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# MONTHLY CASE-LAW DIGEST
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# I. INSTITUTIONAL PROVISIONS: ACCESS TO DOCUMENTS

**Judgment of the General Court (Tenth Chamber, Extended Composition), 25 January 2023, De Capitani v Council, T-163/21**

Link to the full text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Documents concerning an ongoing legislative procedure – Council working groups – Documents concerning a legislative proposal to amend Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings – Partial refusal to grant access – Actions for annulment – Interest in bringing proceedings – Admissibility – First subparagraph of Article 4(3) of Regulation No 1049/2001 – Exception relating to the protection of the decision-making process

The applicant, Mr Emilio De Capitani, had submitted a request for access [1] to certain documents exchanged within the Council's 'Company Law' working group relating to the legislative procedure concerning the amendment of Directive 2013/34 on the annual financial statements. [2] The Council had refused access to certain documents on the ground that their disclosure would seriously undermine the Council's decision-making process within the meaning of Regulation No 1049/2001. [3] Following the applicant's confirmatory application concerning access to the undisclosed documents, the Council adopted the contested decision, [4] by which it confirmed its refusal to grant access.

The Council working groups are internal bodies of that institution which prepare the work of the Committee of Permanent Representatives (Coreper) and, subsequently, the ministerial formation with competence of the Council.

The General Court, hearing an action for annulment which it upholds, addresses the question of access to documents relating to legislative procedures from the novel perspective of the relationship between, on the one hand, the principles of publicity and transparency of the legislative procedure, deriving from the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union [5] and, on the other hand, the exception to the disclosure of documents taken from the protection of the decision-making process of an institution, laid down by secondary legislation. . [6] In addition, the Court examines for the first time the conditions for access to documents drawn up by the Council's working groups in the context of a legislative procedure.

*Findings of the Court*

First, the Court rejects the applicant's argument that the exception relating to the protection of the decision-making process provided for in Regulation No 1049/2001, interpreted in the light of the FEU Treaty and the Charter, does not apply to legislative documents.

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1 Under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

2 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

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

4 Decision SGS 21/000067 of the Council of the European Union of 14 January 2021.

5 Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter').

6 Within the meaning of Article 4(3) of Regulation No 1049/2001.

The Court notes that as the principle of openness is of fundamental importance in the European Union legal order, the principles of publicity and transparency are inherent in the legislative procedures of the European Union. [7] Access to legislative documents must therefore be as wide as possible. However, that does not mean that EU primary law provides for an unconditional right of access to legislative documents. In accordance with the FEU Treaty, [8] the right of access to documents of the EU institutions is exercised in accordance with the general principles, limits and conditions laid down by means of regulations. The provisions of the FEU Treaty governing the right of access to documents of the institutions do not exclude legislative documents from its scope.

The Court observes that that conclusion is supported by the legislative context of the right of access to documents. It is apparent from primary law that the principle of openness is not absolute. [9] Furthermore, the Court notes that, in accordance with Regulation No 1049/2001, the EU institutions may refuse access to certain documents of a legislative nature in duly justified cases.

Contrary to the applicant's submissions, the Court finds, first of all, that the continuity of the right of access to documents exists between the Treaty establishing the European Community and the FEU Treaty and concludes that the exception to the obligation to disclose a requested document relating to the protection of the decision-making process of the institution concerned, provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, remained applicable following the entry into force of the FEU Treaty and the Charter. Next, it considers that there is nothing to support the conclusion that the provisions of the FEU Treaty and of the Charter exclude, as a matter of principle, the possibility that access to documents drawn up by the Council's working groups in the context of a legislative procedure may be refused on the ground that their disclosure would seriously undermine the Council's decision-making process. Lastly, it states that although the provisions of the FEU Treaty according to which the Council is to meet in public when considering and voting on a draft legislative act [10] lay down the principle of publication of legislative debates during Council sessions, they do not concern the right of access to documents or the limits and conditions for the exercise of that right.

Secondly, the Court finds that none of the grounds relied on by the Council in the contested decision supports the conclusion that disclosure of the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process concerned.

First of all, as regards the ground based on the allegedly sensitive content of the documents at issue, the Court finds that they in fact contain specific textual comments and amendments which form part of the normal legislative process. Although those documents relate to subjects of some importance, possibly characterised by both political and legal difficulty, and may contain elements resulting from 'difficult negotiations' which might reflect the difficulties which it still had to resolve before reaching an agreement, the Council does not identify any concrete and specific aspect of those documents which is particularly sensitive in the sense that a fundamental interest of the European Union or of the Member States would have been called into question in the event of disclosure. Nor does it explain how access to the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the possibilities of reaching an agreement on the legislative proposal in question.

Next, as regards the preliminary nature of the discussions, within the Council working group, relating to the legislative proposal in question, the Court notes that it does not justify, as such, the application of the exception based on the protection of the decision-making process. That exception makes no distinction according to the state of progress of the discussions, but envisages in general the

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7 Judgment of 22 March 2018, De Capitani v Parliament (T-540/15, EU:T:2018:167, paragraph 81).

8 Article 15(3) TFEU.

9 Article 1 and Article 10(3) TEU and Article 15(1) TFEU.

10 Article 15(2) TFEU.

documents relating to a question where a 'decision has not been taken' by the institution concerned. Since a proposal is, by its nature, intended to be discussed, an applicant for access to legislative documents in the context of an ongoing procedure is fully aware that the information contained therein is intended to be amended throughout the discussions in the course of the preparatory work of the working group until agreement on the whole text is reached. That was the objective pursued by the request for access made by the applicant, who sought to ascertain the positions expressed by the Member States within the Council specifically in order to generate a debate in that regard before that institution established its position in the legislative procedure in question.

Furthermore, the Court finds that the Council has produced no tangible evidence to show that access to the documents at issue would have harmed the Member States' cooperation in good faith. It notes that, since the Member States express, in the context of Council working groups, their respective positions on a given legislative proposal, and accept that their position could evolve, the fact that those elements are then disclosed, on request, is not in itself capable of undermining sincere cooperation. [11] In a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public and if citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. In the present case, there is nothing to suggest that the Council could reasonably expect a risk of external pressure and a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation.

Furthermore, the Court notes that it is only if the institution concerned considers that disclosure of a document would specifically and actually undermine the decision-making process in question that it is then required to ascertain whether an overriding public interest nevertheless justifies disclosure of the document. Similarly, the mere fact that access to certain documents relating to the same legislative procedure has been granted cannot justify the refusal of access to other documents.

Lastly, access to documents drawn up by the Council working groups cannot be limited because of their allegedly 'technical' nature. Whether or not a document is 'technical' is not a relevant criterion for the purposes of the application of the exception based on protection of the decision-making process. The members of Council working groups are given a mandate from the Member States that they represent and, at the time of deliberation on a given legislative proposal, they express the position of their Member State within the Council, when the Council acts in its capacity as co-legislator. The fact that the working groups are not authorised to adopt the Council's definitive position does not mean that their work does not form part of the normal legislative process, or that the documents drawn up are 'technical' in nature.

11 Article 4(3) TFEU.

## II. PROTECTION OF PERSONAL DATA

**Judgment of the Court of Justice (Fifth Chamber), 26 January 2023 Ministerstvo na vatreshnite raboti (Recording of biometric and genetic data by the police), C-205/21**

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Directive (EU) 2016/680 – Article 4(1)(a) to (c) – Principles relating to processing of personal data – Purpose limitation – Data minimisation – Article 6(a) – Clear distinction between personal data of different categories of data subjects – Article 8 – Lawfulness of processing – Article 10 – Transposition – Processing of biometric data and genetic data – Concept of 'processing authorised by Member State law' – Concept of 'strictly necessary' – Discretion – Charter of Fundamental Rights of the European Union – Articles 7, 8, 47, 48 and 52 – Right to effective judicial protection – Presumption of innocence – Limitation – Intentional criminal offence subject to public prosecution – Accused persons – Collection of photographic and dactyloscopic data in order for them to be entered in a record and taking of a biological sample for the purpose of creating a DNA profile – Procedure for enforcement of collection – Systematic nature of the collection

In criminal proceedings for tax fraud instituted by the Bulgarian authorities, V.S. was accused of participation in a criminal organisation, formed with the aim of enrichment, with a view to committing offences in concert on Bulgarian territory. Following that accusation, the Bulgarian police requested V.S. to consent to the collection of her dactyloscopic and photographic data in order for them to be entered in a record and to the taking of a sample for the purpose of creating her DNA profile. V.S. opposed their collection.

Relying on national legislation which provides for the 'creation of a police record' for persons accused of an intentional criminal offence subject to public prosecution, the police authorities requested the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) to authorise enforcement of the collection of V.S.'s genetic and biometric data. Only copies of the order accusing her and of the declaration in which she refused to give her consent to the collection of her data accompanied the police authorities' application.

That court had doubts as to whether the Bulgarian legislation applicable to such 'creation of a police record' is compatible with Directive 2016/680, [12] read in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), and therefore made a reference to the Court of Justice for a preliminary ruling.

In its judgment, the Court explains, first of all, the conditions under which the processing of biometric and genetic data by the police authorities may be regarded as authorised by Member State law, within the meaning of Directive 2016/680. It rules, next, on the implementation of the requirement, set out in that directive, concerning the processing of data of a category of persons with regard to whom there are serious grounds for believing that they are involved in a criminal offence, and on observance of the right to effective judicial protection and of the principle of the presumption of innocence where the national court having jurisdiction is permitted by national legislation to authorise the compulsory collection of those data, regarded as 'sensitive' by the EU legislature. It

12 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

addresses, finally, the question whether national legislation providing for the systematic collection of those data is compatible with the provisions of Directive 2016/680 that relate to their processing, having regard to the principles applicable thereto.

*Findings of the Court*

First of all, the Court holds that Directive 2016/680, read in the light of the Charter, [13] must be must be interpreted as meaning that the processing of biometric and genetic data by the police authorities with a view to their investigative activities, for purposes of combating crime and maintaining law and order, is authorised by Member State law provided that the law of the Member State contains a sufficiently clear and precise legal basis to authorise that processing. The fact that the national legislative act containing such a legal basis refers, furthermore, to the General Data Protection Regulation, [14] and not to Directive 2016/680, is not capable, in itself, of calling the existence of such authorisation into question, provided that it is apparent, in a sufficiently clear, precise and unequivocal manner, from the interpretation of the set of applicable provisions of national law that the processing of biometric and genetic data at issue falls within the scope of that directive, and not of the GDPR.

In that context, in the light of the fact that the relevant national legislation referred to the provisions of the GDPR which govern the processing of sensitive data, while reproducing the content of the provisions of Directive 2016/680 which relate to the processing of the same data, [15] the Court observes that those provisions are not equivalent. Whereas processing of sensitive data by the competent authorities for inter alia the purposes, covered by Directive 2016/680, of the prevention and detection of criminal offences is capable of being allowed only where strictly necessary, and must be subject to appropriate safeguards and be provided for by EU or Member State law, the GDPR lays down a general prohibition of the processing of those data, coupled with a list of exceptions. Whilst the national legislature may provide, in the same legislative instrument, for the processing of personal data for purposes covered by Directive 2016/680 and for other purposes covered by the GDPR, it is obliged to make sure that there is no ambiguity as to the applicability of one or other of those two EU acts to the collection of sensitive data.

In addition, with regard to a possible incorrect transposition of Directive 2016/680, raised by the referring court, the Court points out that that directive does not require the national measures which authorise processing of data falling within its scope to contain a reference to the directive. It states that, where the national legislature provides for the processing by competent authorities of biometric and genetic data which are capable of falling either within the scope of that directive or within the scope of the GDPR, it may, for reasons of clarity and precision, refer explicitly, on the one hand, to the provisions of national law transposing that directive and, on the other, to the GDPR, but is not obliged to mention that directive. However, in the event of an apparent conflict between the national provisions authorising the data processing at issue and those seeming to preclude it, the national court must give the provisions an interpretation which safeguards the effectiveness of Directive 2016/680.

Next, the Court rules that Directive 2016/680 [16] and the Charter [17] do not preclude national legislation which provides that, if the person accused of an intentional offence subject to public prosecution

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13 Article 10(a) of Directive 2016/680, read in the light of Article 52 of the Charter.

14 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

15 Article 9 of the GDPR and Article 10 of Directive 2016/680 respectively.

16 Article 6(a) of Directive 2016/680.

17 Articles 47 and 48 of the Charter, enshrining respectively the right to effective judicial protection and the principle of the presumption of innocence.

refuses to cooperate voluntarily in the collection of the biometric and genetic data concerning him or her in order for them to be entered in a record, the criminal court having jurisdiction must authorise a measure enforcing their collection, without having the power to assess whether there are serious grounds for believing that the person concerned has committed the offence of which he or she is accused, provided that national law subsequently guarantees effective judicial review of the conditions for that accusation, from which the authorisation to collect those data arises.

In that regard, the Court notes that, pursuant to Directive 2016/680, [18] the Member States must ensure that a clear distinction is made between the data of the different categories of data subjects in such a way that they are not subject without distinction – whatever the category to which they belong – to same degree of interference with their fundamental right to the protection of their personal data. However, that obligation is not absolute. Furthermore, in so far as that directive refers to the category of persons with regard to whom there are serious grounds for believing that they have committed a criminal offence, the Court states that the existence of sufficient items of evidence pointing to a person's guilt constitutes, in principle, a serious ground for believing that he or she has committed the offence at issue. Thus, Directive 2016/680 does not preclude national legislation which provides for the compulsory collection of data of persons in respect of whom sufficient evidence is gathered that they are guilty of an intentional offence subject to public prosecution and who have been accused for that reason.

So far as concerns observance of the right to effective judicial protection, where the national court having jurisdiction, with a view to authorising a measure enforcing the collection of sensitive data of an accused person, cannot review, on the merits, the conditions for his or her accusation, the Court points out, in particular, that it may prove justified, during the preliminary stage of the criminal procedure, to shield temporarily from judicial review the assessment of the evidence on which accusation of the person concerned is founded. Such review, at this stage, might impede the conduct of the criminal investigation in the course of which those data are being collected and excessively limit the investigators' ability to clear up other offences on the basis of a comparison of those data with data gathered during other investigations. That limitation of effective judicial protection is therefore not disproportionate, provided that national law subsequently guarantees effective judicial review.

As regards observance, by a judicial decision authorising the collection of the data at issue, of the right to be presumed innocent, the Court observes, first, that, in so far as, in the present instance, the collection of such data is limited to the category of persons whose criminal liability has not yet been established, their collection cannot be regarded as being such as to reflect the feeling of the authorities that those persons are guilty. Second, the fact that the court which will have to rule on the guilt of the person concerned cannot assess, at this stage of the criminal procedure, whether the evidence on which the accusation of that person is based is sufficient constitutes a guarantee of observance of his or her right to be presumed innocent.

Finally, the Court concludes that Directive 2016/680 [19] precludes national legislation which provides for the systematic collection of biometric and genetic data of any person accused of an intentional offence subject to public prosecution in order for them to be entered in a record, without laying down an obligation on the competent authority to verify whether and demonstrate that, first, their collection is strictly necessary for achieving the specific objectives pursued and, second, those objectives cannot be achieved by measures constituting a less serious interference with the rights and freedoms of the person concerned.

In that regard, the Court points out that Directive 2016/680 is intended to ensure, inter alia, enhanced protection with regard to the processing of sensitive data – which include biometric and genetic data – since it is liable to create significant risks to fundamental rights and freedoms. The requirement set

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18 Article 6 of Directive 2016/680.

19 Article 10 of Directive 2016/680, read in conjunction with Article 4(1)(a) to (c) and Article 8(1) and (2) thereof.

out therein, that that processing is allowed 'only where strictly necessary', must be interpreted as establishing strengthened conditions for lawful processing of such sensitive data. [20] Furthermore, the scope of that requirement must also be determined in the light of the principles relating to data processing, such as purpose limitation and data minimisation.

In that context, national legislation which provides for the systematic collection of the biometric and genetic data of any person accused of an intentional offence subject to public prosecution in order for them to be entered in a record is, in principle, contrary to that requirement. It is liable to lead, in an indiscriminate and generalised manner, to collection of the data of most accused persons since the concept of 'intentional criminal offence subject to public prosecution' is particularly general and is liable to apply to a large number of criminal offences, irrespective of their nature and gravity, their particular circumstances, any link between them and other procedures in progress, the criminal record of the person concerned or his or her individual profile.

