of Article 107(1) TFEU.

Findings of the Court

As a preliminary point, the Court recalls that, in the context of the analysis of tax measures from the perspective of EU State aid law, the examination of the condition relating to selective advantage involves, as a first step, identifying the reference system, that is the 'normal' tax regime applicable in the Member State concerned, then demonstrating, as a second step, that the tax measure at issue is a derogation from that system, in so far as it differentiates between economic operators which, in the light of the objective pursued by that system, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

More specifically, the determination of the reference system, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under national law and, outside the spheres in which EU law has been harmonised, it must be done, as is the case for direct taxation, solely in the light of the national law applicable in the Member State concerned. It is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the determination of the basis of assessment and the taxable event.

It is in the light of those considerations that the Court of Justice examines whether, in the present case, by endorsing the Commission's methodology, the General Court erred in law in determining the reference system.

In the first place, the Court of Justice specifies that the question whether the General Court adequately defined the relevant reference system and, by extension, correctly applied a legal test, such as the arm's length principle, is a question of law which can be reviewed by the Court of Justice on appeal.

In the second place, the Court of Justice finds that, when defining the reference system in order to determine whether the tax ruling at issue confers a selective advantage on its beneficiary, the Commission did not carry out a comparison with the tax system normally applicable in the Member State concerned, following an objective examination of the content, interaction and concrete effects of the rules applicable under the national law of that State. It applied an arm's length principle different from that defined by Luxembourg law, confining itself to identifying the abstract expression of that principle in the objective pursued by the general system of corporate income tax in Luxembourg, and to examining the tax ruling at issue without taking into account the way in which the said principle has actually been incorporated into that law with regard to integrated companies in particular.

It follows that, first, by endorsing such an approach, the General Court erred in law in the application of Article 107(1) TFEU and, second, by accepting that the Commission may rely on rules which are not part of Luxembourg law, it infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular Article 114(2) TFEU and Article 115 TFEU.

In that regard, the Court notes, first of all, that, without harmonisation in EU law in that regard, any fixing of the methods and criteria for determining an 'arm's length' outcome falls within the discretion of the Member States. It follows that only the national provisions are relevant for the purposes of analysing whether transactions must be examined in the light of the arm's length principle and, if so, whether or not transfer prices, which form the basis of a taxpayer's taxable income and its allocation among the States concerned, deviate from an arm's length outcome.

Next, the Court notes that the Grand Duchy of Luxembourg laid down specific rules for determining an arm's length remuneration for intra-group financing companies, such as FFT, which were not however taken into account by the Commission in its analysis of the reference system and, by extension, of the existence of a selective advantage granted to FFT.

Last, the Court specifies that, contrary to what the General Court held at first instance, the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, [41] does not support the position that the arm's length principle is applicable where national tax law is intended to tax integrated companies and stand-alone companies in the same way, irrespective of whether, and in what way, that principle has been incorporated into that law. In that case, it was in the light of the rules on taxation laid down in the relevant national law, namely Belgian law, that the Court concluded that it was appropriate to use the arm's length principle.

Having regard to the foregoing, the Court sets aside the judgment under appeal, considers that the state of the proceedings so permits and, giving final judgment in the matter, annuls the decision at issue in so far as the error committed by the Commission in determining the rules actually applicable under the relevant national law and, therefore, in identifying the 'normal' taxation in the light of which the tax ruling at issue had to be assessed invalidates the entirety of the reasoning relating to the existence of a selective advantage. The Court of Justice finds in particular that the setting aside of the judgment of the General Court on account of the error of law committed by the latter cannot be avoided on account of the fact that the Commission also included in the decision at issue, as a subsidiary point, a line of reasoning based on Article 164(3) of the Luxembourg Tax Code and the related Circular No 164/2. The Court of Justice holds that that line of reasoning merely refers to the Commission's principal analysis of the correct reference system, so that it rectifies only in a superficial manner the Commission's error in the identification of the reference system that should have formed the basis of its analysis relating to the existence of a selective advantage.

Judgment of the Court (Second Chamber) of 17 November 2022, Volotea and easyJet v Commission, C-331/20 P and C-343/20 P

Link to the full text of the judgment

Appeal – State aid – Article 107(1) TFEU – European Commission decision on compensation to Sardinian airports for public service obligations – Existence of unlawful State aid incompatible with the internal market, granted by the Italian Republic to airlines through airport operators – Concept of 'State aid' – Proof of the existence of an advantage – Determination of the amount – Market economy operator principle – Applicability and application – Test of the private acquirer of goods or services – Conditions – Burden of proof

On 13 April 2010, the Autonomous Region of Sardinia (Italy) ('the Region') adopted Law No 10/2010 authorising financial support to Sardinian airports in order to develop air transport. That law was put into effect by a series of measures adopted by the Executive of the Region (together with the relevant provisions of Law No 10/2010, 'the measures at issue').

The measures at issue were intended, inter alia, to encourage the conclusion of contracts between the operators of the airports and airlines in order to improve Sardinia's air transport connections and promote it as a tourist destination. To that end, those measures provided, in essence, that the Region would reimburse the amounts paid by the airport operators to the airlines under those contracts,

41 Judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416).

provided that certain conditions and detailed rules, relating in particular to the profitability of those contracts, were complied with.

By decision of 29 July 2016 [42] ('the decision at issue'), the European Commission classified the measures at issue, in part, as State aid that was incompatible with the internal market and ordered that it be recovered from the airlines, which were considered to be the sole beneficiaries of the aid.

The airlines Volotea SA and easyJet Airline Co. Ltd ('easyJet'), which had concluded contracts for the provision of services falling within the scope of the measures at issue with the operators of Olbia (Italy) and Cagliari-Elmas (Italy) airports, brought two actions before the General Court for annulment of the decision at issue. Those actions were dismissed by judgments of 13 May 2020 [43] ('the judgments under appeal').

Hearing two appeals brought by Volotea and easyJet, the Court of Justice both sets aside the judgments under appeal and annuls the decision at issue to the extent that it concerns those two airlines. In that context, the Court reiterates the role of and the conditions for implementing the market economy operator principle in the field of State aid, going on to clarify the method to be employed for examining, from the perspective of Article 107(1) TFEU, the existence of an advantage arising from a Member State's allocation of public funds to private operators in order to finance contracts for the provision of services that they have concluded with other private operators.

Findings of the Court

In the first place, the Court of Justice finds that the General Court erred in law in its interpretation of Article 107(1) TFEU by holding in the judgments under appeal that the question of whether Volotea and easyJet had benefited from an advantage granted by the Region was not to be examined in the light of the market economy operator principle.

In that regard, the Court observes that, in order to establish the existence of an advantage for the purpose of Article 107(1) TFEU, it is necessary to take into consideration the effects on the recipient undertakings of the measure under examination, irrespective of the objectives pursued by the Member State concerned or of whether that advantage is granted directly by the State or by a public or private body which it has appointed or established for that purpose. Consequently, that must be considered as including any measure which, whatever its form or objectives, favours one or more undertakings directly or indirectly, or which confers an advantage on them which they would not have been able to obtain under normal market conditions.

In addition, the characterisation of such an advantage as existing is, in principle, carried out by applying the market economy operator principle, unless there is no possibility of comparing the State conduct at issue in a particular case with that of a private operator because, for example, that conduct is inseparably linked with the existence of infrastructure that no private operator would ever have been able to create, or the State acted in its capacity as a public authority.

It follows that, contrary to what the General Court held in the judgments under appeal, neither the public policy objectives pursued by the measures at issue, nor the situation that the operators of Olbia and Cagliari airports were private undertakings, nor the fact that those operators did not have significant autonomy in relation to the Region in the implementation of those measures were capable of ruling out the applicability of the market economy operator principle in the present case.

In the second place, since the General Court, despite its conclusion that the market economy operator principle was inapplicable, nevertheless examined whether the Region had behaved like a private acquirer of goods or services, before going on to conclude that an advantage had been conferred by

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42 Commission Decision (EU) 2017/1861 of 29 July 2016 on State aid SA 33983 (2013/C) (ex 2012/NN) (ex 2011/N) – Italy – Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1).

43 Judgments of 13 May 2020, *Volotea* v *Commission* (T-607/17, EU:T:2020:180), and of 13 May 2020, *easyJet Airline* v *Commission* (T-8/18, EU:T:2020:182).

the measures at issue, the Court of Justice examines whether that additional reasoning on the part of the General Court is capable of founding the operative part of the judgments under appeal, despite the errors of law identified previously.

After stating that the private acquirer test, like the private vendor test of which it is the counterpart, constitutes one of the various tests which give specific expression to the market economy operator principle, the Court of Justice observes, in particular, that, pursuant to that test, the General Court considered that Volotea and easyJet had benefited from an advantage under the contracts concluded with the airport operators for the provision of air transport, marketing and advertising services on the ground that those contracts had not been preceded by a tender procedure or an equivalent procedure.

Although it follows from the settled case-law of the Court that, where a Member State decides to sell or acquire goods or services directly from one or more private undertakings, the holding of a tender procedure allows for the presumption, in certain conditions, that the contracts or other acts which are concluded to that end following that procedure reflect normal market conditions, it also follows from that case-law that the holding of such a procedure does not constitute the sole method of ruling out the existence of an advantage for the purpose of Article 107(1) TFEU, and that this is particularly the case where the State does not carry out the sale or acquisition of goods or services to or from private undertakings directly, but does so through the intermediary of other private undertakings that are not obliged to make use of a tender procedure. Furthermore, whichever method is used, the question of whether such an advantage must be ruled out or, conversely, found to exist requires an assessment of whether or not the contracts or other acts providing for that sale or acquisition reflect normal market conditions.

In the light of those considerations, the Court of Justice finds that the General Court erred in law in finding the existence of an advantage in favour of Volotea and easyJet on the ground that the contracts concluded with the airport operators had not been preceded by the holding of a tender procedure or an equivalent procedure. It also observes that the General Court did not carry out an appropriate examination of whether those contracts reflect normal market conditions.

On those grounds, the Court upholds the complaints by Volotea and easyJet alleging an infringement of Article 107(1) TFEU and sets aside the judgments under appeal.

Since the state of the proceedings permits judgment to be given, the Court proceeds to dispose of the case and, in the third and final place, examines the complaints put forward by Volotea and easyJet in support of their respective actions for annulment of the decision at issue.

In that regard, the Court states that the Commission made a first error of law by rejecting – on grounds that were based on the public policy objectives pursued by the Region, the private character of the airport operators, and the form that those measures took – the applicability of the market economy operator principle in order to examine the existence of an advantage, for the purpose of Article 107(1) TFEU. Next, it observes that the Commission made a second error of law by accepting the existence of such an advantage without assessing, in an overall and concrete manner, whether the Region and the airport operators had sought to acquire the services at issue under normal market conditions.

In the light of those considerations, the Court also annuls the decision at issue, owing to an infringement of Article 107(1) TFEU, to the extent that it concerns Volotea and easyJet.

Judgment of the General Court (Third Chamber) of 30 November 2022, Austria v Commission, T-101/18

Link to the judgment as published in extract form

State aid – Nuclear industry – Aid planned by Hungary for the development of two new nuclear reactors at the Paks site – Decision declaring the aid compatible with the internal market subject to compliance with certain commitments – Article 107(3)(c) TFEU – Compliance of the aid with EU law other than State aid law – Inextricable link – Promotion of nuclear energy – First paragraph of Article 192 of the Euratom

Treaty – Principle of protection of the environment, 'polluter pays' principle, precautionary principle and principle of sustainability – Determination of the economic activity concerned – Market failure – Distortion of competition – Proportionality of the aid – Need for State intervention – Determination of the aid elements – Public procurement procedure – Obligation to state reasons

By decision of 6 March 2017 [44] ('the contested decision'), the European Commission approved investment aid, notified by Hungary, for the State-owned undertaking MVM Paks II Nuclear Power Plant Development Private Company Limited by Shares ('the Paks II company'). The aid concerns the operation of two nuclear reactors under construction at the Paks nuclear power station site, which are gradually to replace the four nuclear reactors already in operation on that site.

That investment aid ('the aid at issue'), which consists, in essence, of the provision free of charge of the new nuclear reactors to the Paks II company for the purpose of their operation, is in large part financed by a loan in the form of a revolving credit facility of EUR 10 billion granted by the Russian Federation to Hungary in the framework of an intergovernmental agreement on cooperation on the peaceful use of nuclear energy. In accordance with that agreement, the task of constructing the new reactors was entrusted, by means of a direct award, to the company Nizhny Novgorod Engineering Company Atomenergoproekt ('JSC NIAEP').

In the contested decision, the Commission declared the aid at issue compatible with the internal market, subject to conditions, in accordance with Article 107(3)(c) TFEU. Under that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market, in so far as it does not adversely affect trading conditions to an extent contrary to the common interest.

The Republic of Austria brought an action for annulment of the contested decision.

Findings of the Court

In the first place, the General Court rejects the plea claiming that the contested decision was unlawful in that the Commission declared the aid at issue compatible with the internal market despite the fact that the direct award to JSC NIAEP of the contract for the construction of the new nuclear reactors allegedly constitutes an infringement of EU rules governing public procurement.

In that regard, the Republic of Austria argued in particular that since the award of the contract for the construction of the new reactors was an aspect that was inextricably linked to the aid at issue, the Commission was required to examine it also in the light of the EU rules on public procurement. According to the Republic of Austria, it is apparent, furthermore, from the judgment in *Austria* v *Commission* [45] that the Commission should have assessed the aid at issue in the light of the provisions of EU law on public procurement irrespective of whether the award of the construction contract constituted an aspect that was inextricably linked to that aid.

The General Court, first of all, rejects the line of argument put forward by the Republic of Austria on the basis of the judgment in *Austria* v *Commission*. While it is apparent from that judgment that the economic activity promoted by the aid must be compatible with EU law, no infringement of EU law owing to the activity supported, namely the production of nuclear energy, has been raised by the Republic of Austria in the present case. Moreover, that judgment does not show that the Court of Justice intended to broaden the scope of the review falling to the Commission in the context of a procedure to determine whether State aid is compatible with the internal market by abandoning its

44 Commission Decision (EU) 2017/2112 of 6 March 2017 on State aid SA.38454 – 2015/C (ex 2015/N) which Hungary is planning to implement for supporting the development of two new nuclear reactors at Paks II nuclear power station (OJ 2017 L 317, p. 45).

45 Judgment of 22 September 2020, *Austria* v *Commission* (C- 594/18 P, EU:C:2020:742).

case-law under which a distinction should be drawn between aspects that are inextricably linked to the object of the aid and those that are not.

In addition, recognition of an obligation requiring the Commission, in a procedure to determine whether State aid is compatible with the internal market, to adopt a definitive position on the existence or absence of an infringement of provisions of EU law distinct from those relating to State aid, irrespective of the link between the aspect of the aid and the object of that aid, would run counter to, first, the procedural rules and guarantees specific to the procedures specially established for control of the application of those provisions and, second, the principle of autonomy of administrative procedures and remedies.