## III. JUDICIAL COOPERATION IN CRIMINAL MATTERS: MUTUAL RECOGNITION OF CRIMINAL CONVICTIONS

### Judgment of the Court of Justice (Second Chamber), 12 January 2023, MV (Formation of a cumulative sentence), C-583/22 PPU

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Police and judicial cooperation in criminal matters – Framework Decision 2008/675/JHA – Article 3(1) – Principle of assimilation of earlier convictions handed down in another Member State – Obligation to ensure that the effects attached to those convictions are equivalent to those attached to previous national convictions – National rules concerning subsequent formation of a cumulative sentence – Multiple offences – Determination of an aggregate sentence – Maximum of 15 years for non-life custodial sentences – Article 3(5) – Exception – Offence committed before the handing down or execution of sentences in another Member State

On 10 October 2003, MV, a French national, abducted a female student from a university campus in Germany and raped her. Although he had never previously been convicted of a criminal offence in Germany, MV had, however, been sentenced on several occasions in France, in particular to a period of 15 years' imprisonment. All those convictions were handed down by French courts after the said date and related to acts committed before October 2003.

After being imprisoned in France for 17 years and 9 months, MV was surrendered to the German authorities in July 2021. In February 2022, the Landgericht Freiburg im Breisgau (Regional Court, Freiburg im Breisgau, Germany) tried MV for the offences committed in Germany in October 2003, convicted him of aggravated rape and sentenced him to six years' imprisonment. That court held that the sentence 'actually commensurate' with the offences committed by MV in Germany was seven years' imprisonment. Nevertheless, since it was not possible to form a subsequent cumulative sentence which included the sentences imposed in France, that court reduced that sentence by one year 'on a compensatory basis'.

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20 Compared with the conditions following from Article 4(1)(b) and (c) and Article 8(1) of Directive 2016/680.

The referring court, hearing an appeal on a point of law against that judgment, is uncertain, in essence, as to whether it is compatible with the provisions of Framework Decision 2008/675 [21] which lay down, first, the principle of equal treatment of criminal convictions handed down in other Member States [22] and, secondly, the exception to that principle. [23]

In that context, that court states that the convictions handed down in France against MV could in principle be cumulated if they were treated in the same way as sentences handed down in Germany. However, in the context of the formation of a subsequent cumulative sentence, account must be taken of the maximum custodial sentence of 15 years, in accordance with the rules of German law. Were there to be equal treatment of convictions handed down in France against MV, that maximum would already have been reached with the custodial sentence of 15 years imposed on the person concerned in that Member State. Consequently, the sentence imposed on him in Germany could not, in practice, be executed.

The referring court therefore asks the Court of Justice whether the abovementioned principle is applicable in the present case. If that principle was not applicable, the referring court also seeks to ascertain whether, when determining the penalty imposed for an offence committed on national territory, the disadvantage resulting from the impossibility of imposing a subsequent cumulative sentence must necessarily be specifically demonstrated and justified.

In the context of the urgent preliminary ruling procedure, the Court defines the scope of the exception to the principle of equal treatment of criminal convictions handed down in other Member States and the obligations of the Member States when implementing that principle.

*Findings of the Court*

In the first place, the Court states that, under Framework Decision 2008/675, [24] a Member State is not required, in criminal proceedings brought against a person, to attach to previous convictions handed down in another Member State, against that person and in respect of different facts, effects equivalent to those attached to previous national convictions in accordance with the rules of national law relating to the formation of a cumulative sentence where, first, the offence giving rise to those previous proceedings was committed before the previous convictions were handed down and, secondly, taking account of the previous convictions in accordance with those rules would prevent the national court hearing the proceedings from imposing a sentence that could be executed against the person concerned.

In reaching that conclusion, the Court points out, first of all, that that framework decision [25] requires the Member States, in principle, to take into account, in criminal proceedings brought against a person, previous convictions handed down in another Member State against that person in respect of different facts. However, under the exception to that principle, [26] if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down

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21 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32).

22 This principle is set out in Article 3(1) of Framework Decision 2008/675, according to which 'each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law'.

23 That exception is provided for in the first subparagraph of Article 3(5) of Framework Decision 2008/675, according to which 'if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings'.

24 This concerns, in particular, Article 3(1) and (5) of Framework Decision 2008/675.

25 See Article 3(1) of Framework Decision 2008/675.

26 See Article 3(5) of Framework Decision 2008/675.

or fully executed, Member States are not obliged to apply their national sentencing rules where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

The Court then states that, since the time-related condition laid down by that exception is satisfied in the circumstances of the dispute in the main proceedings, those circumstances may fall within that exception. In that regard, the Court states, first, that the rules of German law relating to the cumulation of sentences constitute 'national rules on imposing sentences' and, secondly, that the application of those rules with regard to previous convictions handed down in France would prevent the national court from handing down a sentence that could be executed. Accordingly, in the present case, attaching to previous convictions handed down in France effects equivalent to those attached to previous national convictions would 'limit the judge in imposing a sentence in the new proceedings'. Consequently, that exception is applicable in the circumstances of the present case and has the effect of releasing the national court from the obligation to attach to previous convictions handed down in France effects equivalent to those attaching to national convictions in accordance with the rules on the formation of cumulative sentences.

In the second place, the Court ruled that the taking into account of previous convictions handed down in another Member State, within the meaning of Framework Decision 2008/675, [27] does not require the national court to establish and give specific reasons for the disadvantage resulting from the impossibility of imposing a subsequent cumulative sentence which is laid down for earlier national convictions.

The Court points out in that regard that, in any criminal proceedings covered by the abovementioned exception, the Member States must ensure that 'their courts can otherwise take into account previous convictions handed down in other Member States'. However, no obligation can be inferred from the provision laying down that exception as regards the specific substantive or procedural arrangements which should be observed, in that regard, by the national courts. Thus, it cannot be inferred from that provision that the court ruling on the substance of the case is under an obligation, in the circumstances of the case, to calculate the disadvantage resulting from the fact that it is impossible to apply the national rules on cumulative sentences laid down for national convictions and subsequently to grant a reduction in sentence based on that calculation.

## IV. COMPETITION

### 1. ABUSE OF A DOMINANT POSITION (ARTICLE 102 TFEU)

**Judgment of the Court of Justice (Fifth Chamber), 19 January 2023, Unilever Italia Mkt. Operations, C-680/20**

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Article 102 TFEU – Dominant position – Imputation, to the producer, of actions of its distributors – Existence of contractual links between the producer and the

27 The Court refers to the second subparagraph of Article 3(5) of Framework Decision 2008/675, which provides that 'however, the Member States shall ensure that in such cases their courts can otherwise take into account previous convictions handed down in other Member States.'"

distributors – Concept of 'economic unit' – Scope – Abuse – Exclusivity clause – Need to demonstrate the effects on the market

By decision of 31 October 2017, the Italian Competition and Markets Authority ('the AGCM') [28] found that Unilever Italia Mkt. Operations Srl ('Unilever') had abused its dominant position on the Italian market for the sale of individually packaged ice cream intended for consumption 'outside', that is to say, away from consumers' homes, at various sales outlets.

The abuse alleged against Unilever resulted from conduct materially committed not by that company, but by independent distributors of its products who had imposed exclusivity clauses on the operators of those sale outlets. In that regard, the AGCM considered, inter alia, that the practices which were the subject of its investigation had precluded, or at least limited, the possibility for competing operators to engage in competition on the merits of their products.

In that context, it did not find that it was compulsory to analyse the economic studies produced by Unilever in order to demonstrate that the practices at issue did not have an exclusionary effect against its equally efficient competitors, on the ground that those studies were irrelevant where there were exclusivity clauses, since the use of such clauses by an undertaking in a dominant position was sufficient to establish abusive use of that position.

Consequently, the AGCM imposed a fine of EUR 60 668 580 on Unilever for abuse of its dominant position in breach of Article 102 TFEU.

The action brought by Unilever against that decision was dismissed in its entirety by the court of first instance.

Hearing an appeal, the Consiglio di Stato (Council of State, Italy) referred questions to the Court of Justice for a preliminary ruling on the interpretation and application of EU competition law in the light of the AGCM's decision.

By its judgment, the Court sets out the detailed rules for the implementation of the prohibition of abuse of a dominant position referred to in Article 102 TFEU in relation to a dominant undertaking whose distribution network is organised exclusively on a contractual basis and the Court clarifies, in that context, the burden of proof borne by the national competition authority.

*Findings of the Court*

First of all, the Court holds that abusive conduct by distributors forming part of the distribution network of a producer in a dominant position, such as Unilever, may be imputed to that producer under Article 102 TFEU if it is established that that conduct was not adopted independently by its distributors, but forms part of a policy decided unilaterally by that producer and implemented through those distributors.

In such a situation, the distributors and, consequently, the distribution network which those distributors form with the dominant undertaking must be regarded as merely an instrument of territorial implementation of the commercial policy of that undertaking and, on that basis, as being the instrument by which, as the case may be, the exclusionary practice at issue was implemented.

That applies in particular where, as in the present case, the distributors of a producer in a dominant position are required to have operators of sales outlets sign standard contracts which are supplied by that producer and contain exclusivity clauses for the benefit of its products.

Next, the Court answers the question of whether, for the purposes of the application of Article 102 TFEU, in a case such as that at issue in the main proceedings, the competent competition authority is required to establish that exclusivity clauses in distribution contracts have the effect of excluding

28 Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy).

from the market competitors that are as efficient as the dominant undertaking and whether that authority is required to examine in detail the economic analyses produced by that undertaking, in particular where they are based on 'as efficient competitor test'.

In that regard, the Court states that abuse of a dominant position may, inter alia, be established where the conduct complained of has produced exclusionary effects in respect of competitors that are as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate or quality, or where that conduct is based on the use of means other than those which come under the scope of 'normal' competition, that is to say, on the basis of the merits. It is, in general, for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question, which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position.

It is true that, in order to establish that conduct is abusive, a competition authority does not necessarily have to demonstrate that that conduct actually produced anti-competitive effects. Accordingly, a competition authority may find that there has been an infringement of Article 102 TFEU by establishing that, during the period in which the conduct in question was implemented, that conduct was, in the circumstances of the case, capable of restricting competition on the merits despite its lack of effect. However, that demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice.

Although a competition authority may rely on guidance from economic sciences, confirmed by empirical or behavioural studies, in order to assess whether an undertaking's conduct is capable of restricting competition, other factors specific to the circumstances of the case, such as the extent of that conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the undertaking in a dominant position is, at least, for part of the demand, an inevitable partner, must also be taken into account in order to determine whether, in the light of that guidance, the conduct at issue must be regarded as having been capable of producing exclusionary effects on the market concerned.

In that context, with regard more specifically to the use of exclusivity clauses, it follows from the Court's case-law that clauses by which contracting parties undertake to purchase all or a considerable part of their requirements from an undertaking in a dominant position, even if not accompanied by rebates, constitute, by their very nature, an exploitation of a dominant position and that the same is true of the loyalty rebates granted by such an undertaking.

In the judgment in Intel, [29] however, the Court clarified that case-law by stating, in the first place, that where an undertaking in a dominant position submits, during the administrative procedure, that its conduct was not capable of producing the alleged exclusionary effects and puts forward evidence in support of its claims, the competition authority is required, inter alia, to assess whether there is a strategy aimed at excluding competitors that are at least as efficient as the dominant undertaking.

In the second place, the Court added that the analysis of the capacity to exclude is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from a system of rebates, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out only after an analysis of the intrinsic capacity of that practice to exclude competitors that are at least as efficient as the dominant undertaking.

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29 Judgment of 6 September 2017, Intel v Commission (C-413/14 P, EU:C:2017:632, paragraph 138, 'the judgment in Intel').

That clarification in the judgment in Intel in relation to rebate schemes must be understood as also being applicable to exclusivity clauses.

It follows that, first, where a competition authority suspects that an undertaking has infringed Article 102 TFEU by using such clauses, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market.

Secondly, the competition authority which initiated that procedure is also required to assess, specifically, the ability of those clauses to restrict competition where, during the administrative procedure, the undertaking which is under suspicion maintains that there are justifications for its conduct.

In any event, the submission, in the course of the procedure, of evidence capable of demonstrating the inability to produce restrictive effects gives rise to an obligation for that competition authority to examine that evidence.

Consequently, where the undertaking in a dominant position has produced an economic study in order to demonstrate that the practice of which it is accused is not capable of excluding competitors, the competent competition authority cannot exclude the relevance of that study without setting out the reasons why it considers that the study does not contribute to demonstrating that the practices in question were incapable of undermining effective competition on the relevant market and, consequently, without giving that undertaking the opportunity to determine the evidence which could be substituted for that study.

Since the referring court expressly referred, in its reference for a preliminary ruling, to the 'as efficient competitor' test, the Court states, lastly, that such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects. Consequently, the competition authorities cannot be under a legal obligation to use that test in order to find that a practice is abusive. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results.

## 2. STATE AID

**Judgment of the Court of Justice (Grand Chamber), 12 January 2023, DOBELES HES, C-702/20 and C-17/21**

Link to the full text of the judgment

Reference for a preliminary ruling – State aid – Article 107(1) TFEU – National legislation imposing an obligation on the public operator to purchase from renewable energy producers at a price higher than the market price – Failure to pay a portion of the aid concerned – Application for compensation submitted by those producers to a public authority distinct from that which is, in principle, required, under that national legislation, to pay that aid and whose budget is intended solely to ensure its own operation – New aid – Notification requirement – De minimis aid – Regulation (EU) No 1407/2013 – Article 5(2) – Cumulation – Taking into account the amounts of aid already received during the reference period on the basis of that national legislation

The companies 'DOBELES HES' SIA and 'GM' SIA ('the producers concerned') operate hydroelectric power plants in Latvia and generate electricity from renewable energy sources.

Until 7 June 2005, a provision of the Latvian Law on Energy granted electricity producers, subject to certain conditions, the right to sell their surplus electricity production to the approved electricity

distribution undertaking at a preferential price corresponding to twice the average electricity sale tariff, as determined by the national regulatory authority. From the entry into force, on 8 June 2005, of new provisions governing the sale by electricity producers of surplus production at a preferential tariff, a provision allowed producers of electricity from renewable energy sources that had already commenced their activity on that date to continue to benefit from the previous scheme.

The regulatory authority interpreted that provision as blocking for those producers the applicable preferential tariff at its value on 7 June 2005, so that it ceased to update it. Thus, from that date, the two producers concerned sold their surplus production at a price corresponding to twice the average tariff for the sale of electricity then in force. However, by decision of 20 January 2010, the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) held that the regulatory authority's interpretation of the provision at issue was incorrect, in so far as the latter had taken the view that the term 'price' had to be understood as a fixed price and not a price-fixing mechanism, with the result that it was also wrong to consider itself no longer competent, from 8 June 2005, to fix the average electricity sale tariff.

In those circumstances, each of the producers concerned submitted to the regulatory authority a claim for compensation for the losses sustained as a result of the failure to update that average tariff as from 8 June 2005. In 2011, when the regulatory authority refused to grant their respective claims, the producers concerned applied to the administrative judicature which, by judgments of 31 May 2019 and 10 July 2019, upheld their respective claims in part, while making the payment of the sums charged to the regulatory authority, as payment of State aid, subject to the adoption of a decision of the European Commission authorising such aid.

The regulatory authority brought an appeal on a point of law against those judgments before the Augstākā tiesa (Supreme Court, Latvia). Uncertain, in particular, as to the classification of the compensation at issue in the light of the concept of 'State aid' and of the requirements to be satisfied, where appropriate, in order to enable payment of the compensation in the light of the Commission's prerogatives in the field of State aid, the Supreme Court decided to stay the proceedings and, in turn, to refer to the Court of Justice for a preliminary ruling a series of questions on that subject, worded identically in both cases.

By its Grand Chamber judgment, the Court specifies the conditions under which a national measure allowing producers of electricity from renewable energy sources to receive a higher tariff may be classified as 'State aid' within the meaning of Article 107(1) TFEU. Moreover, if the measure in question receives that classification, although it has not been duly notified to the Commission, the Court nevertheless accepts that the national court may grant a request for payment of a sum in respect of such a support measure, while making the payment subject to the requirement of prior notification of the aid to the Commission and to the Commission's consent in that regard.

*Findings of the Court*

In the first place, the Court provides the interpretative guidance sought by the referring court in order to enable it to determine whether the national measure giving rise to the cases before it may be classified as 'State aid' within the meaning of Article 107(1) TFEU.

In that regard, the Court examines, first of all, whether national legislation which obliges the approved electricity distribution undertaking to purchase electricity generated from renewable energy sources at a price higher than the market price and which provides that the resulting additional costs are financed by a compulsory surcharge borne by end consumers constitutes intervention 'through State resources' within the meaning of that provision. In the present case, the Court points out that funds resulting from a surcharge, the financial burden of which is borne in practice by a defined category of persons, can be regarded as being 'State resources' only where the surcharge in question is compulsory under national law. Therefore, funds financed by a levy or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation constitute 'State resources' within the meaning of that provision. However, the fact that sums constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources'. Consequently, subject to the verifications which it is for the referring court to carry out, the funds by means of which a tariff advantage is granted, pursuant to the Latvian legislation concerned, to producers of electricity from renewable

energy sources are 'State resources', within the meaning of Article 107(1) TFEU, in the light of the two alternative criteria for that concept.