In the light of those explanations, the Court finds, next, that the decision to award the contract for the construction of the two new reactors, which preceded the aid measure at issue, does not constitute an aspect that is inextricably linked to the object of that aid. The carrying out of a public procurement procedure and the possible use of another undertaking for the construction of the reactors would alter neither the object of the aid, namely the provision free of charge of two new reactors for the purpose of their operation, nor the beneficiary of the aid, which is the Paks II company. Furthermore, assuming that a tender procedure may have had an influence on the amount of the aid, which the Republic of Austria has not proven, such a factor would not by itself have had any effect on the advantage which that aid constituted for its recipient, namely the provision free of charge of two new reactors with a view to their operation.

Lastly, the Court states that, contrary to what is argued by the Republic of Austria, the Commission was justified in referring in the contested decision to its assessment carried out in earlier infringement proceedings, in which it had found that the direct award of the task of constructing the two new reactors to JSC NIAEP did not infringe EU public procurement law. The principle of legal certainty precludes the Commission from carrying out, in the State aid procedure, a fresh examination of the award of the construction contract in the absence of any new information as against the time when it decided to close the infringement proceedings.

In the second place, the Court rejects the pleas alleging disproportionate distortions of competition and unequal treatment which result in the exclusion of producers of renewable energy from the liberalised internal electricity market. In that regard, the Court observes that the Member States are free to determine the composition of their own energy mix and that the Commission cannot require that State financing be allocated to alternative energy sources.

In the third place, after rejecting the plea alleging the strengthening or creation of a dominant market position, the Court also dismisses the plea relating to risks to the liquidity of the Hungarian wholesale electricity market.

V. APPROXIMATION OF LAWS

1. PUBLIC PROCUREMENT

Judgment of the Court (Fourth Chamber) of 17 November 2022, Antea Polska and Others, C-54/21

Link to the full text of the judgment

Reference for a preliminary ruling – Public procurement – Directive 2014/24/EU – Principles of awarding contracts – Article 18 – Transparency – Article 21 – Confidentiality – Insertion of those principles in the national legislation – Right of access to the essential content of the information provided by tenderers concerning their experience and references, concerning the persons proposed to carry out the contract and concerning the design of the proposed projects and the manner of performance – Article 67 – Contract award criteria – Criteria relating to the quality of the proposed work or services – Requirement of precision – Directive 89/665/EEC – Article 1(1) and (3) – Right to an effective remedy – Remedy in the event of infringement of that right on account of the refusal to grant access to non-confidential information

The Państwowe Gospodarstwo Wodne Wody Polskie (National Water Management Authority, Poland; 'the contracting authority') launched a tender procedure for the purpose of developing projects relating to the environmental management of certain river basin districts in Poland.

At the end of that procedure, one of the tenderers, to whom the contract was not awarded, brought an action before the Krajowa Izba Odwoławcza (National Appeal Chamber, Poland), the referring court, seeking annulment of the decision awarding the contract to another tenderer, a fresh examination of the tenders, and disclosure of certain information. The referring court asks the Court about the limits of the confidentiality of information included by tenderers in their tenders in procedures for the award of public contracts.

By its judgment, the Court clarifies the scope and applicability of the prohibition on the disclosure by contracting authorities of information which candidates and tenderers provide to them in the context of procedures for the award of such contracts.

Findings of the Court

In the first place, the Court considers the delimitation of the scope of the obligation to treat information as confidential. In that regard, it finds that Directive 2014/24 on public procurement [46] does not preclude a Member State from establishing a regime that limits the scope of the obligation to treat information as confidential on the basis of a concept of trade secrets corresponding, in essence, to that contained in Directive 2016/943. [47] By contrast, that directive precludes such a regime where it does not include a set of rules allowing contracting authorities exceptionally to refuse to disclose information which, while not covered by the concept of trade secrets, should remain inaccessible.

In order to reach that conclusion, the Court finds that the scope of the protection of confidentiality set out in Directive 2014/24 is broader than that of protection covering trade secrets alone. It recalls, however, that, under that directive, the prohibition on disclosure of information communicated in

46 Article 21(1) of Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

47 Article 2(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).

confidence applies unless otherwise provided in the national law to which the contracting authority is subject. Consequently, each Member State may strike a balance between the confidentiality referred to in that provision of that directive and the rules of national law pursuing other legitimate interests, such as access to information, in order to ensure the greatest possible transparency in public procurement procedures. That being so, it must refrain from introducing regimes which do not guarantee undistorted competition, which undermine the balancing of the prohibition on disclosure of confidential information against the general principle of good administration, from which the obligation to state reasons arises, in order to ensure observance of the right to an effective remedy of unsuccessful tenderers, or which alter the regime relating to the publicising of awarded contracts and the rules relating to information to candidates and tenderers. [48]

National legislation which requires that any information communicated by all tenderers to the contracting authority, with the sole exception of information covered by the concept of trade secrets, be publicised is liable to prevent that authority from deciding, pursuant to one of the interests and objectives recognised by Directive 2014/24, relating to the application of laws, the public interest, the legitimate commercial interests of an economic operator and fair competition, [49] not to disclose certain information which does not fall within that concept.

In the second place, the Court states that the contracting authority must, in order to determine whether it will refuse a tenderer whose admissible tender has been rejected access to the information which other tenderers submitted concerning (i) their relevant experience and the references relating thereto, (ii) the identity and professional qualifications of the persons that they propose will perform the contract or the subcontractors and (iii) the design of the projects to be performed under the public contract and the manner of performance of that contract, assess whether that information has a commercial value outside the scope of the contract in question, where its disclosure might undermine legitimate commercial or fair competition. [50] Furthermore, the contracting authority may refuse to grant access to that information where its release would impede law enforcement or otherwise be contrary to the public interest. However, where full access to information is refused, the contracting authority must grant access to the essential content of that information, so that observance of the right to an effective remedy is ensured.

In particular, as regards, first of all, the relevant experience of the tenderers and the references demonstrating that experience and their capacities, the Court considers that such information cannot be classified as confidential in its entirety. Experience is not, as a general rule, secret, so that competitors cannot, in principle, be deprived of information relating to it. Tenderers must, in the interests of transparency and in order to ensure compliance with the requirements of good administration and effective judicial protection, enjoy access, at the very least, to the essential content of the information provided by each of them to the contracting authority concerning their relevant experience and the references demonstrating that experience. Such access is, however, without prejudice to particular circumstances relating to certain contracts for sensitive products or services which may exceptionally justify a refusal of disclosure in order to ensure compliance with a prohibition or requirement laid down by law or the protection of the public interest.

As regards, next, information on natural and legal persons, including subcontractors, on which a tenderer indicates reliance in order to perform the contract, a distinction must be made between information enabling those persons to be identified and that which relates only to their qualifications or professional capacities.

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48 Articles 50 and 55 of Directive 2014/24.

49 Article 50(4) and Article 55(3) of Directive 2014/24.

50 Article 18(1), Article 21(1), and Article 55 of Directive 2014/24.

As regard name-specific data, the Court does not rule out that, in so far as it is plausible that the tenderer and its experts or subcontractors have created a synergy with commercial value, access to that data should be refused. Thus, the contracting authority must determine whether the disclosure of that identifying information is likely to undermine the protection of confidentiality [51] in respect of that tenderer. To that end, it should take into account all relevant circumstances, including the subject matter of the contract in question, and the interest of that tenderer and those experts and subcontractors in taking part, with the same commitments negotiated in confidence, in other procurement procedures. However, the disclosure of information sent to the contracting authority cannot be refused if that information, which is relevant to the procurement procedure in question, has no commercial value in the wider context of the activities of those economic operators.

As regards non-name-specific data, the Court considers that, given their importance for the award of the contract, the principle of transparency and the right to an effective remedy require that the essential content of information such as the qualifications or professional capacities of the persons engaged to perform the contract, the size and format of the workforce thus created, or the share of performance of the contract that the tenderer intends to assign to subcontractors be accessible to all tenderers.

As regards, finally, the design of the projects planned to be carried out under the contract and the description of the manner of performance of the contract, the Court finds that it is for the contracting authority to examine whether they constitute elements or contain elements which can be protected by an intellectual property right, in particular by copyright, and thus fall within the scope of the ground for refusal of disclosure relating to law enforcement. [52] It recalls however that, even in the event that that design and that description are regarded as constituting works protected by copyright, that protection is solely reserved for elements which are the expression of an intellectual creation specific to its author, reflecting the author's personality.

In addition, and independently of that examination, the publication of that design and of that description, which have commercial value, may distort competition, in particular by reducing the ability of the economic operator concerned to distinguish itself using the same design and description in future public procurement procedures. While it is therefore possible that full access to information relating to the design of the projects and the description of the manner of performance should be refused, the essential content of that part of the tenders must nevertheless be accessible. [53]

In the third and last place, the Court holds that, in the event of a finding, when dealing with an action brought against a decision awarding a public contract, [54] of an obligation on the part of the contracting authority to disclose to the applicant information wrongly treated as confidential and of a breach of the right to an effective remedy on account of the failure to disclose that information, that finding does not necessarily have to lead to the adoption of a new contract award decision, provided that the national procedural law permits the court hearing the case to adopt, during the proceedings, measures which restore observance of the right to an effective remedy or allow it to find that the applicant may bring a new action against the award decision that has already been made. The time limit for bringing such an action must not start to run until the applicant has access to all the information which had been wrongly classified as confidential.

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51 Article 21(1) of Directive 2014/24.

52 Article 55(3) of Directive 2014/24.

53 Pursuant to Article 21(1) or Article 55(3) of Directive 2014/24.

54 Article 1(1) and (3) of Council Directive 89/665 of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33).

2. CHEMICALS

Judgment of the General Court (Ninth Chamber, Extended Composition) of 23 November 2022, CWS Powder Coatings and Others v Commission, T-279/20, T-288/20 and T-283/20

Link to the full text of the judgment

Environment and protection of human health – Regulation (EC) No 1272/2008 – Classification, labelling and packaging of substances and mixtures – Delegated Regulation (EU) 2020/217 – Classification of titanium dioxide in powder form containing 1% or more of particles of a diameter equal to or below 10 µm – Criteria for classification of a substance as carcinogenic – Reliability and acceptability of studies – Substance that has the intrinsic property to cause cancer – Calculation of lung overload in particles – Manifest errors of assessment

Titanium dioxide is an inorganic chemical substance used, in particular in the form of a white pigment, for its colourant and covering properties in various products, ranging from paints to medicinal products and toys. In 2016, the competent French authority submitted to the European Chemicals Agency (ECHA) a proposal to classify titanium dioxide as a carcinogenic substance. [55] The following year, ECHA's Committee for Risk Assessment ('the RAC') adopted an opinion classifying titanium dioxide as a category 2 carcinogen, including the hazard statement 'H 351 (inhalation)'.

On the basis of the RAC Opinion, the European Commission adopted Regulation 2020/217, [56] by which it proceeded with the harmonised classification and labelling of titanium dioxide, recognising that that substance was suspected of being carcinogenic to humans, by inhalation, in powder form containing 1% or more of particles of a diameter equal to or below 10 µm.

The applicants, in their capacity as manufacturers, importers, downstream users or suppliers of titanium dioxide, brought actions before the General Court for the partial annulment of Regulation 2020/217.

By its judgment, delivered in a chamber sitting in extended composition in three joined cases, [57] the Court annuls the contested regulation in so far as it concerns the harmonised classification and labelling of titanium dioxide. On that occasion, it rules on novel questions alleging manifest errors of assessment and infringement of the criteria established for harmonised classification and labelling under Regulation No 1272/2008 as regards, first, the reliability and acceptability of the scientific study on which the classification was based and, second, compliance with the classification criterion laid down by that regulation, according to which the substance must have the intrinsic property to cause cancer. [58]

Findings of the Court

In the first place, the Court holds that, in the present case, the requirement to base the classification of a carcinogenic substance on reliable and acceptable studies was not satisfied.

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55 Proposal for harmonised classification and labelling pursuant to Article 37(1) of Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

56 Commission Delegated Regulation (EU) 2020/217 of 4 October 2019 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures and correcting that Regulation (OJ 2020 L 44, p. 1, 'the contested regulation').

57 T-279/20, T-283/20 and T-288/20.

58 Criteria referred to in Section 3.6.2.2.1 of Annex I to Regulation No 1272/2008.

In recognising that the results of a scientific study on which it based its opinion on the classification and labelling of titanium dioxide were sufficiently reliable, relevant and adequate for assessing the carcinogenic potential of that substance, the RAC committed a manifest error of assessment. Specifically, in order to verify the degree of lung overload of titanium dioxide particles in that scientific study in order to assess carcinogenicity, the RAC used a density value corresponding to the density of unagglomerated primary particles of titanium dioxide, which is always higher than the density of the agglomerates of nano-sized particles of that substance. However, in so doing, it did not take into account all the relevant factors in order to calculate the lung overload during the scientific study at issue, namely the characteristics of the particles tested in that scientific study, the fact that those particles tend to agglomerate and the fact that the density of the agglomerates of particles was lower than the particle density and that, for that reason, those agglomerates occupied more volume in the lungs. Thus, the RAC's findings that the lung overload in the scientific study at issue was acceptable were implausible.

Consequently, in so far as, for the purposes of the harmonised classification and labelling of titanium dioxide, the Commission based the contested regulation on the RAC Opinion and thus followed the RAC's conclusion as to the reliability and acceptability of the results of the scientific study at issue, which constituted a decisive study for the classification proposal for titanium dioxide, it made the same manifest error of assessment as the RAC.

In the second place, the Court finds that the contested classification and labelling infringed the criterion according to which the classification of a substance as carcinogenic can apply only to a substance that has the intrinsic property to cause cancer.

In that context, in view of the fact that, under Regulation No 1272/2008, harmonised classification and labelling of a substance as carcinogenic may be based only on the intrinsic properties of the substance which determine its intrinsic capacity to cause cancer, the Court goes on to interpret the concept of 'intrinsic properties'. In that regard, it states that, although that concept does not appear in Regulation No 1272/2008, it must be interpreted in its literal sense as referring to the 'properties which a substance has in and of itself', which is consistent, inter alia, with the objectives and purpose of harmonised classification and labelling under that regulation.

In addition, it notes that the contested classification and labelling are intended to identify and notify a carcinogenic hazard of titanium dioxide which, in the RAC Opinion, was classified as 'non-intrinsic in a classical sense'. The Court states that that 'non-intrinsic in a classical sense' nature stems from several factors, referred to both in that opinion and in the contested regulation. The carcinogenicity hazard is linked solely to certain respirable titanium dioxide particles, when they are present in a certain form, physical state, size and quantity, it occurs only in lung overload conditions and corresponds to particle toxicity.

The Court therefore concludes that, by upholding the conclusion contained in the RAC Opinion that the mode of action of carcinogenicity on which that committee relied could not be regarded as intrinsic toxicity in the classical sense, but which had to be taken into consideration in the context of harmonised classification and labelling under Regulation No 1272/2008, the Commission committed a manifest error of assessment.

The Court states that the examples of classification and labelling of other substances, relied on in order to compare them with the classification and labelling of titanium dioxide, illustrate only cases in which, even though the form and size of the particles were taken into account, certain properties specific to the substances were nevertheless decisive for their classification, which does not correspond to the case here.