In addition, the Court states that the date of complete liberalisation of the electricity market in Latvia is irrelevant for the purpose of determining whether the aid provided by the public operator in that Member State by purchasing electricity generated from renewable energy sources at a price higher than the market price must be classified as State aid.

Furthermore, where national legislation has established 'State aid' within the meaning of that provision, the payment of a sum claimed before the courts in accordance with that legislation also constitutes such aid. According to the Court, it is irrelevant, for the purpose of determining whether sums correspond to 'State aid', whether actions seeking payment of those sums are classified as 'claims for compensation' or as 'claims for damages' under national law.

Finally, the Court observes that, although the national court may, where appropriate, deliver a judgment from which it follows that one of the parties must, in accordance with national law, receive a sum corresponding to State aid, that does not mean that, in that case, it itself grants that aid. The establishment as such of State aid cannot result from a judicial decision since it entails a decision as to the appropriate course of action which falls outside the scope of a court's powers and obligations. The Court thus concludes that, where national legislation establishing a statutory right to a higher payment for electricity generated from renewable energy sources constitutes 'State aid', within the meaning of Article 107(1) TFEU, legal proceedings seeking full entitlement to that right must be regarded as requests for payment of the portion of that State aid not received, and not as requests for the grant by the court seised of a separate State aid.

In the second place, the Court provides clarification on the application of the criteria laid down by Regulation No 1407/2013 in relation to de minimis aid, [30] which is not subject to the notification obligation laid down in Article 108(3) TFEU. In that regard, the Court considers that compliance with the de minimis threshold laid down in Article 3(2) of that regulation must be assessed in the light of the amount of aid claimed under the relevant national legislation cumulated with the amount of the payments already received during the reference period under that legislation.

In the third place, the Court rules on the relationship between the respective prerogatives of the national court and the Commission, in the event that the sums sought by the producers concerned in the cases in the main proceedings correspond to State aid.

In the present case, in so far as the aid in question does not correspond to any of the categories of existing aid provided for by EU law, [31] subject to the verifications which it is for the referring court to carry out, the Court concludes that the support in question, including the portion thereof whose payment is claimed subsequently, must be classified as 'new aid'. [32]

Thus placing itself, in the light of the foregoing finding, in a situation where the national court is seised of a request seeking the payment of aid which is unlawful, since it was not notified to the Commission, the Court points out that the task of reviewing State aid which EU law confers on that court must, in principle, lead the latter to reject such a request. Nevertheless, the Court accepts that a decision of the national court ordering the defendant to pay the aid in question subject to the condition that that aid must first be notified to the Commission by the national authorities concerned and that that institution gives its consent, or is deemed to have given it, is also likely to prevent new

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30 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 [TFEU] to de minimis aid (OJ 2013 L 352, p. 1).

31 Article 1(b) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

32 Within the meaning of Article 1(c) of Regulation 2015/1589.

aid from being paid in breach of Article 108(3) TFEU and Article 2(1) and Article 3 of Regulation 2015/1589.

## 3. ACTIONS FOR COMPENSATION FOR THE HARM CAUSED BY INFRINGEMENTS OF COMPETITION RULES

**Judgment of the Court of Justice (Second Chamber), 12 January 2023, RegioJet, C-57/21**

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Abuse of a dominant position – Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – Directive 2014/104/EU – Articles 5 and 6 – Disclosure of evidence – Evidence in a competition authority's file – Proceedings relating to an infringement of competition rules pending before the European Commission – National proceedings relating to an action for damages with regard to the same infringement – Conditions for the disclosure of evidence

RegioJet, a rail passenger carrier on the Prague-Ostrava route, brought an action in 2015 for damages before the Městský soud v Praze (Prague City Court, Czech Republic) against České dráhy, the Czech national railway carrier, seeking compensation for damage suffered as a result of infringements of competition law allegedly committed by České dráhy.

The Czech competition authority had in 2012 already initiated administrative proceedings concerning a possible abuse of a dominant position by České dráhy, which were stayed in 2016 after the European Commission initiated proceedings concerning the same conduct.

As part of its action for damages, RegioJet submitted a request to the Prague City Court for the disclosure of several documents which it assumed to be in the possession of České dráhy. However, the Czech competition authority stated that the requested documents that were available to it in the context of the administrative proceedings, in the same way as the other documents sought, that together with the first documents constituted a comprehensive set, could not be disclosed until those proceedings had been definitively closed.

Nevertheless, after questioning the Commission on that issue, the Prague City Court granted the request for the disclosure of documents and ordered České dráhy to place in the file documents that contained information specifically prepared by České dráhy for the purpose of the proceedings before the Czech competition authority, and information kept outside the context of those proceedings. That court decided in addition to stay the substantive proceedings on the action for damages until the closure of the proceedings initiated by the Commission.

On appeal, the decision ordering the disclosure of the documents was upheld by the Vrchní soud v Praze (High Court, Prague, Czech Republic), which, in order to ensure the protection of the evidence disclosed, placed it under sequestration.

Called upon to rule, as a court seised of a point of law, on the lawfulness of the decision of the Prague High Court, the Nejvyšší soud (Supreme Court, Czech Republic) decided to refer questions to the Court of Justice on the interpretation of Directive 2014/104 on compensation for the victims of

anticompetitive practices, [33] Articles 5 and 6 of which lay down rules on the disclosure of evidence requested for the purpose of an action for damages under national law for infringements of the competition law provisions of the Member States and the European Union. [34]

In interpreting Articles 5 and 6 of Directive 2014/104, the Court provides clarification as to the scope of the powers of national courts in the context of a request for the disclosure of evidence for the purpose of an action for damages for infringements of competition law and on the scope of the protection of such evidence under Directive 2014/104, where that evidence falls under administrative proceedings in the field of competition that have not yet been closed.

*Findings of the Court*

As a preliminary point, the Court observes that Directive 2014/104 explicitly states the conditions for the temporal application of the provisions which it lays down, depending on whether or not they are substantive provisions under EU law.

In the present case, the Court observes that the power to order the disclosure of relevant evidence held by the defendant or a third party, under the conditions laid down in Articles 5 and 6 of Directive 2014/104, relates only to the procedural measures applicable before the national courts and does not directly affect the legal situation of the parties.

In those circumstances, first, Articles 5 and 6 of Directive 2014/104 are not among the substantive provisions of that directive, within the meaning of Article 22(1) thereof, and therefore number among the other provisions covered by Article 22(2) of that directive, which makes them applicable to actions brought after 26 December 2014. Second, since the Czech legislature decided that the national provisions intended to transpose the procedural provisions of Directive 2014/104 apply, directly and unconditionally, also to actions brought before the date of its transposition into domestic law but after 26 December 2014, it follows that Articles 5 and 6 of that directive are applicable to the action being considered by the referring court since that action was brought in 2015.

As to the substance, the Court observes, as a preliminary point, that when national courts decide disputes relating to compensation to victims of anticompetitive conduct, they have a role that complements that of the competition authorities of the Member States. In adopting Directive 2014/104, the EU legislature in fact proceeded from the consideration that the enforcement of the EU competition rules by the public authorities (public enforcement) and actions for damages for infringement of those rules in the private sphere (private enforcement) are required to interact in a coherent manner, including in relation to the arrangements for access to documents held by competition authorities.

As regards actions for damages for infringement of the competition rules, the provisions applicable to the disclosure of documents set out in Articles 5 to 8 of Directive 2014/104 reflect a balance between the effectiveness of actions pursued by the competition authorities, and the effectiveness of actions for compensation brought by persons who consider that they have suffered injury as a result of anticompetitive practices. In addition, while Directive 2014/104, given the asymmetry of information which often characterises litigation on actions for damages to compensate the injury suffered as a result of infringements of competition law, seeks to improve access to evidence for the victims of anticompetitive conduct, it also clearly defines that access.

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33 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).

34 Article 5 of that directive sets out the rules which together form a general body of rules on the disclosure of evidence requested for the purpose of an action for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. In addition to that provision, Article 6 of that directive lays down specific rules on the disclosure of evidence contained in the files of the authorities responsible for implementing the competition rules.

In the light of those explanations, the Court examines, in the first place, the question referred for a preliminary ruling relating to whether a national court which is deliberating on an action for damages for an infringement of competition law may order the disclosure of evidence at the same time as it stays the judicial proceedings on account of administrative proceedings conducted by the Commission which have not yet been closed.

In that regard, the Court states that it is true that Article 16(1) of Regulation No 1/2003 [35] requires national courts to refrain from giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated and, to that effect, to assess whether it is necessary to stay the proceedings. However, it is clear from a reading of the provisions of Directive 2014/104 as a whole that that directive does not require the national courts to stay proceedings brought before them concerning actions for damages for infringements of the competition rules owing to the fact that the Commission has initiated proceedings in respect of the same infringements.

On that point, the Court of Justice states that when a court orders the disclosure of evidence by the parties or third parties in an action for damages which has been suspended as a result of the initiation of proceedings by the Commission, that court is not in principle taking a decision which may conflict with the decision contemplated by the Commission.

Nevertheless, the national court must limit the disclosure of evidence to that which is strictly relevant, proportionate and necessary, while ensuring that such disclosure does not unduly interfere with the ongoing investigation carried out by the Commission. To that end, it must carry out a thorough examination of the relevance of the evidence requested, the link between that evidence and the claim for damages submitted, whether that evidence is sufficiently precise and as regards its proportionality. In that context, the national court must also take account of whether or not the proceedings relating to the action for damages have been stayed.

In the second place, the Court answers the question referred for a preliminary ruling that relates to whether a stay of administrative proceedings initiated by a national competition authority on account of the Commission opening proceedings in respect of the same circumstances may be equated to a means of closing the proceedings 'otherwise', within the meaning of Article 6(5) of Directive 2014/104, which permits the national court to order the disclosure of documents that are part of those proceedings, as referred to in that provision. [36]

In that regard, the Court observes that when Directive 2014/104 refers to the closure of proceedings by the adoption of a decision or 'otherwise', it means measures whereby a national competition authority decides, in the light of the information gathered in the course of the proceedings, that it is possible or even necessary to make a determination and close them. By contrast, a stay of the national administrative proceedings until the Commission has closed the investigation in the case in question constitutes merely an interim measure which cannot be equated to a closing of those proceedings.

In the third place, the Court states that national legislation that temporarily limits the disclosure of all information submitted in the course of administrative proceedings in the area of competition is not compliant with Article 6(5)(a) and (9) of Directive 2014/104.

It is unambiguously clear from the wording of Article 6(5) of Directive 2014/104, read in the light of recital 25 thereof, that the temporary protection granted under that provision does not concern all

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

36 Article 6(5) of Directive 2014/104 allows national courts, after the closure of administrative proceedings initiated by a competition authority, to order the disclosure of information prepared by a natural or legal person specifically for those proceedings, information that the competition authority has drawn up and sent to the parties in the course of those proceedings and settlement submissions that have been withdrawn.

information submitted to a competition authority, but only information specifically prepared for the purpose of proceedings initiated by that authority.

That finding is confirmed by a systemic interpretation of Directive 2014/104. In that regard, the Court states in particular that allowing Member States to extend the scope of the information whose disclosure can be ordered only after the closure of the proceedings, within the meaning of Article 6(5) of that directive, would lead to a more limited disclosure of evidence, contrary to the logic of Article 5(8) of that directive, which explicitly permits Member States to adopt rules leading to wider disclosure of evidence.

In the fourth and last place, the Court finds that Directive 2014/104 does not preclude a national court, pursuant to a procedural instrument of national law, from ordering the disclosure of evidence solely in order to place it under sequestration and not disclose it until the court has ascertained whether the release of that information should await the closure of ongoing administrative proceedings. Provided that it complies with the requirements arising from the principle of proportionality, such a procedural instrument is capable of contributing to the effectiveness of claims for damages for infringement of the competition rules, while maintaining the protection to be afforded to certain kinds of evidence under Article 6(5) of Directive 2014/104.

## V. APPROXIMATION OF LAWS: EU TRADE MARK

**Judgment of the General Court (Fifth Chamber), 11 January 2023, Hecht Pharma v EUIPO – Gufic BioSciences (Gufic), T-346/21**

Link to the judgment as published in extract form

EU trade mark – Revocation proceedings – EU word mark Gufic – Genuine use of the mark – Article 58(1)(a) of Regulation (EU) 2017/1001 – Public and outward use – Extent of use – Nature and form of use – Use in connection with the goods in respect of which the mark was registered

Gufic BioSciences Ltd is the proprietor of the EU word mark Gufic registered in Classes 3, 5 and 29 in respect of cosmeceuticals, medicines and medical products and in respect of food supplements. [37]

On 9 October 2017, Hecht Pharma GmbH filed an application for revocation of the mark for all the goods with the European Union Intellectual Property Office (EUIPO). [38] The Cancellation Division revoked the mark in its entirety, on the ground that extent of use had not been demonstrated sufficiently.

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37 More specifically, the word mark Gufic covered goods in Classes 3 'Incense; cosmeceuticals; perfumery, sanitary preparations being cosmetics', 5 'Insect repellent incense; medicines; medical products for internal use or application to the human body, with no pharmacological, immunological or metabolic effects, the aforesaid products included in class 5; dietetic preparations adapted for medical use; food supplements for medical and non-medical purposes' and 29 'Food supplements, not for medical purposes, with a base of proteins' within the meaning of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

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

The Board of Appeal of EUIPO upheld the appeal against the Cancellation Division's decision in part in relation to 'medicines' in Class 5 and revoked the contested mark for the remaining goods in Classes 3, 5 and 29.

The applicant brought an action against that decision before the General Court; the Court dismisses that action and provides details on the classification of the goods, in the present case 'medicines', in relation to their classification under the Nice Agreement, in the light of trade mark law and, more specifically, the case-law of the Court of Justice and the General Court in Dermavita. [39]

*Findings of the Court*

First of all, the General Court recalls that the classification of goods and services under the Nice Agreement is, in essence, designed to reflect the needs of the market and not to impose an artificial segmentation of the goods. Consequently, the class headings contain 'general indications' relating to the sector within which the goods or services 'in principle' fall. Likewise, that classification is intended to serve exclusively administrative purposes. Furthermore, the Nice Classification cannot determine, in itself, the nature and characteristics of the goods at issue.

Moreover, the classification of goods according to other rules of EU law, such as the Community Code relating to medicinal products for human use, [40] is, in principle, not decisive in respect of their classification for the purposes of the registration of an EU trade mark. First, goods and services are to be classified according to the Nice Classification. Second, although the EU legislative measures referred to by the applicant are of primary importance for the sector concerned, as they safeguard the process of manufacturing, labelling and distributing medicinal products, they do not necessarily have an influence on the way in which the goods and services are classified in the Nice Classification.

Next, the Court emphasises that for the purposes of assessing genuine use of the contested mark, it is necessary to ask whether the goods in connection with which the mark is used are the same as the goods in respect of which the mark was registered in Class 5. Likewise, the relevant public's perception of the goods in respect of which the contested mark was registered is decisive.

However, the fact that a product is only dispensed in a pharmacy upon presentation of a medical prescription is a relevant factor to be taken into account for the purposes of defining goods as medicines.

Consequently, in view of the importance of visual appearance in the relevant public's perception of the goods in question, and taking into account, as a whole, the fact that those goods were sold only in pharmacies upon presentation of a medical prescription and that the particulars and information on the packaging allowed the relevant public to easily perceive the goods as medicinal products, it is reasonable to conclude that those goods had to be classified as medicines within the meaning of Class 5.

Finally, the Court makes it clear that goods which, due to their presentation, are likely to be perceived by consumers as medicinal products are also likely to be classified as medicines within the meaning of Class 5, in the same way as medicinal products by function which have a pharmacological action. Moreover, the absence of marketing authorisation for the goods in question, that is, a fact of which consumers are not necessarily aware, is not capable of calling into question the finding that the relevant public will be able easily to perceive those goods as medicines.

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39 See judgments of 18 November 2020, Dermavita v EUIPO – Allergan Holdings France (JUVEDERM ULTRA) (T-643/19, not published, EU:T:2020:549) and of 6 October 2021, Dermavita Company v EUIPO – Allergan Holdings France (JUVEDERM) (T-372/20, not published, EU:T:2021:652); orders of 3 December 2020, Dermavita v EUIPO (C-400/20 P, not published, EU:C:2020:997) and of 4 May 2021, Dermavita v EUIPO (C-26/21 P, not published, EU:C:2021:355).

40 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).

## VI. SOCIAL POLICY: EQUAL TREATMENT IN EMPLOYMENT AND SOCIAL SECURITY

**Judgment of the Court of Justice (Second Chamber), 12 January 2023, TP (Audiovisual editor for public television), C-356/21**

Link to the full text of the judgment

Reference for a preliminary ruling – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 3(1)(a) and (c) – Conditions for access to self-employment – Employment and working conditions – Prohibition of discrimination based on sexual orientation – Self-employed person working on the basis of a contract for specific work – Termination and non-renewal of contract – Freedom to choose a contracting party

Between 2010 and 2017, J.K. personally prepared, on the basis of consecutive short-term contracts for specific work, concluded in the context of his independent economic activity, audiovisual material, trailers or features for the Editorial and Promotional Office of a channel of TP, a company which operates a nationwide public television channel in Poland.

On 20 November 2017, a new contract for specific work was concluded between J.K. and TP for a term of one month, providing for two one-week shifts in December. However, following the publication by J.K. and his partner, on 4 December 2017, of a video on YouTube aimed at promoting tolerance towards same-sex couples, TP informed J.K. that those two one-week shifts had been cancelled.

J.K. therefore did not carry out any shift in December 2017, and no new contract for specific work was concluded between him and TP.

Subsequently, J.K. brought an action before the referring court, the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court, Warsaw, Poland), seeking, inter alia, compensation for non-material harm resulting from TP's refusal to renew his contract, terminating their professional relationship, on the ground, according to J.K, of his sexual orientation.

In the context of that dispute, that court has doubts as to the compatibility of a provision of Polish law [41] with EU law, in so far as that provision excludes the freedom of choice of contracting parties from the protection against discrimination conferred by Directive 2000/78, [42] so long as that choice is not based on sex, race, ethnic origin or nationality.

In that regard, the Court of Justice holds that Article 3(1)(a) and (c) of Directive 2000/78 preclude such a national provision which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.

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41 Article 5(3) of the ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Law on the transposition of certain provisions of EU law regarding equal treatment) of 3 December 2010 (Dz. U. No 254, item 1700). In its consolidated version (Dz. U. of 2016, item 1219), that provision states that that law does not apply to the freedom of choice of contracting parties, provided that that choice is not based on sex, race, ethnic origin or nationality.

42 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

*Findings of the Court*

In the first place, the Court points out that the terms 'employment', 'self-employment' and 'occupation' in Article 3(1)(a) of Directive 2000/78 [43] must be interpreted broadly. Directive 2000/78 is thus intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood. It is nevertheless necessary to distinguish activities falling within the scope of that directive from those consisting of the mere provision of goods or services to one or more recipients, which do not fall within that scope.

It is therefore necessary, in order for occupational activities to fall within the scope of Directive 2000/78, that those activities are genuine and are pursued in the context of a legal relationship characterised by a degree of stability, which is for the referring court to assess as regards the activity pursued by J.K.

Since that activity constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling J.K. to earn his livelihood, in whole or in part, the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as 'employment' or 'self-employment'.

The Court concludes that, in order for a person to be able to pursue his or her occupational activity effectively, the conclusion of a contract for specific work constitutes a factor the existence of which may be essential. Consequently, the concept of 'conditions for access' to self-employment [44] may include the conclusion of such a contract, and the refusal to conclude that contract on grounds linked to the sexual orientation of that contractor falls within the scope of Directive 2000/78.

In the second place, as regards the interpretation of Article 3(1)(c) of Directive 2000/78, [45] the Court observes that the concept of 'employment and working conditions' in that provision, having regard to the objective of that directive, refers, in a broad sense, to the conditions applicable to any form of employment or self-employment, whatever the legal form in which it is pursued.

Consequently, the fact that J.K. was unable to complete any of the shifts provided for in the contract for specific work appears to constitute an involuntary termination of activity of a self-employed person which may be assimilated to dismissal of an employee, which is a matter for the referring court to determine. In those circumstances, TP's decision not to renew the contract for specific work with J.K. on the ground, according to the latter, of his sexual orientation, thus terminating the professional relationship between them, falls within the scope of Article 3(1)(c) of Directive 2000/78.

In the third and last place, the Court points out that to accept that freedom of contract allows a refusal to contract with a person on the ground of that person's sexual orientation would be tantamount to depriving Article 3(1)(a) of Directive 2000/78 of its practical effect in so far as that provision specifically prohibits any discrimination based on that ground as regards access to self-employment.

Thus, since the freedom to conduct a business is not absolute, the provision of Polish law at issue, which does not include sexual orientation among the exceptions to the freedom to choose a contracting party, cannot justify, in the present case, an exclusion from the protection against discrimination conferred by Directive 2000/78, where that exclusion is not necessary, in accordance

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43 As provided in Article 3(1)(a) of Directive 2000/78, 'within the limits of the areas of competence conferred on the [European Union], [that] Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'.

44 Within the meaning of Article 3(1)(a) of Directive 2000/78.

45 Under Article 3(1)(c) of Directive 2000/78, that directive is applicable in relation to employment and working conditions, including dismissals and pay.

with Article 2(5) of that directive, for the protection of the rights and freedoms of others in a democratic society.

## VII. CONSUMER PROTECTION: UNFAIR TERMS

**Judgment of the Court of Justice (Fourth Chamber), 12 January 2023, D.V. (Lawyers' fees – Principle of an hourly rate), C-395/21**

Link to the full text of the judgment

Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Contract for the provision of legal services concluded between a lawyer and a consumer – Article 4(2) – Assessment of the unfairness of contractual terms – Exclusion of terms relating to the main subject matter of the contract – Term providing for the payment of lawyers' fees on the basis of an hourly rate – Article 6(1) – Powers of the national court when dealing with a term considered to be 'unfair'

M.A., as a consumer, concluded five contracts for the provision of legal services with D.V., a lawyer. Each of those contracts provided that the lawyer's fees were to be calculated on the basis of an hourly rate, fixed at EUR 100 for each hour of consultation or of provision of legal services to M.A.

When she did not receive all the fees claimed, D.V. brought an action before the court of first instance seeking an order that M.A. pay the fees due in respect of legal services performed. The court of first instance upheld D.V.'s claim in part. However, it found the contractual term regarding the price of the services provided to be unfair and reduced the fees claimed by half. After that judgment was upheld by the appeal court, D.V. brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

On a request for a preliminary ruling from that court, the Court of Justice rules on the interpretation of Directive 93/13. In its judgment, it focuses in particular on the requirement of transparency of terms relating to the main subject matter of contracts for the provision of legal services and the effects of a finding that a term setting the price of those services is unfair. [46]

*Findings of the Court*

First of all, the Court finds that a term in a contract for the provision of legal services concluded between a lawyer and a consumer, which sets the cost of the services provided on the basis of an hourly rate, falls within the 'main subject matter of the contract' under Directive 93/13. [47]

Next, when examining whether that term, which contains no information other than the hourly rate charged, meets the requirement of being drafted in plain intelligible language, [48] the Court notes that, given the nature of the services which are the subject matter of a contract for the provision of legal services, it is often difficult, if not impossible, for the seller or supplier to predict, at the time the contract is concluded, the exact number of hours needed to ensure the performance of that contract

46 Article 3(1), Article 4(2), Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

47 Within the meaning of Article 4(2) thereof.

48 Laid down in Article 4(2) of Directive 93/13.

and, thus, the actual total cost of the services provided. However, although a seller or supplier cannot be required to inform the consumer of the final financial consequences of his or her commitment, which depend on future events which are unpredictable and beyond the control of that seller or supplier, the seller or supplier is required to provide to the consumer, before the conclusion of the contract, with information that enables him or her to take a prudent decision in full knowledge of the possibility that such events may occur and of the consequences which they are likely to have with regard to the duration of the provision of legal services.

That information, which may vary according to, on the one hand, the subject matter and nature of the services provided for in the contract for legal services and, on the other, the applicable rules of professional conduct, must include particulars that enable the consumer to assess the approximate total cost of those services. An estimate of the expected number or minimum number of hours of work needed or a commitment to send, at reasonable intervals, bills or periodic reports indicating the number of hours worked could constitute such particulars. The Court states that it is for the national court to assess, taking into account those considerations and all the relevant factors surrounding the conclusion of the contract concerned, whether the seller or supplier has provided appropriate pre-contractual information to the consumer.

Thus, the Court concludes that a term which sets the price on the basis of an hourly rate, without the consumer being provided, before the conclusion of the contract, with information that enables him or to take a prudent decision in full knowledge of the economic consequences of concluding that contract, does not satisfy the requirement of being drafted in plain intelligible language.

Next, the Court recalls that the assessment of the unfair character of a term in a contract concluded with a consumer is based, in principle, on an overall assessment which does not take account solely of the possible lack of transparency of that term. However, it is open to the Member States to ensure a maximum degree of protection for the consumer. [49]

Consequently, the Court finds that a term in a contract for the provision of legal services, which sets the price of those services on the basis of an hourly rate and therefore falls within the main subject matter of that contract, is not to be considered unfair [50] simply on the ground that it does not satisfy the requirement of transparency, unless the Member State whose national law applies to the contract in question has expressly provided, as in the present case, for classification as an 'unfair term' simply on that ground.

Lastly, as regards the consequences of a finding that a term regarding cost is unfair, the Court observes that the national court is under an obligation to disapply that term, unless the consumer objects.

It states that, where, pursuant to the relevant provisions of national law, a contract for the provision of legal services is not capable of continuing in existence after the unfair term regarding cost has been removed and those services have already been provided, Directive 93/13 [51] does not preclude the invalidation of that contract or the national court from restoring the situation in which the consumer would have been in the absence of that term, even if, as a result, the seller or supplier does not receive any remuneration for the services provided.

As regards the consequences which annulment of the contracts at issue in the main proceedings could have for the consumer, the Court recalls its case-law according to which, in the case of a loan agreement, the annulment of the loan agreement in its entirety would, in principle, make the outstanding balance of the loan become due forthwith, which would be likely to be in excess of the consumer's financial capacities and could expose the consumer to particularly unfavourable

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49 In accordance with Article 8 of Directive 93/13.

50 Under Article 3(1) of Directive 93/13.

51 Article 6(1) and Article 7(1) of Directive 93/13.

consequences. [52] However, the particularly unfavourable nature of the annulment of a contract cannot be reduced solely to purely pecuniary consequences.

It is possible that the annulment of a contract for the provision of legal services that have already been performed may place the consumer in a situation of legal uncertainty, in particular where national law allows the seller or supplier to claim remuneration for those services on a different basis from that of the annulled contract. Furthermore, the invalidity of the contract could possibly affect the validity and effectiveness of the transactions conducted under it.

In those circumstances, the Court finds that, in the event that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences, which it is for the referring court to ascertain, Directive 93/13 [53] does not preclude the national court from remedying the invalidity of the unfair term by replacing it with a supplementary provision of national law or a provision of national law applied by mutual agreement of the parties to that contract. On the other hand, that directive precludes the national court from replacing the unfair term that has been annulled with a judicial assessment of the level of remuneration due for those services.

## VIII. INTERNATIONAL AGREEMENTS: EXTERNAL COMPETENCE OF THE EUROPEAN UNION

**Judgment of the Court of Justice (Grand Chamber), 17 January 2023, Spain v Commission, C-632/20 P**

Link to the full text of the judgment

Appeal – External relations – Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part – Electronic communications – Regulation (EU) 2018/1971 – Body of European Regulators for Electronic Communications (BEREC) – Article 35(2) – Participation of the regulatory authority of Kosovo in that body – Concepts of 'third country' and 'third State' – Competence of the European Commission

Between 2001 and 2015, the European Union signed stabilisation and association agreements (SAA) with six countries of the Western Balkans, including Kosovo. In that context, the European Commission recommended actions to, inter alia, align the legislation of those countries with EU legislation and incorporate the Western Balkans into existing regulatory bodies, such as the Body of European Regulators for Electronic Communications (BEREC) established by Regulation 2018/1971. [54] In order to establish a closer relationship between the national regulatory authorities (NRAs) of the European Union and of the Western Balkans, the Commission adopted six decisions, on 18 March 2019, concerning the participation in BEREC of the NRAs of the countries of the Western Balkans. The decisions in question include a decision by which the Commission allowed the NRA of Kosovo to

52 See, to that effect, judgment of 3 March 2020, Gómez del Moral Guasch (C-125/18, EU:C:2020:138, paragraph 63 and the case-law cited).

53 Article 6(1) and Article 7(1) of Directive 93/13.

54 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ 2018 L 321, p. 1).

participate in the Board of Regulators and working groups of BEREC and in the Management Board of the BEREC Office ('the decision at issue'). [55]

The Kingdom of Spain brought an action for annulment of the decision at issue on the ground of the Commission's infringement of Article 35 of Regulation 2018/1971. [56] It claimed, in essence, that that decision misconstrued the concept of 'third country' used in that provision, which could not relate to Kosovo as Kosovo is not a sovereign State. That action was dismissed in its entirety by the General Court in its judgment of 23 September 2020, Spain v Commission [57] ('the judgment under appeal').

On appeal by the Kingdom of Spain, the Grand Chamber of the Court of Justice sets aside the judgment of the General Court and annuls the decision at issue, on the ground that the General Court erred in law in finding [58] that the power to draw up working arrangements applying to the participation of NRAs of third countries in BEREC, within the meaning of the second subparagraph of Article 35(2) of Regulation 2018/1971, lies unilaterally with the Commission under Article 17 TEU.

*Findings of the Court*

As regards, in the first place, the concept of 'third country' used in Article 35 of Regulation 2018/1971, the Court of Justice considers first of all that it is not possible to determine the meaning of that concept on the basis of a literal interpretation of the Treaties. In addition, not all the language versions of the EU and FEU Treaties use the terms 'third State' and 'third country' together. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union and, where there is any divergence between those various versions, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part. The wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision. In the present case, the General Court, proceeding on the basis that the provisions of the FEU Treaty relating to 'third countries' allow international agreements to be concluded with entities 'other than States', considered that the scope of the concept of 'third country', within the meaning of Article 35(2), went beyond sovereign States alone. That premiss was, however, established without the General Court taking into account the differences between the language versions of the EU and FEU Treaties, the wording of which does not support the conclusion that there is a difference in meaning between the words 'third country' and 'third State'. Moreover, since the words 'third country' do not appear in all the language versions of Regulation 2018/1971, only the equivalent of the term 'third State' being used in some of them, the Court of Justice finds that the General Court's reasoning was vitiated by an error of law.

Since the operative part of the judgment under appeal may, however, be well founded on other legal grounds, the Court of Justice goes on to examine whether the General Court was entitled to conclude that the Commission had not infringed Article 35 of Regulation 2018/1971 by treating Kosovo in the same way as a 'third country' within the meaning of that provision. In that regard, for the purposes of

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55 Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 26).

56 According to that provision, entitled 'Cooperation with Union bodies, third countries and international organisations': '(1) In so far as necessary in order to achieve the objectives set out in this Regulation and carry out its tasks, and without prejudice to the competences of the Member States and the institutions of the Union, BEREC and the BEREC Office may cooperate with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations. To that end, BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements. Those arrangements shall not create legal obligations. (2) The Board of Regulators, the working groups and the Management Board shall be open to the participation of regulatory authorities of third countries with primary responsibility in the field of electronic communications, where those third countries have entered into agreements with the Union to that effect. Under the relevant provisions of those agreements, working arrangements shall be developed specifying, in particular, the nature, extent and manner in which the regulatory authorities of the third countries concerned will participate without the right to vote in the work of BEREC and of the BEREC Office, including provisions relating to participation in the initiatives carried out by BEREC, financial contributions and staff to the BEREC Office. As regards staff matters, those arrangements shall, in any event, comply with the Staff Regulations. …'

57 Judgment of 23 September 2020, Spain v Commission (T-370/19, EU:T:2020:440).

58 See paragraphs 77 and 82 of the General Court's judgment of 23 September 2020, Spain v Commission (T-370/19, EU:T:2020:440).

ensuring the effectiveness of Article 35(2) of Regulation 2018/1971, a territorial entity situated outside the European Union which the European Union has not recognised as an independent State must be capable of being treated in the same way as a 'third country' within the meaning of that provision, without infringing international law. In the case of Kosovo, the International Court of Justice concluded that the adoption, on 17 February 2008, of the Kosovo declaration of independence had not violated general international law, United Nations Security Council resolution 1244 (1999) or the applicable constitutional framework. [59] Furthermore, as the first footnote to the decision at issue indicates, the treatment of Kosovo as a third country referred to above does not affect the individual positions of the Member States as to whether Kosovo has the status of an independent State that is claimed by its authorities. Accordingly the Court of Justice holds that Kosovo may be treated in the same way as a 'third country', within the meaning of Article 35(2) of Regulation 2018/1971, without infringing international law.