Judgment of the General Court (Seventh Chamber) of 16 November 2022, Sciessent v Commission, T-122/20 and T-123/20

Link to the judgment as published in extract form

Biocidal products – Active substances – Silver zeolite and silver copper zeolite – Refusal of approval for product-types 2 and 7 – Article 4 and Article 19(1)(b) of Regulation (EU) No 528/2012 – Efficacy – Active

substances for use in treated articles – Assessment of the efficacy of the treated articles themselves – Competence of the Commission – Principle of non-discrimination – Legal certainty – Legitimate expectations

Sciessent LLC is a producer of several silver-containing active substances, including 'silver zeolite' and 'silver copper zeolite' ('the substances concerned'), used to treat certain polymers to achieve an antimicrobial effect.

In the context of the programme for the assessment of existing active substances established by Directive 98/8, [59] Sciessent notified the European Commission, with a view to obtaining approval, of the substances concerned in connection, inter alia, with product-type 2 (disinfectants and algaecides not intended for direct application to humans or animals) and product-type 7 (film preservatives).

The assessment reports submitted by the evaluating competent authority were examined by the biocidal products committee of the European Chemicals Agency (ECHA). In accordance with the opinion of the committee, the Commission refused approval of each of the substances concerned as existing active substances for use in product-types 2 and 7 [60] because the sufficient efficacy of the biocidal products in those product-types containing the substances concerned had not been demonstrated. Sciessent therefore brought two actions for annulment of those Commission decisions.

The General Court dismisses the actions and rules, for the first time, on the application of the criterion of the efficacy of an existing active substance with a view to its approval, where that substance is intended to be incorporated into treated articles.

Findings of the Court

First, the Court observes that the applicant for approval of an active substance for use in one or more treated articles is not required to demonstrate the efficacy of those treated articles with the representative biocidal product containing the active substance in question. Nevertheless, the applicant must prove that at least one representative biocidal product may be expected to fulfil the efficacy criterion in the light of the claims which the applicant has him- or herself defined for that product. Where the product chosen by the applicant is intended to be incorporated into a treated article in order to impart on that article a certain kind of protection or a certain effect, it is for the applicant to support his or her claims by way of appropriate tests.

Second, in such circumstances, the applicant cannot merely submit tests carried out under conditions that do not take account of specific conditions for use of the representative biocidal product, or to provide only proof of principle of the efficacy of the active substance. The applicant must submit tests which reproduce the realistic worst case conditions under which the product may be used and which take into account the way in which the treated article may be used. Those conditions are simulated, in essence, in phase 2 tests. The Court adds that the efficacy assessment of an active substance is more limited than that of a biocidal product in the context of a marketing authorisation procedure. It is only at the authorisation stage of a biocidal product, with a view to placing it on the market, that all the intended uses of that product and its efficacy on all of the target organisms will be examined in detail and an assessment of the product's efficacy and risks, having regard to each of those uses, will be carried out.

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59 Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, p. 1).

60 Commission Implementing Decision (EU) 2019/1960 of 26 November 2019 not approving silver zeolite as an existing active substance for use in biocidal products of product-types 2 and 7 (OJ 2019 L 306, p. 42) and Commission Implementing Decision (EU) 2019/1973 of 27 November 2019 not approving silver copper zeolite as an existing active substance for use in biocidal products of product-types 2 and 7 (OJ 2019 L 307, p. 58).

Third, the ECHA guidance stresses that it is necessary for the applicant to justify the selection of the use concentrations for the efficacy tests. The likely use concentration corresponds ideally to the minimum effective concentration under realistic conditions, taking into account all relevant parameters that impact efficacy. From that standpoint, there is therefore also a necessary link between the efficacy assessment of an active substance and of the representative biocidal product, on the one hand, and the realistic conditions of use of that biocidal product as reflected in phase 2 tests, on the other, which reproduce, in laboratory conditions, the practical conditions appropriate to the intended use.

Consequently, the Court considers that, in order to demonstrate the efficacy of an active substance for use in a treated article, the applicant must prove (i) the innate efficacy of that substance in the dossier relating to the substance [61] and (ii) the sufficient efficacy of the protection imparted on the articles treated by the representative biocidal product containing the active substance in the dossier relating to that product. [62] As for the representative biocidal product, the applicant is required, for each product-type and each claim, to submit tests carried out in realistic worst case conditions and taking into account the way in which the treated articles may be used. The Court adds that this does not mean that the tests must be carried out on the treated article itself, in the state in which it will be placed on the market. It is for the applicant to conduct its tests on a representative material which can, generally speaking, be used to manufacture the treated article chosen by the applicant as an example use, in relevant conditions in the light of Regulation No 528/2012, having regard to that example use.

VI. ENVIRONMENT: AARHUS CONVENTION

Judgment of the Court (Grand Chamber) of 8 November 2022, Deutsche Umwelthilfe (Approval of motor vehicles), C-873/19

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Aarhus Convention – Access to justice – Article 9(3) – Charter of Fundamental Rights of the European Union – Article 47, first paragraph – Right to effective judicial protection – Environmental association – Standing of such an association to bring an action before a national court against EC type-approval granted to certain vehicles – Regulation (EC) No 715/2007 – Article 5(2)(a) – Motor vehicles – Diesel engine – Pollutant emissions – Valve for exhaust gas recirculation (EGR valve) – Reduction of nitrogen oxide (NO_x) emissions limited by a 'temperature window' – Defeat device – Authorisation of such a device where the need is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle – State of the art

Volkswagen AG is a car manufacturer which marketed motor vehicles equipped with a Euro 5 generation EA 189-type diesel engine and with a valve for exhaust gas recirculation ('the EGR valve'), one of the technologies used by car manufacturers to control and reduce nitrogen oxide (NO_x) emissions. The software operating the exhaust gas recirculation ('EGR') system was programmed in such a way that, under normal conditions of use, the EGR rate was reduced. Thus, the vehicles

61 Dossier provided for in Article 6(1)(a) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).

62 Dossier provided for in Article 6(1)(b) of Regulation (EU) No 528/2012.

concerned did not comply with the NO_x emission limit values laid down by Regulation No 715/2007 on type-approval of motor vehicles. [63]

In the EC type-approval procedure for one of those vehicle models, [64] the Kraftfahrt-Bundesamt (Federal Motor Transport Authority, Germany; 'the KBA') found that the software at issue constituted a defeat device [65] which was not consistent with that regulation. [66]

Volkswagen therefore updated the software by setting the EGR valve so that exhaust gas purification was fully effective only when the outside temperature was greater than 15 °C ('the temperature window'). By decision of 20 June 2016 ('the contested decision'), the KBA granted authorisation for the software at issue.

Deutsche Umwelthilfe, an environmental association which is authorised to bring legal proceedings, in accordance with German law, brought an action against the contested decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany).

That court notes that, under German law, Deutsche Umwelthilfe does not have standing to bring legal proceedings against the contested decision. It is, however, uncertain whether that association can derive such standing directly from EU law. If so, it raises the question whether the temperature window is compatible with Regulation No 715/2007. Having found that that window constitutes a defeat device within the meaning of that regulation, it asks whether the software in question may be authorised on the basis of the exception to the prohibition of such devices laid down in that regulation, [67] which requires that 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'.

On a request for a preliminary ruling from that court, the Court of Justice, sitting as the Grand Chamber, rules on the standing of an environmental association to challenge before a national court an administrative decision granting an authorisation which may be contrary to EU law, in the light of the Aarhus Convention [68] and the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It also specifies the circumstances in which a defeat device may be justified under Regulation No 715/2007. [69]

Findings of the Court

First of all, the Court recalls that under Article 9(3) of the Aarhus Convention, each party must ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

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

64 Under Article 3(5) of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), 'EC type-approval' means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of EU law.

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

66 Article 5 of Regulation No 715/2007.

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

68 Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; 'the Aarhus Convention').

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

In that regard, the Court finds, in the first place, that an administrative decision relating to EC type-approval which may be contrary to Regulation No 715/2007 falls within the material scope of Article 9(3) of the Aarhus Convention, since it constitutes an act of a public authority which is alleged to contravene the provisions of national law relating to the environment. In pursuing the objective of ensuring a high level of environmental protection by reducing NO_x emissions from diesel vehicles, Regulation No 715/2007 forms part of 'national law relating to the environment' within the meaning of the aforementioned provision. That finding is in no way affected by the fact that the regulation at issue was adopted on the basis of Article 95 EC (now Article 114 TFEU) and not on a specific legal basis for the environment, since, in accordance with Article 114(3) TFEU, the Commission, in its proposals for measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States concerning environmental protection, is to take as a base a high level of protection, taking account in particular of any new development based on scientific facts.

In the second place, the Court points out that an environmental association authorised to bring legal proceedings falls within the personal scope of Article 9(3) of the Aarhus Convention, inasmuch as it is part of the public concerned by that provision and meets the criteria, if any, laid down in national law.

In the third place, as regards the concept of criteria laid down in national law within the meaning of that provision, the Court clarifies that although it follows from Article 9(3) of the Aarhus Convention that Member States may, in the context of the discretion they have in that regard, establish procedural rules setting out conditions that must be satisfied in order to be able to pursue the review procedures referred to in that provision, such criteria relate only to the determination of those persons entitled to bring an action. It follows that Member States may not reduce the material scope of Article 9(3) by excluding from the subject matter of the action certain categories of provisions of national environmental law. Furthermore, Member States must comply with the right to an effective remedy, enshrined in Article 47 of the Charter, when establishing the applicable procedural rules and cannot impose criteria so strict that it would be impossible for environmental associations to challenge the acts or omissions that are the subject of the Aarhus Convention. [70] The Court concludes from this that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, precludes a situation where such an association is unable to challenge a decision granting or amending EC type-approval which may be contrary to Regulation No 715/2007. [71] That situation would indeed constitute an unjustified limitation of the right to an effective remedy.

Consequently, it is for the referring court to interpret national procedural law in a manner consistent with the Aarhus Convention and with the right to an effective remedy enshrined in EU law, in order to enable an environmental association to challenge such a decision before a national court. If a consistent interpretation to that effect were to prove impossible and in the absence of direct effect of Article 9(3) of the Aarhus Convention, Article 47 of the Charter confers on individuals a right which they may rely on as such, with the result that it may be relied on as a limit on the discretion left to the Member States in that regard. In such a case, it will be for the referring court to disapply the national provisions precluding an environmental association, such as Deutsche Umwelthilfe, from exercising any right to bring an action against a decision granting or amending EC type-approval which may be contrary to Regulation No 715/2007. [72]

Lastly, the Court finds that the use of a defeat device can be justified by a need to protect the engine against damage or accident and for safe operation of the vehicle, within the meaning of Regulation No 715/2007, [73] only where that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation

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70 Article 9(3) of the Arhus Convention.

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

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

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

system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, the need for such a defeat device exists only where, at the time of the EC type-approval of that device or of the vehicle equipped with it, no other technical solution makes it possible to avoid the abovementioned risks.

VII. COMMON COMMERCIAL POLICY: SAFEGUARD MEASURES

Judgment of the General Court (Fifth Chamber, Extended Composition) of 9 November 2022, Cambodia and CRF v Commission, T-246/19

Link to the full text of the judgment

Safeguard measures – Rice market – Imports of Indica rice originating in Cambodia and Myanmar/Burma – Regulation (EU) No 978/2012 – Concept of 'Union producers' – Concept of 'like or directly competing products' – Serious difficulties – Rights of the defence – Essential facts and considerations – Manifest errors of assessment

Since 2012, under the 'Everything but Arms' regime intended to promote the development of the least advanced countries, imports of Indica rice originating in Cambodia and Myanmar/Burma benefited from a total suspension of Common Customs Tariff duties.

Under the safeguard investigation, the European Commission concluded in 2018 that milled or semi-milled Indica rice originating in Cambodia and Myanmar/Burma was imported in volumes and at prices which caused serious difficulties for the Union industry. Thus, by Regulation 2019/67, [74] the Commission reintroduced the Common Customs Tariff duties on imports of that rice for a period of three years and introduced a gradual reduction in the rate of the applicable duties.

The General Court, before which the Kingdom of Cambodia and Cambodia Rice Federation brought proceedings, upheld the action for annulment brought against the contested regulation. In its judgment, it interprets, for the first time, Articles 22 and 23 of the GSP Regulation [75] and, in particular, the concepts relating to 'Union producers manufacturing like or directly competing products' and the conditions surrounding proof of the existence of serious difficulties caused to the Union industry.

Findings of the Court

As regards, first of all, the concept of 'like or directly competing products' and the definition of the Union industry, the General Court notes as a preliminary point that, in safeguard investigations, both Union producers of 'like products' and producers of 'directly competing' products must be taken into account.

Next, it states that, in the present case, the Commission took the view, for the purposes of assessing the existence of serious difficulties encountered by Union producers, that milled or semi-milled Indica rice processed from paddy rice produced or grown in the European Union constituted the 'like or directly competing product'.

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74 Commission Implementing Regulation (EU) 2019/67 of 16 January 2019 imposing safeguard measures with regard to imports of Indica rice originating in Cambodia and Myanmar/Burma (OJ 2019 L 15, p. 5).

75 Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ 2012 L 303, p. 1) ('the GSP Regulation').

In that regard, the Court notes, in the first place, that the Commission is wrong to take the view that 'like or directly competing products', within the meaning of Article 22(1) of the GSP Regulation should be subject to the condition of origin of products imported from countries benefiting from tariff preferences, within the meaning of Article 33 of the GSP Regulation and of Delegated Regulation 2015/2446. [76]

The EU legislature refers to the rules of origin only in respect of imported products. Moreover, Article 22(1) and (2) of the GSP Regulation does not state that the analysis of the impact of imports of a product originating in a beneficiary country on the economic or financial situation of Union producers must take into account the origin of the products of those producers and thus limit those Union producers who are entitled to the protection provided for by that provision.

In the second place, the Court considers that milled or semi-milled Indica rice produced in the European Union must be classified as a like product or as a direct competitor of milled or semi-milled Indica rice originating in Cambodia, irrespective of the origin of the raw material from which it was processed.

Milled or semi-milled Indica rice, whatever the origin of that raw material, has the same basic physical, technical and chemical characteristics and has the same use. It is therefore interchangeable or substitutable with other milled or semi-milled Indica rice, both for EU millers and for consumers.

Therefore, the Commission was required, in the analysis of the effects of imports of Indica rice from Cambodia on the prices of the Union industry, to take into consideration all EU millers producing milled or semi-milled Indica rice, irrespective of the origin of the paddy rice that they process.

In so far as the Commission excluded some of the producers from the injury assessment, the Court notes that the incorrect definition of Union producers also vitiated the analysis of the existence of serious difficulties.

In the third place, the Court finds that, by limiting the definition of Union producers to be taken into account for the purposes of assessing injury by reference to the origin of the raw material processed into milled or semi-milled Indica rice, the Commission de facto extended the scope of protection to Union growers, only the latter being actually concerned by rice grown in the European Union. Such an interpretation cannot, however, be justified in the light of the definition of the Union industry set out in recitals 22 and 23 of the contested regulation, which refers expressly only to EU millers.