As regards, moreover, the integration of 'third countries' into the participation scheme provided for in Article 35(2) of Regulation 2018/1971, the Court of Justice recalls that, according to that provision, the participation of the NRAs of such countries is subject to two cumulative conditions, consisting, first, in the existence of an 'agreement' entered into with the European Union and, second, in the fact that that agreement was entered into 'to that effect'. The European Union has entered into several agreements with Kosovo, thus recognising its capacity to conclude such agreements. They include the Kosovo SAA, [60] which provides, in Article 111, that the cooperation established in relation to electronic communications networks and services is primarily to focus on priority areas related to the EU acquis in that field, and that the parties are to strengthen that cooperation. The Kosovo SAA must therefore also be regarded as having been concluded for the purposes of permitting the participation of the NRA of Kosovo in the bodies of BEREC, in so far as Article 111 of that agreement relates to the adoption of the EU acquis and to strengthening cooperation between the parties in the area of electronic communications networks and services. Lastly, the Court of Justice notes that, in accordance with its objective of cooperation, Article 35(2) of Regulation 2018/1971 opens up certain BEREC bodies to the participation of NRAs of third countries with primary responsibility in the field of electronic communications. In the light of the above, the General Court did not err in law when it concluded that the Commission had not infringed, in the decision at issue, Article 35(2) of Regulation 2018/1971 by finding that Kosovo was to be treated as a 'third country' within the meaning of that provision.

As regards, in the second place, the General Court's interpretation of the consequences of the lack of an EU position on the status of Kosovo under international law, the decision at issue does not infringe the Kosovo SAA and Regulation 2018/1971 merely because it establishes cooperation with the NRA of Kosovo by implementing those acts and does not entail recognition of Kosovo as a third State. Consequently, the Commission's adoption of the decision at issue cannot be interpreted as entailing the implicit recognition by the European Union of Kosovo's status as an independent State.

As regards, in the third place, the ground of appeal alleging that the General Court wrongly held that the cooperation referred to in Article 111 of the Kosovo SAA did not correspond to the participation envisaged in Article 35(2) of Regulation 2018/1971, the Court of Justice rules that ground to be unfounded, finding, in particular, that that provision of the Kosovo SAA does constitute an agreement 'to that effect', within the meaning of Regulation 2018/1971. Article 35(1) of that regulation envisages various degrees and forms of closer and less close cooperation, by means, inter alia, of working arrangements with the NRAs of third countries. By contrast, the participation of the NRA of Kosovo in BEREC bodies cannot be equated with the incorporation of that NRA into that EU body. Moreover, the

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59 Advisory opinion of the International Court of Justice of 22 July 2010, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (ICJ Reports 2010, p. 403).

60 Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (OJ 2016 L 71, p. 3; 'the Kosovo SAA').

participation of the NRA of Kosovo in BEREC does not allow Kosovo to contribute to the development of EU sectoral legislation on electronic communications.

The Court of Justice nevertheless upholds, in the fourth place, the Kingdom of Spain's appeal in so far as it relates, in essence, to the Commission's lack of competence. The Court notes, first of all, that the decision at issue could not be taken on the basis of Article 17 TEU by virtue of the Commission's executive or external representation functions, the Commission being intended to exercise only a supervisory function in the context of the adoption of the working arrangements in question. In particular, it is apparent from Article 35(2) of Regulation 2018/1971 that the purpose of the working arrangements is not the external representation as such of the European Union, but specifying, in particular, the nature, extent and manner in which the NRAs of third countries which have entered into agreements with the European Union to that effect will participate in the work of EU bodies. Next, the fact that Article 35(2) of Regulation 2018/1971 does not, unlike paragraph 1 of that provision, mention that BEREC and the BEREC Office are to establish working arrangements 'subject to prior approval by the Commission' does not mean that the power to establish such arrangements with the NRAs of third countries lies with the Commission. That finding is not called into question by the fact that the participation in the work of BEREC and the BEREC Office referred to in that provision is a closer form of cooperation with the NRAs of third countries than that established under Article 35(1) of that regulation. Lastly, the fact that the Commission could unilaterally decide on certain working arrangements for participation in the work of BEREC and the BEREC Office, without their agreement, is not compatible with BEREC's independence and would go beyond the supervisory function assigned to the Commission by the regulation. Thus, by holding that the power to draw up working arrangements applying to the participation of NRAs of third countries, including the NRA of Kosovo, lay with the Commission, the General Court failed to have regard to the division of powers between, on the one hand, the Commission and, on the other hand, BEREC and the BEREC Office, as well as to the rules guaranteeing the independence of BEREC laid down by the regulation. Such arrangements should be agreed between BEREC and the BEREC Office, on one side, and the competent authorities of those third countries, on the other, and be authorised jointly, as is apparent from Regulation 2018/1971, [61] by the Board of Regulators and the Director of the BEREC Office. While making clear that that power does not lie with the Council, the Court of Justice concludes that the General Court erred in law in ruling [62] that the Commission had a unilateral power to draw up those arrangements.

While setting aside, in consequence, the judgment under appeal and annulling the decision at issue, the Court of Justice nevertheless rules, in view of the necessity of the arrangements at issue, that the effects of the annulled decision are to be maintained until that decision is replaced by a new act.

61 Article 9(i) and Article 20(6)(m) of Regulation 2018/1971.

62 Judgment of the General Court of 23 September 2020, Spain v Commission (T-370/19, EU:T:2020:440, paragraphs 77 and 82).

# IX. JUDGMENTS PREVIOUSLY DELIVERED

## 1. PROTECTION OF PERSONAL DATA

**Judgment of the Court of Justice (Grand Chamber), 22 December 2022, SpaceNet and Telekom Deutschland, C-793/19 and C-794/19**

Link to the full text of the judgment

Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Confidentiality of communications – Providers of electronic communications services – General and indiscriminate retention of traffic and location data – Directive 2002/58/EC – Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 6, 7, 8 and 11 and Article 52(1) – Article 4(2) TEU

In recent years, the Court has ruled, in several judgments, on the retention of and access to personal data in the field of electronic communications. [63]

More recently, in the judgment in *La Quadrature du net and Others,* [64] delivered by the Grand Chamber on 6 October 2020, the Court confirmed its case-law arising from the judgment in *Tele2 Sverige and Watson and Others* [65] on the disproportionate nature of a general and indiscriminate retention of traffic and location data relating to electronic communications. It also provided clarification, inter alia as regards the extent of the powers conferred on the Member States by the Directive on privacy and electronic communications with regard to the retention of such data for the purposes of safeguarding national security, combating crime and safeguarding public security.

In the present joined cases, two requests for a preliminary ruling were submitted by the Bundesverwaltungsgericht (Federal Administrative Court, Germany), before which the Federal Republic of Germany brought an appeal on a point of law against two judgments which had upheld the actions brought by two companies providing internet access services, SpaceNet AG (Case C-793/19) and Telekom Deutschland GmbH (Case C-794/19). By those actions, those companies challenged the obligation imposed by the German legislation [66] to retain traffic and location data relating to their customers' electronic communications.

The doubts expressed by the referring court concern, inter alia, the compatibility with the Directive on privacy and electronic communications, [67] read in the light of the Charter of Fundamental Rights of the European Union ('the Charter') [68] and of Article 4(2) TEU, of national legislation which requires providers of publicly available electronic communications services – inter alia for the purposes of

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63 Judgments of 8 April 2014, Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238), of 21 December 2016, Tele2 Sverige and Watson and Others (C-203/15 and C-698/15, EU:C:2016:970), and of 2 October 2018, Ministerio Fiscal (C-207/16, EU:C:2018:788).

64 Judgment of 6 October 2020, La Quadrature du Net and Others (C-511/18, C-512/18 and C-520/18, EU:C:2020:791). See also the judgment delivered on the same day, Privacy International (C-623/17, EU:C:2020:790), concerning the general and indiscriminate transmission of traffic and location data.

65 In that judgment, the Court held that Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) ('the Directive on privacy and electronic communications'), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), precludes national legislation providing for the general and indiscriminate retention of traffic and location data for the purposes of combating crime.

66 Combined provisions of Paragraph 113a(1) and Paragraph 113b of the Telekommunikationsgesetz (Law on telecommunications), of 22 June 2004 (BGBl. 2004 I, p. 1190), in the version applicable to the dispute in the main proceedings.

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

68 Articles 6 to 8, 11 and Article 52(1) of the Charter.

prosecuting serious criminal offences or preventing a specific risk to national security – to retain, in a general and indiscriminate way, most of the traffic and location data of the end users of those services, laying down a retention period of several weeks and rules intended to ensure the effective protection of the retained data against the risks of abuse and against any unlawful access to those data.

By its judgment, the Court, sitting as a Grand Chamber, confirms its case-law arising from *La Quadrature du Net and Others*, and, more recently, the judgment in *Commissioner of An Garda Síochána and Others*, [69] and clarifies the scope of that case-law. It recalls inter alia that the general and indiscriminate retention of traffic and location data relating to electronic communications is not permitted, on a preventative basis, for the purposes of combating serious crime and preventing serious threats to public security.

*Findings of the Court*

The Court begins by confirming the applicability of the Directive on privacy and electronic communications to the national legislation at issue, and then recalls the principles derived from its case-law, before carrying out a detailed examination of the characteristics of the national legislation at issue, highlighted by the referring court.

As regards, first of all, the extent of the data retained, the Court observes that the retention obligation laid down by the national legislation at issue covers a very broad set of traffic and location data and that it concerns practically the entire population without those persons being, even indirectly, in a situation liable to give rise to criminal prosecutions. It also notes that that legislation requires the general retention, without a reason, and without any distinction in terms of personal, temporal or geographical factors, of most traffic and location data, the scope of which corresponds, in essence, to that of the data retained in the cases which led to the judgment in *La Quadrature du net and Others*. Accordingly, in the light of that case-law, the Court considers that a data retention obligation such as that at issue in the main proceedings cannot be regarded as a targeted retention of data.

Next, as regards the data retention period, the Court notes that it is follows from the Directive on privacy and electronic communications [70] that the length of the retention period provided for by a national measure imposing a general and indiscriminate retention obligation is indeed a relevant factor, amongst others, in determining whether EU law precludes such a measure, since that sentence requires that that period be 'limited'. However, the seriousness of the interference stems from the risk, particularly in view of their number and variety, that the data retained, taken as a whole, may enable very precise conclusions to be drawn concerning the private life of the person or persons whose data have been retained and, in particular, provide the means of establishing a profile of the person or persons concerned, information that is no less sensitive, having regard to the right to privacy, than the actual content of communications. Accordingly, the retention of traffic or location data is in any event serious regardless of the length of the retention period and the quantity or nature of the data retained, when that set of data is liable to allow precise conclusions to be drawn concerning the private life of the person or persons concerned. [71]

Lastly, as regards the safeguards intended to protect the retained data against the risks of abuse and against any unlawful access, the Court points out, on the basis of its previous case-law, that the retention of and access to those data each constitute separate interferences with the fundamental rights of the persons concerned, requiring a separate justification. It follows that national legislation ensuring full respect for the conditions established by the case-law as regards access to retained data

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69 Judgment of 5 April 2022, Commissioner of An Garda Síochána and Others (C-140/20, EU:C:2022:258).

70 More specifically, from the second sentence of Article 15(1) of Directive 2002/58.

71 See, as regards access to such data, judgment of 2 March 2021, Prokuratuur (Conditions of access to data relating to electronic communications) (C-746/18, EU:C:2021:152, paragraph 39).

cannot, by its very nature, be capable of either limiting or even remedying the serious interference with the rights of the persons concerned which results from the general retention of those data.

In addition, in order to respond to certain arguments raised before it, the Court notes, in the first place, that a threat to national security must be genuine and present, or, at the very least, foreseeable, which presupposes that sufficiently concrete circumstances have arisen to be able to justify a generalised and indiscriminate measure of retention of traffic and location data for a limited period of time. Such a threat is therefore distinguishable, by its nature, its seriousness, and the specific nature of the circumstances of which it is constituted, from the general and permanent risk of the occurrence of tensions or disturbances, even of a serious nature, that affect public security, or from that of serious criminal offences being committed. Thus, crime, even of a particularly serious nature, cannot be treated in the same way as a threat to national security.

It observes, in the second place, that authorising access, for the purpose of combating serious crime, to traffic and location data which have been retained in a general and indiscriminate way in order to confront a serious threat to national security, would be contrary to the hierarchy of public interest objectives which may justify a measure adopted under the Directive on privacy and electronic communications. [72] That would amount to allowing access to be justified for an objective of lesser importance than that which justified its retention, namely the safeguarding of national security, which would risk depriving of any effectiveness the prohibition on a general and indiscriminate retention for the purpose of combating serious crime.

The Court concludes, confirming its previous case-law, that the Directive on privacy and electronic communications, read in the light of the Charter, precludes national legislative measures which provide, on a preventative basis, for the purposes of combating serious crime and preventing serious threats to public security, for the general and indiscriminate retention of traffic and location data.

However, it does not preclude national legislative measures which allow, for the purposes of safeguarding national security, recourse to an instruction requiring providers of electronic communications services to retain, generally and indiscriminately, traffic and location data in situations where the Member State concerned is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable. In that regard, the Court specifies that the decision imposing such an instruction must be subject to effective review, either by a court or by an independent administrative body whose decision is binding, the aim of that review being to verify that one of those situations exists and that the conditions and safeguards which must be laid down are observed, and that instruction may be given only for a period that is limited in time to what is strictly necessary, but which may be extended if that threat persists.

That directive, read in the light of the Charter, also does not preclude national legislative measures providing, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the targeted retention of traffic and location data which is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended.

The same is true of national legislative measures providing, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the general and indiscriminate retention of IP addresses assigned to the source of an internet connection, for a period that is limited in time to what is strictly necessary, and data relating to the civil identity of users of electronic communications systems, the retention of which may undisputedly contribute to the fight against serious crime, to the extent that those data make it possible to identify persons who have used those means in the context of planning or committing an act constituting serious crime.

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72 That hierarchy is set out in the case-law of the Court, in particular in La Quadrature du Net and Others, in paragraphs 135 and 136. In that hierarchy, combating serious crime is of lesser importance than safeguarding national security.

That is also the case for national legislative measures that allow, for the purposes of combating serious crime and, a fortiori, safeguarding national security, recourse to an instruction requiring providers of electronic communications services, by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention of traffic and location data in the possession of those service providers.

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

## 2. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN ARREST WARRANT

### Judgment of the Court of Justice (Third Chamber), 14 July 2022, Procureur général près la cour d'appel d'Angers, C-168/21

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – Article 2(4) – Condition of double criminality of the act – Article 4(1) – Ground for optional non-execution of the European arrest warrant – Verification by the executing judicial authority – Acts some of which constitute an offence under the law of the executing Member State – Article 49(3) of the Charter of Fundamental Rights of the European Union – Principle of proportionality of criminal offences and penalties

In June 2016, the Italian judicial authorities issued a European arrest warrant (EAW) against KL for the purpose of enforcing a custodial sentence of 12 years and 6 months. This is a cumulative sentence representing four sentences handed down for four offences, one of which is classified as 'devastation and looting'. The cour d'appel d'Angers (Court of Appeal, Angers, France) refused to surrender KL on the ground that two of the acts underlying that offence did not constitute an offence in France. In that regard, the referring court, hearing an appeal on a point of law against that refusal to surrender, states that the constituent elements of the offence of 'devastation and looting' are different in the two Member States concerned, since, under Italian law (unlike French law), a breach of the public peace is an essential element for the purposes of the classification of that offence.

Accordingly, the referring court questions whether the condition of double criminality of the act, as laid down in Framework Decision 2002/584 [73] and to which the surrender of KL is subject, is fulfilled in the case at hand. If that condition does not prevent the surrender of KL, the referring court considers that the question then arises as to whether, in such circumstances, there should be a refusal to execute the EAW in the light of the principle of proportionality of penalties, laid down in Article 49(3) of the Charter of Fundamental Rights of the European Union. [74] Consequently, that court has referred those questions to the Court of Justice.

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73 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584'). The condition of double criminality of the act is laid down in Article 2(4) of that framework decision.