In the light of the foregoing, the Court finds that the Commission erred in law and made a manifest error of assessment by arbitrarily limiting the scope of its investigation concerning the injury caused to the Union industry solely to millers of milled or semi-milled Indica rice processed from paddy rice grown or harvested in the European Union.

As regards, next, the undercutting analysis, the Court finds that the Commission did not rely on direct evidence or reliable and relevant circumstantial evidence supporting its decision to make adjustments.

First, the geographical spread underlying the 'undisputed fact' that competition in milled or semi-milled Indica rice in the European Union took place in northern Europe is therefore not supported by reliable and relevant evidence. The same is true of the Commission's decision to apply to the entire production of Indica rice in the European Union the uniform rate of EUR 49 per tonne in respect of transport costs, without limiting the adjustment to a certain proportion of sales of milled and semi-milled Indica rice in the European Union which actually requires transport from southern to northern Europe.

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76 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1).

Secondly, the evidence on which the Commission relies in order to justify the adjustment of import prices is not sufficiently convincing, or is non-existent, and cannot be regarded as direct evidence or circumstantial evidence, establishing the existence of the factor on the basis of which the adjustment of import prices was made and determining its impact on price comparability.

Thirdly, the Commission has not adduced any direct evidence in support of the adjustment of the undercutting analysis in order to take account of differences in the level of trade and to compare the prices of milled rice sold in bulk with those of rice sold in packages, nor any circumstantial evidence establishing the existence of the factors in respect of which that adjustment was made and determining its impact on price comparability.

As regards, lastly, the Commission's obligation to disclose the details underlying the essential facts and considerations or the various facts and considerations on the basis of which it takes its decisions, the Court notes that Article 17 of Delegated Regulation No 1083/2013 [77] does not in any way make that obligation subject to any request from interested parties. That obligation is to be distinguished both from the right of interested parties under Article 16 of Delegated Regulation No 1083/2013 and Article 12(1) of Decision 2019/339 [78] to request written access to the file during the administrative phase and from the question of the possible intervention of a Hearing Officer in the event of refusal or a dispute concerning the confidentiality of certain documents. Also, the Court notes that Article 17 of Delegated Regulation No 1083/2013 contains no indication that that disclosure is purely indicative. Although that provision thus imposes an obligation on the Commission to disclose the details underlying the essential facts and considerations on the basis of which it takes its decisions, that obligation applies a fortiori with regard to the essential facts and considerations themselves.

VIII. JUDGMENTS PREVIOUSLY DELIVERED

1. FUNDAMENTAL RIGHTS: PRINCIPLE *NE BIS IN IDEM*

Judgment of the Court (Grand Chamber) of 28 October 2022, Generalstaatsanwaltschaft München (Extradition and *ne bis in idem),* C-435/22 PPU

Link to the full text of the judgment

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Charter of Fundamental Rights of the European Union – Article 50 – Convention implementing the Schengen Agreement – Article 54 – Principle *ne bis in idem* – Extradition agreement between the European Union and the United States of America – Extradition of a third-country national to the United States under a bilateral treaty concluded by a Member State – National who has been convicted by final judgment for the same acts and has served his sentence in full in another Member State

In January 2022, HF, a Serbian national, was temporarily arrested in Germany on the basis of a red notice published by the International Criminal Police Organisation (Interpol) at the request of the authorities of the United States of America. The latter request the extradition of HF with a view to

77 Commission Delegated Regulation (EU) No 1083/2013 of 28 August 2013 establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalised tariff preferences (OJ L 2013 L 293, p. 16).

78 Decision (EU) 2019/339 of the President of the European Commission of 21 February 2019 on the function and terms of reference of the hearing officer in certain trade proceedings (OJ 2019 L 60, p. 20).

criminal proceedings for offences consisting of a conspiracy to participate in racketeer-influenced corrupt organisations and conspiracy to commit bank fraud and fraud by means of telecommunication, committed between September 2008 and December 2013. When he was arrested, HF stated that he was resident in Slovenia and produced, inter alia, a Slovenian residence permit which had expired in November 2019.

The person concerned has already been convicted by final judgment in Slovenia for the same acts as those referred to in the extradition request, as regards the offences committed up to June 2010. In addition, he has already served his sentence in full.

Accordingly, the Oberlandesgericht München (Higher Regional Court, Munich, Germany), called upon to rule on HF's extradition request, decided to ask the Court of Justice whether the principle *ne bis in idem* requires it to refuse that extradition for offences for which final judgment has been passed in Slovenia. That principle, which is enshrined in both Article 54 of the Convention implementing the Schengen Agreement ('the CISA') [79] and Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), prohibits, inter alia, a person against whom final judgment has been passed in a Member State from being tried again in another Member State for the same offence. In that context, the referring court also asks whether the extradition treaty concluded between Germany and the United States, [80] in so far as it allows extradition to be refused on the basis of the principle *ne bis in idem* only in the case of a conviction in the requested State (here, Germany), is likely to affect the application of that principle in the dispute in the main proceedings.

By its judgment, delivered in the context of the urgent preliminary ruling procedure, the Court, sitting as the Grand Chamber, rules that Article 54 of the CISA, read in the light of Article 50 of the Charter, precludes the extradition, by the authorities of a Member State, of a third-country national to another third country, where final judgment has been passed in another Member State, as regards that national, in respect of the same acts as those referred to in the extradition request and he or she has served the sentence which has been imposed there. The fact that the extradition request is based on a bilateral extradition treaty limiting the scope of the principle *ne bis in idem* to judgments delivered in the requested Member State is irrelevant in that regard.

Findings of the Court

In the first place, as regards whether the concept of 'person' referred to in Article 54 of the CISA includes a third-country national, the Court observes first of all that that article guarantees the protection of the principle *ne bis in idem* where a person's trial has been finally disposed of in a Member State. Accordingly, the wording of that provision does not establish a condition relating to possession of the nationality of a Member State. Next, the context of that article supports such an interpretation. Article 50 of the Charter, [81] in the light of which Article 54 of the CISA must be interpreted, also does not establish a link with the status of citizen of the European Union. Finally, the objectives pursued by that provision, namely, in particular, to ensure legal certainty through respect for decisions of public bodies which have become final, and fairness, support the interpretation that the application of that provision is not limited solely to nationals of a Member State. In that regard, the Court also states that there is nothing in Article 54 of the CISA to suggest that enjoyment of the fundamental right provided for therein is subject, as regards third-country nationals, to compliance with conditions relating to the lawful nature of their stay or to a right to freedom of movement within the Schengen area. In a case such as that in the main proceedings, irrespective of the lawful nature of

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79 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013.

80 Auslieferungsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika (Extradition Treaty between the Federal Republic of Germany and the United States of America) of 20 June 1978 (BGBl. 1980 II, p. 647; 'the Germany-USA Extradition Treaty').

81 Article 50 of the Charter provides that 'no one' is to be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the European Union in accordance with the law.

his or her stay, the person concerned must therefore be regarded as falling within the scope of Article 54 of the CISA.

In the second place, the Court finds that the Agreement on extradition between the European Union and the United States of America ('the EU-USA Agreement'), [82] which applies to relations existing between the Member States and that third State on extradition, is applicable to the dispute in the main proceedings, since the extradition request was made, on the basis of the Germany-USA Extradition Treaty, after the entry into force of that EU-USA Agreement. While it is true that the latter does not expressly provide that the applicability of the principle *ne bis in idem* may allow a Member State to refuse extradition requested by the United States, however, Article 17(2) thereof, [83] which in principle allows a Member State to prohibit the extradition of persons who have already been finally judged in respect of the same offence for which extradition is sought, constitutes an autonomous and subsidiary legal basis for the application of that principle where the applicable bilateral treaty does not enable that question to be resolved. However, the Germany-USA Extradition Treaty settles prima facie the question raised in the dispute in the main proceedings since it does not envisage that extradition can be refused if the person prosecuted has been finally judged, for the offense referred to in the request for extradition, by the competent authorities of a State other than the requested State. [84] On this point, the Court nevertheless recalls that, as required by the principle of primacy, it is for the referring court to ensure the full effect of Article 54 of the CISA and Article 50 of the Charter in the dispute in the main proceedings, by disapplying, of its own motion, any provision of the Germany-USA Extradition Treaty which proves to be incompatible with the principle *ne bis in idem* enshrined in those articles. Although the provisions of the Germany-USA Extradition Treaty relating to the application of the principle *ne bis in idem* are set aside on the ground that they are contrary to EU law, that treaty no longer allows the question of extradition raised in the dispute in the main proceedings to be resolved, so that the application of that principle may be based on the autonomous and subsidiary legal basis of Article 17(2) of the EU-USA Agreement.

In the last place, although it finds that the first paragraph of Article 351 TFEU [85] is not a priori applicable to the dispute in the main proceedings having regard to the date on which the Germany-USA Extradition Treaty was concluded, the referring court wonders whether that provision should not be interpreted broadly as also referring to agreements concluded by a Member State after 1 January 1958 or the date of its accession, but before the date on which the European Union became competent in the field covered by those agreements. In that regard, noting in particular that exceptions must be interpreted strictly so that general rules are not negated, the Court specifies that that derogating provision must be interpreted as applying only to agreements concluded before 1 January 1958 or, in the case of acceding States, before the date of their accession, so that it is not applicable to the Germany-USA Extradition Treaty.

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82 Agreement on extradition between the European Union and the United States of America of 25 June 2003 (OJ 2003 L 181, p. 27).

83 Article 17 of that EU-USA Agreement, headed 'Non-derogation', provides, in paragraph 2 thereof, that 'where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States'.

84 Under Article 8 of the Germany-USA Extradition Treaty, extradition is not to be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the requested State for the offence for which his or her extradition is requested. However, that provision does not provide for such a possibility where a final judgment has been passed in another State.

85 Under that provision, 'the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'.

2. APPROXIMATION OF LAWS: EUROPEAN UNION TRADEMARK

Judgment of the General Court (Fifth Chamber) of 26 October 2022, The Bazooka Companies v EUIPO – Bilkiewicz (Shape of a baby's bottle), T-273/21

Link to the judgment as published in extract form

EU trade mark – Revocation proceedings – Three-dimensional EU trade mark – Shape of a baby's bottle – Genuine use of the mark – Point (a) of the second subparagraph of Article 18(1) and Article 58(1)(a) of Regulation (EU) 2017/1001 – Nature of use of the mark – Form differing in elements which do not alter the distinctive character – Obligation to state reasons

In 1999, The Topps Company, Inc., obtained from the European Union Intellectual Property Office (EUIPO) registration of a three-dimensional trade mark consisting of the shape of a baby's bottle in respect of goods in the candy sector.

In 2018, an application for revocation alleging a lack of genuine use [86] of that mark was filed with EUIPO; that application was granted by the Cancellation Division and confirmed by the Board of Appeal of EUIPO. In 2022, the contested mark was transferred to The Bazooka Companies, Inc., which thus became the applicant before the General Court.

By the present judgment, the Court annuls the decision of the Board of Appeal and clarifies the differences between the terms 'shape' and 'form' used in the English-language version of Regulation 2017/1001. In addition, it summarises its case-law regarding alteration of the distinctive character of a three-dimensional mark and its joint use with another mark.

Findings of the Court

As a preliminary point, the Court notes that the English-language version of Regulation 2017/1001 uses, on the one hand, the word 'shape' to state that an EU trade mark may consist, inter alia, of the shape of goods or of the packaging of goods, [87] and, on the other hand, the word 'form' to designate use of the mark in a form differing in elements which do not alter the distinctive character of that mark. [88]

In the first place, the Court considers that no variation between the form of which the contested mark as registered consists, that is to say, the three-dimensional 'shape', and the form of which the contested mark as used consists can be regarded as significant. Both marks have the shape of a baby's bottle, including a teat, a serrated surface and a lid, and will be perceived by the relevant public as identical.

In the second place, the Court holds that the word and figurative elements that cover the contested mark as used have not led to use in a 'form' differing from that mark as registered, since they do not alter the distinctive character of the mark. Those elements do not call into question the fact that their addition may be regarded as having given rise to use of that mark in an acceptable variant.

To reach that conclusion, the Court relies on the fact that, in order for the use of a mark that is used only as part of a composite mark or in conjunction with another mark to be covered by the term 'genuine use', that mark must continue to be perceived as indicative of the origin of the goods at

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86 For the purposes of Article 58(1)(a) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

87 First paragraph of Article 4 of Regulation 2017/1001.

88 Point (a) of the second subparagraph of Article 18(1) of Regulation 2017/1001.

issue. Furthermore, it is for the proprietor of the mark to prove that that mark alone, as opposed to any other trade mark which may also be present, identifies the particular undertaking from which the goods originate. In addition, the fact that the relevant public might recognise the mark being contested by referring to another mark which designates the same goods and is used in conjunction with the mark being contested does not mean that the latter mark is not used as a means of identification in itself.

In the light of those considerations, the Court finds, first of all, that the addition of elements to the surface of the contested mark as used does not alter that mark's form as registered, since the consumer can still distinguish the form of the three-dimensional mark. Next, it states that the fact that another mark may also facilitate the determination of the commercial origin of the goods in question is not at odds with the fact that it may not alter the distinctive character of the three-dimensional mark. Otherwise, the relatively common addition of a word element to a three-dimensional mark, which may still facilitate the determination of the commercial origin of the goods covered, would necessarily imply an alteration of the distinctive character of that three-dimensional mark. In addition, not only is the combination of a three-dimensional form with additional word or figurative elements common in the relevant sector, but also it is inconceivable from a commercial and regulatory point of view to sell goods without any label on their surface.

Furthermore, as regards the figurative and word elements included on the contested mark, the Court states that one part of those elements alludes to the baby's bottle shape of which the contested mark consists and that the other part is weakly distinctive.

Lastly, as regards the fact that the contested mark as used has various colours while it was registered without colour, the Court considers that colours possess little inherent capacity for communicating specific information. They will therefore be understood as purely aesthetic elements or as presentational features and not as indicative of the commercial origin of the goods.

Nota:

The summaries of the following cases are currently being finalised and will be published in a future issue of the Monthly Case-Law Digest:

- 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 22 November 2022, Luxembourg Business Registers, C-37/20, EU:C:2022:852
- Judgment of 22 November 2022, Staatssecretaris van Justitie en Veiligheid (Removal – medicinal cannabis), C-69/21, EU:C:2022:913
- 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 16 November 2022, Netherlands v Commission, T-469/20, EU:T:2022:713
- Judgment of 23 November 2022, Westfälische Drahtindustrie and Pampus Industriebeteiligungen v Commission, T-275/20, EU:T:2022:723
- Judgment of 30 November 2022, PKK v Council, T-316/14 Renv and T-148/19, EU:T:2022:727
- Judgment of 30 November 2022, KN v Parliament, T-401/21, EU:T:2022:736
- Judgment of 30 November 2022, ADS L. Kowalik, B. Włodarczyk v EUIPO – ESSAtech (Accessory for a wireless remote control), T-611/21, EU:T:2022:739