74 According to that principle, the severity of penalties must not be disproportionate to the criminal offence.

The Court holds that the condition of double criminality of the act laid down in Framework Decision 2002/584 [75] is met where an EAW is issued for the purpose of enforcing a custodial sentence handed down for acts which relate, in the issuing Member State, to a single offence requiring that those acts impair a legal interest protected in that Member State when such acts also constitute a criminal offence, under the law of the executing Member State, of which the impairment of that protected legal interest is not a constituent element. In addition, the Court holds that, in the light of that condition and of the principle of proportionality of penalties, the executing judicial authority may not refuse to execute an EAW issued for the purpose of enforcing a custodial sentence where that sentence was imposed in the issuing Member State for the commission, by the requested person, of a single offence consisting of multiple acts, only some of which constitute a criminal offence in the executing Member State.

*Findings of the Court*

In the first place, as regards the scope of the condition of double criminality of the act, the Court states, first of all, that, in order to determine whether that condition is met, it is necessary and sufficient that the acts giving rise to the issuing of the EAW also constitute an offence under the law of the executing Member State. Thus, the offences do not need to be identical in the two Member States concerned. It follows that, when assessing the condition referred to above, in order to establish whether there are grounds for non-execution of the EAW, [76] the executing judicial authority is required to verify whether the factual elements underlying the offence which gave rise to the issuing of that EAW would also, per se, constitute an offence under the law of the executing Member State if they were present in that State.

Next, the Court notes that, as an exception to the rule that the EAW must be executed, the ground for optional non-execution of the EAW which the condition of double criminality of the act constitutes must be interpreted strictly and, therefore, cannot be interpreted in a way which would frustrate the objective of facilitating and accelerating surrenders between judicial authorities. If that condition were to be interpreted as requiring there to be an exact match between the constituent elements of the offence as defined in the law of the issuing Member State and those of the offence as provided for in the law of the executing Member State, as well as between the legal interests protected under the laws of those two Member States, the effectiveness of the surrender procedure would be undermined. Indeed, given the minimal harmonisation in the field of criminal law at EU level, it is likely that there will be no exact match for a large number of offences. The interpretation envisaged above would therefore considerably limit the situations in which the condition referred to above could be met, thereby jeopardising the objective pursued by Framework Decision 2002/584. Moreover, such an interpretation would also disregard the objective of combating the impunity of a requested person who is present in a territory other than that in which he or she has committed an offence.

In the second place, the Court notes, first of all, that, unless the ground for non-execution relating to the condition of double criminality of the act is transposed to those acts which constitute an offence under the law of the executing Member State and which thus fall outside the scope of that ground, the fact that only some of the acts constituting an offence in the issuing Member State also constitute an offence under the law of the executing Member State does not permit the executing judicial authority to refuse to execute the EAW. Framework Decision 2002/584 [77] does not lay down any

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75 See Article 2(4) of that framework decision, which provides for the possibility of making surrender subject to that condition for offences other than those covered by Article 2(2), and Article 4(1) thereof, under which the executing judicial authority may refuse to execute the EAW if, in one of the cases referred to in Article 2(4), the act on which the EAW is based does not constitute an offence under the law of the executing Member State.

76 See Article 4(1) of Framework Decision 2002/584.

77 See Article 5 of Framework Decision 2002/584, which lays down the conditions to which, by the law of the executing Member State, the execution of the EAW may be made subject.

condition that the person concerned must not serve the sentence in the issuing Member State for those acts which do not constitute an offence in the executing Member State. The execution of the EAW may be made subject only to one of the conditions exhaustively laid down in that framework decision.

In addition, the Court states that interpreting the condition of double criminality of the act as meaning that execution of the EAW may be refused on the ground that some of the elements of the offence in the issuing Member State do not constitute an offence in the executing Member State would create an obstacle to the effective surrender of the person concerned and would lead to the impunity of that person for all the acts concerned. Accordingly, in such circumstances, that condition is met. Lastly, the Court states that it is not for the executing judicial authority, when assessing the condition referred to above, to assess the sentence handed down in the issuing Member State in the light of the principle of proportionality of penalties.

# 3. COMPETITION

## 3.1. Agreements, decisions and concerted practices (Article 101 TFEU)

### Judgment of the General Court (Seventh Chamber, Extended Composition), 7 December 2022, CCPL and Others v Commission, T-130/21

Competition – Agreements, decisions and concerted practices – Retail food packaging – Decision amending the amount of a fine – Calculation of the fine – Imputability of the unlawful conduct – 2006 Guidelines on the method for setting fines – Ceiling of the fine – Proportionality – Equal treatment – Ability to pay

By decision of 24 June 2015, [78] the Commission imposed fines on five companies belonging to a group of undertakings ('the CCPL Group') for having participated, with their competitors, in collusive arrangements aimed at restricting competition on the European market for food packaging in polystyrene and polypropylene trays. When the amount of the fines were set, those five companies benefitted from a 25% reduction on account of their limited ability to pay.

The five undertakings sanctioned include Coopbox Group SpA, Coopbox Eastern s.r.o. and CCPL – Consorzio Cooperative di Produzione e Lavoro SC ('CCPL'), the parent company of the CCPL Group. Against that background, CCPL was found to be liable for the anticompetitive conduct of its subsidiaries Coopbox Group and Coopbox Eastern, which it owned through a third company, CCPL SpA.

By its judgment of 11 July 2019, [79] the General Court annulled in part the 2015 Commission decision on the basis that an inadequate statement of reasons had been provided in relation to the granting of the 25% reduction based on the limited ability to pay of the undertakings concerned.

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78 Commission Decision C(2015) 4336 final of 24 June 2015 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39563 – Retail food packaging) ('the 2015 Decision').

79 Judgment of 11 July 2019, CCPL and Others v Commission (T-522/15, not published, EU:T:2019:500).

Following the delivery of that judgment, the Commission, by decision of 17 December 2020 ('the contested decision'), [80] imposed new fines and dismissed the applicants' request for a reduction in the amount of the fines on the grounds of their limited ability to pay.

Coopbox Group, Coopbox Eastern and CCPL brought an action for annulment of the contested decision, which is dismissed by the Ninth Chamber (Extended Composition) of the General Court. In its judgment, the Court addresses, first, the conditions for imputing the unlawful conduct of one or more subsidiaries to the parent company and, second, the rules for granting a reduction of the fine on the grounds of the inability of the undertakings concerned to pay.

*Findings of the Court*

The Court examines, in the first place, the applicants' pleas in law contesting the imputation of the anticompetitive conduct of the subsidiaries Coopbox Group and Coopbox Eastern to their parent company CCPL.

As regards, first, compliance with the Commission's obligation to state reasons, the Court notes that the Commission held, in the contested decision, that CCPL was the ultimate parent company of the CCPL Group throughout the duration of the infringements in question, that its direct or indirect shareholding in one or more of the subsidiaries involved in those infringements was 100% and then 93.864%, and that such a shareholding was sufficient for it to be presumed that it exercised a decisive influence over the conduct of its subsidiary. Those factors were such as to enable the applicants to understand the reasoning that had led the Commission to hold CCPL liable and to enable the Court to review the merits of those reasons.

With regard, second, to the applicants' complaint alleging infringement of the principle of personal responsibility, the Court confirms that CCPL was indeed held liable for the infringements committed by its subsidiaries even though those infringements had not been imputed to the third company through which CCPL owned those undertakings.

However, it follows from settled case-law that, where a parent company directly or indirectly holds all or almost all of the capital in a subsidiary that has committed an infringement of the competition rules, there is a rebuttable presumption that that parent company does in fact exercise a decisive influence over the conduct of its subsidiary. Unless rebutted, such a presumption gives the Commission grounds to hold the parent company liable for the conduct of its subsidiary, without having to produce any additional evidence.

That presumption also applies where the parent company holds the capital of its subsidiary not directly but through other companies to which no infringement has been imputed. Such a circumstance does not call into question the presumption that the parent company, by virtue of its indirect holding in its subsidiaries, in fact exercises decisive influence over their conduct.

Furthermore, it also follows from the case-law that an economic unit made up of several natural or legal persons that infringes the competition rules must answer for that infringement, according to the principle of personal liability.

In the light of those considerations, the Court holds that the Commission did not err in law in imputing to CCPL anticompetitive practices engaged in by Coopbox Group and Coopbox Eastern.

Third, the Court rejects CCPL's complaint alleging that, since it held only a 93.864% stake in the intermediary company CCPL SpA, the presumption of liability for the acts of its subsidiaries was not applicable in the present case.

On that point, the Court notes that a parent company which holds almost all the capital of its subsidiary is, as a general rule, in a similar situation to that of a sole owner as regards its power to

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80 Commission Decision C(2020) 8940 final of 17 December 2020.

exercise a decisive influence over the conduct of its subsidiary. The Commission was therefore correct to presume that CCPL had made effective use of its power to exercise a decisive influence over the conduct of its subsidiaries, notwithstanding allegations that CCPL had not given instructions to its subsidiaries or had knowledge of the agreements in question.

In the second place, the Court addresses the applicants' complaints regarding alleged errors made by the Commission in its assessment of their ability to pay.

The Court recalls that two conditions must be met simultaneously in order for a reduction in the fine to be granted under paragraph 35 of the 2006 Guidelines [81] on the basis that the undertakings concerned are unable to pay. First, it must be shown that the fine imposed would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value. Second, the existence of a specific social and economic context must also be established.

With regard to the first condition, it is clear from the case-law that the reference to the loss of all value of the assets of the undertaking concerned should be understood as envisaging the situation in which the acquisition of those assets by a voluntary purchase or a forced sale of the assets of the undertaking as a going concern seems unlikely, or indeed impossible. Conversely, the mere finding that the undertaking concerned is in an unfavourable or poor financial situation cannot suffice to substantiate a request that the Commission should take account of its inability to pay in order to grant a reduction of the fine. Furthermore, the fact that a measure taken by an EU authority leads to the insolvency or liquidation of a given undertaking is not prohibited as such by EU law.

As for the second condition, relating to the existence of a specific social and economic context, the Court notes that this refers to the consequences that payment of the fine could have, in particular by leading to an increase in unemployment or a deterioration in the economic sectors upstream and downstream of the undertaking concerned.

In the light of those conditions, the Court begins by noting that the applicants had neither produced consolidated forecast data concerning their available liquidity for the period from 2020 to 2023 nor explained to the Commission why the CCPL Group could not use the liquidity available at group level to pay the fines at issue. Moreover, in response to the applicants' argument that the forecast data for the CCPL Group as a whole were not relevant in the present case, the Court emphasises that, in assessing the ability of a group of undertakings to pay, the Commission must take account of the financial position of all the undertakings in that group in so far as the resources of all of those undertakings can be mobilised to pay the fines. Furthermore, the existence of evidence demonstrating a level of liabilities far in excess of assets was not sufficient, on its own, to demonstrate that in the present case the imposition of fines would have jeopardised the applicants' economic viability.

Thus, the Court finds that the Commission's conclusions that the CCPL Group had sufficient liquidity to pay the total amount of the fines and that there was only a minimal likelihood that the economic viability of that group would itself be endangered by payment of the fine imposed are not vitiated by any error of assessment.

The Court therefore dismisses the action in its entirety.

## 3.2. State aid

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

**Judgment of the General Court (Third Chamber, Extended Composition), 4 May 2022, Larko v Commission, T-423/14 RENV**

Link to the full text of the judgment

State aid – Aid implemented by Greece – Decision declaring the aid incompatible with the internal market – Concept of State aid – Advantage – Private operator principle – Guarantee premium – Firm in difficulty – Knowledge of the Greek authorities – Commission Notice on State aid in the form of guarantees – Manifest error of assessment

By decision of 27 March 2014, [82] the Commission found that the Greek public undertaking Larko Geniki Metalleftiki kai Metallourgiki AE ('Larko') had received over EUR 135 million in unlawful State aid that was incompatible with the internal market, granted in the form of three guarantees in 2008, 2010 and 2011 and an increase in share capital in 2009.

With regard in particular to the guarantee granted in 2008, the Commission classified that guarantee as an advantage for the purposes of Article 107(1) TFEU, since a market creditor would not have provided such a guarantee under the conditions and according to the procedure agreed by the Greek authorities. In that regard, the Commission stated that that guarantee did not fulfil any of the cumulative conditions which precluded it from being classified as State aid, under the Guarantee Notice, [83] namely, in particular, that the recipient undertaking should not be in financial difficulty and that it should be granted on payment of a premium in line with the market price. [84]

By judgment of 1 February 2018, [85] the General Court dismissed the action for annulment brought by Larko against the decision at issue. In the view of that Court, the Commission had not, inter alia, committed a manifest error of assessment in holding that, in the absence of evidence to the contrary provided by the Greek authorities, the latter were or should have been aware of Larko's economic difficulties at the time the 2008 guarantee was granted.

Acting on the appeal lodged by Larko, the Court of Justice set aside in part the judgment of the General Court and referred the case back to that Court. [86] In its judgment, the Court of Justice stated inter alia that, where the Commission decides to refer to the private investor test in order to examine the existence of an advantage under Article 107(1) TFEU, it is required to demonstrate that the conditions for applying that test are satisfied. In applying that test, the Commission cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage. In that regard, the Court of Justice held that it was for the General Court to ascertain, during the procedure on referral, whether the administrative file contained reliable and coherent evidence which provided a sufficient basis for concluding that the Greek authorities were or should have been aware of Larko's alleged economic difficulties and that that point was not disputed between the Commission and the Greek authorities.

By its judgment of 4 May 2022, the General Court dismisses Larko's action and provides clarification concerning the allocation of the burden of proof between the Commission and the Member State

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82 Commission Decision 2014/539/EU of 27 March 2014 on the State aid SA.34572 (2013/C) (ex 13/NN) implemented by Greece for Larco General Mining & Metallurgical Company SA (OJ 2014 L 254, p. 24) ('the decision at issue').

83 Commission Notice on the application of Articles 107 and 108 TFEU to State aid in the form of guarantees (OJ 2008 C 155, p. 10).

84 Point 3.2(a) and (d) of the Commission Notice

85 Judgment of 1 February 2018, Larko v Commission, T-423/14, EU:T:2018:57.

Judgment of 26 March 2020, Larko v Commission, C-244/18 P, EU:C:2020:632, 'the judgment in Intel').

concerned as regards demonstration of the existence of State aid in the light of the conditions set out in the Guarantee Notice.

*Findings of the Court*

The General Court starts by noting that the Commission had based its finding that the Greek authorities had not behaved like a reasonable market creditor in granting the 2008 guarantee, on grounds comprising two parts, one based on Larko's status as a firm in difficulty and the other based on the fact that there had been no payment of a premium in line with the market price.

However, in the judgment on appeal, the Court of Justice had not criticised the Commission's reasoning regarding the fact that there had been no payment of a premium in line with the market price, finding, on the contrary, that there was no need to examine Larko's arguments in that regard. Furthermore, in view of the cumulative nature of the two parts of the grounds put forward by the Commission, the finding that the premium agreed at the time the 2008 guarantee was granted was not in line with the market price was in itself sufficient to support the Commission's conclusion that the existence of State aid could not be ruled out under the Guarantee Notice.

In the light of those clarifications, the General Court examines whether the Commission was entitled to call into question, in the decision at issue, whether that premium was in line with the market price, while ascertaining whether the Greek authorities were or should have been aware of Larko's alleged financial difficulties by the date on which the guarantee in question was granted.

In that regard, the General Court finds that the Commission possessed sufficiently reliable and coherent evidence to show that the Greek authorities were aware of Larko's difficult financial situation at the time the 2008 guarantee was granted. In its opening decision, the Commission had already established a link between Larko's significant financial difficulties and its 'high debt to equity ratio'. Furthermore, it had drawn the attention of the Greek authorities to the fact that a guarantee premium of 1% intended to remunerate a guarantee covering 100% of the guaranteed loan was potentially not in line with market conditions. In that connection, the General Court states, in particular, that the Greek authorities, which had themselves acknowledged that there had been a sharp deterioration in Larko's financial situation during the second half of 2008, had not been able to substantiate their statement that, in 2008, Larko had a good credit rating.

In that context, the General Court states that the rules on the allocation of the burden of proof in the application of the private operator principle, as recalled by the Court of Justice in its judgment on appeal, cannot invalidate that conclusion, as otherwise the burden of proof would be unduly reversed to the detriment of the Commission and the scope of the Member State's duty to cooperate in good faith would be disregarded, by taking into account the separation of the spheres of knowledge and responsibility which give rise to the requirements to provide relevant information, in particular under the Guarantee Notice.

Even though, by such a notice that is not legally binding on the Member States, the Commission cannot reverse, to the latter's detriment, the burden of proof of the existence of State aid, the fact remains that it may make clear, in such a notice, the relevant information, in particular of an economic nature, which may rule out sufficiently the presence of State aid and which the Member State is generally in a position to provide on the ground that such information falls within its sphere of knowledge and responsibility.

Consequently, since it is clear from the case file that the Greek authorities had not provided such information and that the Commission had based its finding on specific evidence, the General Court concludes that, at the time the decision at issue was adopted, the Commission possessed sufficient reliable and coherent evidence to consider that the guarantee premium was not in line with a market price and therefore that the guarantee constituted an advantage for the purposes of Article 107(1) TFEU.

In the light of those considerations, the General Court dismisses the action, while considering it unnecessary to rule on whether Larko was 'a firm in difficulty' at the time the guarantee was granted.

**Judgment of the General Court (First Chamber), 7 September 2022, JCDecaux Street Furniture Belgium v Commission, T-642/19**

Link to the full text of the judgment

State Aid – Aid granted by Belgium to JCDecaux Street Furniture Belgium – Decision declaring the aid incompatible with the internal market and ordering its recovery – Advantage – Obligation to state reasons

The City of Brussels (Belgium) and JCDecaux Street Furniture Belgium ('JCDecaux') concluded two successive contracts for the provision of street furniture, some of which could be used for advertising purposes.

The first contract, dated 16 July 1984 ('the 1984 contract'), provided that JCDecaux was to install in the City of Brussels bus shelter advertisements and street furniture of which JCDecaux would retain ownership. Under that contract, JCDecaux was permitted to use the bus shelters and street furniture for advertising for a period of 15 years running from the date of installation, without making any payment for rent, right of occupancy or fees, in return for offering the City of Brussels a number of benefits in kind.

In 1998, in the context of a new call for tenders, the City of Brussels listed in Annex 10 to the special tender specifications ('Annex 10') the bus shelters and street furniture in respect of which JCDecaux's right of use had not yet expired under the terms of the 1984 contract.

JCDecaux won that call for tenders and signed a second contract with the City of Brussels dated 14 October 1999 ('the 1999 contract') under which ownership of the installed street furniture would pass to the City of Brussels in return for the payment of a price per display supplied. For its part, JCDecaux was to pay monthly rent to use the street furniture covered by the contract for advertising.

When the 1999 contract was implemented, some of the displays listed in Annex 10 were dismantled before the expiry dates stipulated in that annex, while others were kept in place after those dates. For the latter, unlike in the case of the displays covered by the 1999 contract, the applicant paid neither rent nor tax to the City of Brussels.

Having received a complaint, the European Commission found, by decision of 24 June 2019, [87] that JCDecaux had benefited from unlawful State aid incompatible with the internal market, in an amount equivalent to the rent and taxes not paid on the advertising displays installed under the 1984 contract and kept in place after the removal date stipulated in Annex 10 to the 1999 contract, between 15 September 2001 and 21 August 2010.

The action for annulment brought by JCDecaux against the contested decision is dismissed by the Court which provides, in that connection, clarifications regarding the concept of 'economic advantage', for the purposes of Article 107(1) TFEU, and the point from which the limitation period for the recovery of aid starts to run in the context of a contract for the use of street furniture for advertising.

*Findings of the Court*

In the first place, as regards the existence of an economic advantage, for the purposes of Article 107(1) TFEU, the Court begins by rejecting the reasoning that the use of displays listed in Annex 10 after the expiry dates stipulated for that use enabled the economic balance of the 1984 contract to be maintained by compensating JCDecaux for the disadvantage it suffered as a result of the early removal of a number of displays listed in that annex.

In that regard, the Court notes, first of all, that the concept of 'State aid' is an objective legal concept defined directly by Article 107(1) TFEU, which does not distinguish between the causes or the objectives of State aid measures, but defines them in relation to their effects. Consequently, the fact

87 Commission Decision C(2019) 4466 final of 24 June 2019 on State aid granted by Belgium to JCDecaux Belgium Publicité (SA.33078 (2015/C) (ex 2015/NN)) ('the contested decision').

that the objective of a State measure is to maintain the economic balance between the parties to a contract or that that objective is consistent with the principles of national law cannot rule out *ab initio* the classification of such a measure as State aid.

Furthermore, since the 1999 contract made the use of street furniture in the territory of the City of Brussels subject to the payment of rent and taxes, the use by JCDecaux of the displays listed in Annex 10 after the expiry dates stipulated in that annex, without paying rent or taxes to the City of Brussels, had the effect of mitigating those charges.

Finally, the compensation mechanism established by the 1984 contract could not be deemed to be conduct which, in similar circumstances, a market economy operator of a size comparable to that of the bodies managing the public sector might have been prompted to adopt.

There is no evidence in the documents before the Court that the City of Brussels carried out an evaluation of the actual loss incurred by JCDecaux as a result of the early removal of certain displays listed in Annex 10 or of the profit that could be earned from keeping in place other displays listed in that annex. Nor did it monitor the implementation of the compensation mechanism established by the 1984 contract. Furthermore, irrespective of whether or not a written formalisation of that mechanism was necessary, in a judgment of 2016, the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) found that, by failing to adhere to the expiry dates stipulated by Annex 10 for the use of certain displays listed in that annex, JCDecaux had used those displays without right or title.

Accordingly, the Commission was right to consider that the retention and use by JCDecaux of a number of displays listed in Annex 10 after the expiry dates stipulated in that annex constituted an economic advantage for the purposes of Article 107(1) TFEU, even if the retention of those displays was a compensation mechanism established by the 1984 contract.

The Court also rejects the complaint alleging that the Commission made a manifest error of assessment and an error of law in finding that JCDecaux had saved on rent and taxes, which constituted an advantage.

Since one of the conditions laid down in the 1999 contract for the use of street furniture for advertising was the payment of rent, the Commission was right to conclude that the fact that JCDecaux continued to use of a number of displays listed in Annex 10 after the expiry dates without fulfilling such an obligation constituted an advantage conferred through State resources for the purposes of Article 107(1) TFEU.

As regards the taxes, the Court notes that, with effect from 2001, the City of Brussels had introduced a tax on temporary advertising in and on public property. Although the exemption from that tax could be justified if street furniture were used for advertising by the City of Brussels for its own purposes, such an exemption was not applicable where that street furniture was used for advertising by a third party. Consequently, the Commission was right to conclude that, by granting the tax exemption to JCDecaux until the 2009 tax year, the City of Brussels conferred an advantage through State resources. Furthermore, the Belgian authorities had themselves stated, during the formal investigation procedure before the Commission, that the City of Brussels had concluded that exempting street furniture used for advertising by third parties from tax solely on the ground that it was owned by the City of Brussels, when the City of Brussels was not the operator, was unfair to operators of other advertising displays.

In the second place, the Court holds that the Commission was right to consider that the point from which the limitation period for the recovery of aid started to run was not the date of the decision to grant the alleged compensation, but the date from which JCDecaux actually benefited from the advantage consisting of the non-payment of rent and taxes, namely the date on which the displays listed in Annex 10, which were kept in place after the expiry dates stipulated for them in that annex, should have been removed.

**Judgment of the General Court (Seventh Chamber, Extended Composition), 21 December 2022, Landwärme v Commission, T-626/20**

Link to the full text of the judgment

State aid – Biogas market – Tax exemptions compensating for additional production costs – Decisions not to raise objections – Action for annulment – Interest in bringing proceedings – Admissibility – Failure to initiate the formal investigation procedure – Serious difficulties – Article 108(2) and (3) TFEU – Article 4(3) and (4) of Regulation (EU) 2015/1589 – Guidelines on State aid for environmental protection and energy 2014-2020 – Cumulation of aid – Aid granted by several Member States – Imported biogas – Principle of non-discrimination – Article 110 TFEU

On 1 April 2020, the Kingdom of Sweden notified the European Commission of its intention to modify and extend until 31 December 2030 two aid schemes that had already been approved by the Commission until 31 December 2020 ('the schemes at issue'). Under those schemes, the purchase of certain renewable fuel gases ('biogas') is exempted from the payment of certain excise duties on fossil gases used for the same purposes.

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission considered, by decisions of 29 June 2020 ('the contested decisions'), [88] that the notified measures concerned State aid compatible with the internal market under Article 107(3)(c) TFEU. According to 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, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In particular, the Commission found, first, that the schemes at issue were necessary, on the ground that, without the total tax exemptions provided for by those schemes, biogas would be more expensive than fossil gases and, second, that it could be excluded that the aid granted under those schemes exceeded the amount required to compensate for the higher costs of biogas production compared to fossil gas production and thus gave rise to overcompensation of those higher costs ('overcompensation').

The applicant, Landwärme GmbH, a producer of biomethane in Germany, brought an action for annulment of the contested decisions. In upholding that action, the General Court, after finding that the action was admissible, rules that, in the light of the serious difficulties raised by the assessment of the compatibility of the notified measures with the internal market, the Commission should have initiated the formal investigation procedure.

*Findings of the Court*

As regards the admissibility of the action, first of all, the Court notes that the applicant complains, inter alia, that the Commission did not initiate the formal investigation procedure despite the fact that that institution could not have been unaware of the existence of serious difficulties as to the possible cumulation of the aid granted in Sweden under the schemes at issue with other aid, granted by other Member States to biogas producers ('the cumulation at issue'), that cumulation being liable to give rise to overcompensation in favour of those producers when they sell biogas in Sweden. Next, the Court notes that the applicant, as a potential indirect beneficiary of the aid provided for by those schemes and as a competitor of the current beneficiaries of that aid, is an interested party within the meaning of Article 108(2) TFEU and Article 1(h) of the regulation laying down detailed rules for the

88 Tax exemption for non-food based biogas and bio-propane in heat generation, and Commission Decision C(2020) 4487 final of 29 June 2020 on State aid SA.56908 (2020/N) – Sweden – Prolongation and modification of scheme SA.49893 (2018/N) – Tax exemption for non-food based biogas and bio-propane in heat generation, and Commission Decision C(Prolongation and modification of biogas scheme for motor fuel in Sweden, summaries of which have been published in the Official Journal of the European Union (OJ 2020 C 245, p. 2 and OJ 2020 C 260, p. 4, respectively).

application of Article 108 TFEU. [89] Lastly, the Court considers that the applicant has an interest in bringing proceedings, since, in the event of annulment of the contested decisions, it could exercise the procedural rights guaranteed to interested parties in the context of the formal investigation procedure, by submitting observations to the Commission on the changes to be made to the schemes at issue in order to make them compatible with the internal market. Accordingly, the action is admissible, at least in so far as the applicant thereby raises the complaint relating to the cumulation at issue.

Before examining that complaint, the Court rejects the Commission's argument that the Guidelines on State aid for environmental protection and energy 2014-2020, [90] the illegality of which had not been relied on by the applicant, do not allow any role to be attributed to the cumulation at issue for the purpose of assessing the compatibility of the schemes at issue with the internal market. Those guidelines do not prevent the Commission from examining the overcompensation which is liable to result from that cumulation.

As regards the merits of that complaint, the Court notes that, in the contested decisions, the Commission examined only the overcompensation which is liable to result from the cumulation of several aid measures granted by the Kingdom of Sweden and that, in so doing, it excluded the possibility that the cumulation at issue might give rise to serious difficulties in determining the compatibility of the schemes at issue with the internal market. The Court further states that, where the Commission adopts a decision based on Article 107(3)(c) TFEU at the end of the preliminary examination procedure, it must be in a position to conclude, without that issue raising serious difficulties, that the relevant aid will not affect trade between Member States.

Having recalled that, according to the case-law, if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes an indication of the existence of serious difficulties in the assessment of the notified aid measure, the Court notes that the question of the absence of overcompensation is closely linked to that of the proportionality of the schemes at issue. Accordingly, the fact that the Commission, despite the information available to it concerning the possible effects of the cumulation at issue, analysed the absence of overcompensation in an insufficient and incomplete manner may suffice, in the present case, to establish the existence of serious difficulties.

Before finding that the compatibility of the schemes at issue with the internal market raised serious difficulties on account of the overcompensation which is liable to result from the cumulation at issue, the Court examines the arguments of the Commission and the Kingdom of Sweden that, in essence, compliance with the principle of non-discrimination or with Article 110 TFEU requires that the tax exemptions provided for by the schemes at issue apply irrespective of the origin of the biogas sold in Sweden, without drawing any distinction according to whether or not the Member State in which the biogas was produced granted aid for the production of energy from biogas.

As regards compliance with the principle of non-discrimination, the Court points out that the objective of the schemes at issue is to make biogas competitive with fossil gases by compensating for the former's higher production costs. In the light of that objective, the sale of biogas for which the additional production costs have been compensated is not a situation comparable to that of the sale of biogas for which the additional production costs have not yet been compensated. The Court states that the difference between those two situations exists even where the compensation for those additional costs stems from aid granted by Member States other than the Kingdom of Sweden. Consequently, without objective justification, those two types of sales cannot benefit from the same

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

90 Commission Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1).

tax exemption, irrespective of whether the biogas sold in Sweden was produced on national territory or was imported.

As regards Article 110 TFEU, which prohibits Member States from imposing on imported products taxation in excess of that imposed on similar domestic products, the Court notes that the existence of overcompensation may be regarded as an objective criterion allowing the tax exemption provided for by the schemes at issue to be applied only to biogas, whether domestic or imported, the additional production costs of which as compared with fossil gases have not already been compensated for by other aid. That differentiation, based on an objective criterion, is such as to avoid the discrimination which would result from compensation already granted to biogas imported from certain Member States. The Court also states that the schemes at issue give rise to reverse discrimination against biogas produced in Sweden in favour of biogas produced in other Member States which grant aid for energy production from biogas. That outcome cannot be regarded as being imposed by the obligation to comply with Article 110 TFEU, the rationale of which is to prevent a Member State from favouring its own production to the detriment of that of other Member States.

In the light of those considerations, the Court concludes that, when examining the compatibility of the schemes at issue with the internal market, the Commission should have experienced serious difficulties, linked to the overcompensation which is liable to result from the cumulation at issue, which necessitate the initiation of the formal investigation procedure. The Court therefore upholds the action and annuls the contested decisions.

### Judgment of the General Court (Second Chamber, Extended Composition), 21 December 2022, E. Breuninger v Commission, T-260/21

State aid – Framework system to grant support for uncovered fixed costs in the context of the COVID-19 pandemic in Germany – Decision not to raise any objections – Temporary Framework for State aid measures – Individual examination of the aid scheme notified – Measure aimed at remedying a serious disturbance in the economy of a Member State – Proportionality

On 17 November 2020, the Federal Republic of Germany notified the European Commission of an aid scheme to provide support to undertakings for their uncovered fixed costs in the context of the COVID-19 outbreak on its territory. Under the scheme, aid of up to EUR 3 million could be granted to undertakings that had suffered a loss of turnover of at least 30% during the reference period.

Referring to its Communication on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, [91] the Commission declared the notified scheme compatible with the internal market in accordance with Article 107(3)(b) TFEU. [92] Under that provision, aid to remedy a serious disturbance in the economy of a Member State may, under certain circumstances, be considered to be compatible with the internal market.

On 2 February 2021, the Federal Republic of Germany notified the Commission of an amendment to its aid scheme, increasing the aid ceiling to EUR 10 million per undertaking and extending it until

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91 Communication from the Commission of 19 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1, 'the Temporary Framework'), which was amended for the first time on 3 April 2020 (OJ 2020 C 112 I, p. 1), for the second time on 8 May 2020 (OJ 2020 C 164, p. 3), for the third time on 29 June 2020 (OJ 2020 C 218, p. 3), for the fourth time on 13 October 2020 (OJ 2020 C 340 I, p. 1), and for the fifth time on 28 January 2021 (OJ 2021 C 34, p. 6).

92 Commission Decision C(2020) 8318 final of 20 November 2020 on State aid SA.59289 (2020/N) – Germany COVID-19 – Support for uncovered fixed costs (OJ 2022 C 124, p. 1).

31 December 2021. That amendment, which reflected various amendments made by the Commission to the Temporary Framework, was approved by the Commission on 12 February 2021. [93]

The German undertakings E. Breuninger GmbH & Co. and Falke KGaA brought actions for annulment of the Commission's decision, as amended, declaring the German aid scheme compatible with the internal market ('the contested decision'). In dismissing those actions, the Court clarifies, inter alia, the scope of the review of proportionality of decisions adopted by the Commission under Article 107(3)(b) TFEU.

*Findings of the Court*

In the first place, the Court analyses the legality of the contested decision in the light of Article 107(3)(b) TFEU.

The applicants claimed, in that regard, that the Commission had infringed the principles of proportionality and equal treatment by approving the eligibility criterion laid down by the German aid scheme. In accordance with that criterion, access to the State aid scheme was restricted to undertakings which suffered a reduction in turnover of at least 30% during the reference period compared to the same period in 2019.

As a preliminary point, the Court rejects the plea of inadmissibility raised by the Commission, alleging that the contested decision correctly applied the eligibility criterion set out in paragraph 87 of the Temporary Framework, the validity of which was not disputed by the applicants. On that point, it does indeed follow from the case-law that observance of the presumption of legality of legal measures taken by the European Union may prevent an examination of the merits of a decision that constitutes the mere application of a final measure of general application producing binding legal effects on third parties where the validity of that measure of general application has not been challenged. However, that is not the case where, as in the present case, the Commission applies rules of conduct that it has adopted for the purpose of limiting the exercise of its own discretion in the application of Article 107(3) TFEU and that do not in themselves produce binding legal effects.

As regards compliance with the principle of proportionality of the eligibility criterion laid down by the German aid scheme and approved by the contested decision, the Court recalls that a measure's compliance with that principle includes three components. The first component concerns its appropriateness, namely whether it is able to achieve the legitimate objective pursued. The second component concerns its necessity and implies that the legitimate objective in question cannot be achieved by less restrictive but equally appropriate means. Finally, the third component concerns its proportionality, namely the absence of disadvantages disproportionate to the aims pursued.

As regards the complaint alleging infringement of the principle of equal treatment, the Court notes, moreover, that the fact that the eligibility criterion for the German aid scheme, which is based on loss of turnover assessed for the individual undertakings concerned, leads to the undertakings being treated differently depending on whether all or only part of their activities were affected by the COVID-19 pandemic does not, in itself, imply that it is unlawful. On the other hand, the Court must determine whether that difference in treatment is justified in the light of Article 107(3)(b) TFEU, which presupposes that that criterion is appropriate, necessary and proportionate to remedy a serious disturbance in the economy of the Member State concerned. Thus, the complaint alleging infringement of the principle of equal treatment is, in essence, equivalent to the complaints alleging infringement of the principle of proportionality in their various components.

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93 Commission Decision C (2021) 1066 final of 12 February 2021 on State aid SA.61744 (2021/N) – Collective notification of a modification adapting aid schemes approved under the Temporary Framework, in particular following the fifth amendment to the Temporary Framework (OJ 2021 C 77, p. 18).

Those clarifications having been made, the General Court dismisses the various complaints challenging the appropriateness, necessity and proportionality of the eligibility criterion for the aid scheme approved by the contested decision.

In that context, the Court emphasises in particular that, while the applicants are entitled to challenge the necessity of that eligibility criterion, which has its origin in the Temporary Framework, by proposing an alternative criterion that has been applied by the Commission in other decisions, such a complaint may only be upheld if that alternative criterion clearly demonstrates that the eligibility criterion at issue is not necessary. Furthermore, the applicants' proposal to use the losses incurred in the business areas affected by the COVID-19 pandemic as an alternative eligibility criterion, without taking into account the situation of the undertaking concerned as a whole, would have greater budgetary implications for Germany than the eligibility criterion used by the Commission. It must therefore be held that the alternative criterion proposed by the applicants does not constitute an 'equally appropriate' measure capable of demonstrating that the eligibility criterion used by the Commission was not necessary.

In terms of the restrictive effects on competition that the eligibility criterion for the approved aid scheme entails, according to the applicants, for undertakings for which only certain activities were affected by the COVID-19 pandemic and which, consequently, had to devote some of their resources from activities not affected by the pandemic to the financing of the affected activities, the Court finds that that criterion does not, in any event, give rise to restrictive effects on competition that are manifestly disproportionate to the objective pursued by the German aid scheme of ensuring the viability of the undertakings affected by the COVID-19 pandemic.

Moreover, contrary to what the applicants asserted, it cannot be held that the Commission failed to fulfil its obligation to carry out an individual examination of the notified aid scheme. In that regard, the applicants have failed to demonstrate the existence of exceptional circumstances specific to the approved aid scheme that would have justified the Commission not applying, in the contested decision, the eligibility criterion set out in the Temporary Framework.

In the second place, the General Court also rejects the applicants' plea alleging infringement of Article 108(2) TFEU. The applicants claimed, in essence, that, by having validated the notified aid scheme without initiating the formal examination procedure, the Commission had infringed the applicants' procedural rights under that provision.

On that point, the Court notes that this plea is, in reality, subsidiary in the event that it did not examine the complaints relating to the merits of the assessment of the notified aid scheme. However, in so far as those complaints have been examined, that plea is deprived of its stated purpose. Moreover, in so far as that plea repeats in condensed form the arguments raised in the complaints relating to the merits of the assessment of the aid, it lacks any independent content.

In the light of those considerations, the Court dismisses the applicants' actions.

**Judgment of the General Court (Second Chamber, Extended Composition), 21 December 2022, Falke v Commission, T-306/21**

(State aid – Framework system to grant support for uncovered fixed costs in the context of the COVID-19 pandemic in Germany – Decision not to raise any objections – Temporary Framework for State aid measures – Individual examination of the aid scheme notified – Measure aimed at remedying a serious disturbance in the economy of a Member State – Proportionality)

On 17 November 2020, the Federal Republic of Germany notified the European Commission of an aid scheme to provide support to undertakings for their uncovered fixed costs in the context of the

COVID-19 outbreak on its territory. Under the scheme, aid of up to EUR 3 million could be granted to undertakings that had suffered a loss of turnover of at least 30% during the reference period.

Referring to its Communication on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, [94] the Commission declared the notified scheme compatible with the internal market in accordance with Article 107(3)(b) TFEU. [95] Under that provision, aid to remedy a serious disturbance in the economy of a Member State may, under certain circumstances, be considered to be compatible with the internal market.

On 2 February 2021, the Federal Republic of Germany notified the Commission of an amendment to its aid scheme, increasing the aid ceiling to EUR 10 million per undertaking and extending it until 31 December 2021. That amendment, which reflected various amendments made by the Commission to the Temporary Framework, was approved by the Commission on 12 February 2021. [96]

The German undertakings E. Breuninger GmbH & Co. and Falke KGaA brought actions for annulment of the Commission's decision, as amended, declaring the German aid scheme compatible with the internal market ('the contested decision'). In dismissing those actions, the Court clarifies, inter alia, the scope of the review of proportionality of decisions adopted by the Commission under Article 107(3)(b) TFEU.

*Findings of the Court*

In the first place, the Court analyses the legality of the contested decision in the light of Article 107(3)(b) TFEU.

The applicants claimed, in that regard, that the Commission had infringed the principles of proportionality and equal treatment by approving the eligibility criterion laid down by the German aid scheme. In accordance with that criterion, access to the State aid scheme was restricted to undertakings which suffered a reduction in turnover of at least 30% during the reference period compared to the same period in 2019.

As a preliminary point, the Court rejects the plea of inadmissibility raised by the Commission, alleging that the contested decision correctly applied the eligibility criterion set out in paragraph 87 of the Temporary Framework, the validity of which was not disputed by the applicants. On that point, it does indeed follow from the case-law that observance of the presumption of legality of legal measures taken by the European Union may prevent an examination of the merits of a decision that constitutes the mere application of a final measure of general application producing binding legal effects on third parties where the validity of that measure of general application has not been challenged. However, that is not the case where, as in the present case, the Commission applies rules of conduct that it has adopted for the purpose of limiting the exercise of its own discretion in the application of Article 107(3) TFEU and that do not in themselves produce binding legal effects.

As regards compliance with the principle of proportionality of the eligibility criterion laid down by the German aid scheme and approved by the contested decision, the Court recalls that a measure's compliance with that principle includes three components. The first component concerns its appropriateness, namely whether it is able to achieve the legitimate objective pursued. The second component concerns its necessity and implies that the legitimate objective in question cannot be

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94 Communication from the Commission of 19 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1, 'the Temporary Framework'), which was amended for the first time on 3 April 2020 (OJ 2020 C 112 I, p. 1), for the second time on 8 May 2020 (OJ 2020 C 164, p. 3), for the third time on 29 June 2020 (OJ 2020 C 218, p. 3), for the fourth time on 13 October 2020 (OJ 2020 C 340 I, p. 1), and for the fifth time on 28 January 2021 (OJ 2021 C 34, p. 6).

95 Commission Decision C(2020) 8318 final of 20 November 2020 on State aid SA.59289 (2020/N) – Germany COVID-19 – Support for uncovered fixed costs (OJ 2022 C 124, p. 1).

96 Commission Decision C (2021) 1066 final of 12 February 2021 on State aid SA.61744 (2021/N) – Collective notification of a modification adapting aid schemes approved under the Temporary Framework, in particular following the fifth amendment to the Temporary Framework (OJ 2021 C 77, p. 18).

achieved by less restrictive but equally appropriate means. Finally, the third component concerns its proportionality, namely the absence of disadvantages disproportionate to the aims pursued.

As regards the complaint alleging infringement of the principle of equal treatment, the Court notes, moreover, that the fact that the eligibility criterion for the German aid scheme, which is based on loss of turnover assessed for the individual undertakings concerned, leads to the undertakings being treated differently depending on whether all or only part of their activities were affected by the COVID-19 pandemic does not, in itself, imply that it is unlawful. On the other hand, the Court must determine whether that difference in treatment is justified in the light of Article 107(3)(b) TFEU, which presupposes that that criterion is appropriate, necessary and proportionate to remedy a serious disturbance in the economy of the Member State concerned. Thus, the complaint alleging infringement of the principle of equal treatment is, in essence, equivalent to the complaints alleging infringement of the principle of proportionality in their various components.

Those clarifications having been made, the General Court dismisses the various complaints challenging the appropriateness, necessity and proportionality of the eligibility criterion for the aid scheme approved by the contested decision.

In that context, the Court emphasises in particular that, while the applicants are entitled to challenge the necessity of that eligibility criterion, which has its origin in the Temporary Framework, by proposing an alternative criterion that has been applied by the Commission in other decisions, such a complaint may only be upheld if that alternative criterion clearly demonstrates that the eligibility criterion at issue is not necessary. Furthermore, the applicants' proposal to use the losses incurred in the business areas affected by the COVID-19 pandemic as an alternative eligibility criterion, without taking into account the situation of the undertaking concerned as a whole, would have greater budgetary implications for Germany than the eligibility criterion used by the Commission. It must therefore be held that the alternative criterion proposed by the applicants does not constitute an 'equally appropriate' measure capable of demonstrating that the eligibility criterion used by the Commission was not necessary.

In terms of the restrictive effects on competition that the eligibility criterion for the approved aid scheme entails, according to the applicants, for undertakings for which only certain activities were affected by the COVID-19 pandemic and which, consequently, had to devote some of their resources from activities not affected by the pandemic to the financing of the affected activities, the Court finds that that criterion does not, in any event, give rise to restrictive effects on competition that are manifestly disproportionate to the objective pursued by the German aid scheme of ensuring the viability of the undertakings affected by the COVID-19 pandemic.

Moreover, contrary to what the applicants asserted, it cannot be held that the Commission failed to fulfil its obligation to carry out an individual examination of the notified aid scheme. In that regard, the applicants have failed to demonstrate the existence of exceptional circumstances specific to the approved aid scheme that would have justified the Commission not applying, in the contested decision, the eligibility criterion set out in the Temporary Framework.

In the second place, the General Court also rejects the applicants' plea alleging infringement of Article 108(2) TFEU. The applicants claimed, in essence, that, by having validated the notified aid scheme without initiating the formal examination procedure, the Commission had infringed the applicants' procedural rights under that provision.

On that point, the Court notes that this plea is, in reality, subsidiary in the event that it did not examine the complaints relating to the merits of the assessment of the notified aid scheme. However, in so far as those complaints have been examined, that plea is deprived of its stated purpose. Moreover, in so far as that plea repeats in condensed form the arguments raised in the complaints relating to the merits of the assessment of the aid, it lacks any independent content.

In the light of those considerations, the Court dismisses the applicants' actions.

**Judgment of the General Court (Second Chamber, Extended Composition), 21 December 2022, E. Breuninger v Commission, T-525/21**

Action for annulment – State aid – Framework system to establish a federal compensation scheme in Germany for losses caused by lockdown decisions – Decision not to raise any objections – Aid to make good the damage caused by natural disasters or other exceptional occurrences – No interest in bringing proceedings – Inadmissibility

On 21 May 2021, the Federal Republic of Germany notified the European Commission of an aid scheme in the form of temporary economic support for companies whose activities had been suspended as a result of the measures taken by the Federal Government and the Länder to deal with the pandemic in Germany in the context of the COVID-19 crisis ('the federal compensation scheme').

Under this federal compensation scheme, federal, regional and local administrative authorities may, under certain conditions, provide direct subsidies to companies that suffered losses between 16 March 2020 and 31 December 2021 as a result of decisions to enter into lockdown.

By decision of 28 May 2021, [97] the Commission declared that scheme compatible with the internal market pursuant to Article 107(2)(b) TFEU. Under that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market.

The German undertaking E. Breuninger GmbH & Co, which is active, inter alia, in the retail sector, brought an action for annulment of the Commission's decision. However, the action is dismissed as inadmissible by the Second Chamber (Extended Composition) of the General Court, which raises of its own motion that undertaking's failure to establish the requisite interest in bringing proceedings before the Court.

*Findings of the Court*

Since the conditions governing the admissibility of an action relate to the absolute bar to proceeding with an action, which it must determine of its own motion, the Court points out that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of the measure in question is capable, in itself, of having legal consequences and that the action may thus, if successful, procure an advantage for the party who brought it.

As regards the question whether the applicant has an interest in bringing proceedings for the annulment of the contested decision, the Court notes that the applicant's action is based on the incorrect premiss that it was not eligible for the federal compensation scheme on account of the condition, laid down in Article 2(2) of that scheme, that undertakings pursuing mixed activities, some of which are not at all affected by the lockdown, may benefit from the federal compensation scheme only if the prohibited activities represent at least 80% of their turnover. Since the online trading activities pursued by the applicant were considered to be related to its retail activities, all the activities were required to be affected, within the meaning of that provision, by the lockdown decisions ordered during the COVID-19 pandemic.

On the other hand, it became apparent from the discussions in the course of the judicial proceedings that the fact that it was impossible for the applicant to obtain financial assistance under the federal aid programme was in fact due to the application by the German authorities of an eligibility requirement not notified to the Commission, requiring that at least 30% of the applicant's total turnover had been affected by the lockdown decisions.

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97 Commission Decision C(2021) 3999 final of 28 May 2021 on State aid SA.62784 (2021/N) – Germany COVID-19 – Federal Damage Compensation Scheme (OJ 2021 C 223, p. 25; 'the contested decision').

However, in so far as the action brought by the applicant relates exclusively to the legality of the contested decision, by which the Commission declared the notified federal scheme compatible with Article 107(2)(b) TFEU, the application by the German authorities of an additional eligibility requirement which is not expressly or implicitly mentioned in that scheme is not relevant to the present proceedings.

In the light of the foregoing, and of Article 2(2) of the federal compensation scheme, as declared compatible with Article 107(2)(b) TFEU in the contested decision, the applicant was eligible for aid under that scheme. Thus, the Court finds that the annulment of that decision would not procure any advantage for the applicant. Consequently, it dismisses its action as inadmissible for lack of interest in bringing proceedings.

The General Court adds, however, that it is open to the applicant to bring an action before the German courts, which will have to examine, if necessary after having referred a question to the Court of Justice for a preliminary ruling, whether the addition of a supplementary eligibility requirement by the German authorities is akin to the alteration of existing aid, and, therefore, to new aid subject to the notification obligation under Article 108(3) TFEU.

**Judgment of the General Court (First Chamber), 21 December 2022, Ekobulkos v Commission, T-702/21**

Link to the full text of the judgment

State aid – Production of electricity from renewable sources – Complaint – Action for failure to act – Call to act – Admissibility – Obligation to act – None

The company Ekobulkos EEOD is a Bulgarian electricity producer which operates a photovoltaic power plant put into operation on 19 May 2012.

By decision of 4 August 2016, [98] the European Commission took the view that the Bulgarian aid scheme for renewable energy production, notified by the Bulgarian authorities, [99] was compatible with the internal market in accordance with Article 107(3)(c) TFEU, and decided not to raise any objections.

The scheme thus approved laid down, inter alia, the conditions under which producers of electricity from renewable sources could benefit from preferential purchase prices. Those conditions were amended in 2015, inter alia, by the introduction of anti-cumulation rules ('the measure at issue'). [100] More specifically, in order to eliminate any risk of overcompensation, those rules required, when setting the level of support, where necessary, a reduction in the preferential purchase price by deducting the amount of investment aid received on the basis of an application submitted before 3 May 2011, the date on which the law introducing the scheme in question entered into force.

On 21 February 2020, Ekobulkos submitted a complaint to the Commission in which it claimed that the Republic of Bulgaria had granted certain producers of electricity from renewable sources State aid that was unlawful and incompatible with the internal market by giving them the benefit of preferential purchase prices which were exempt from any reductions under the measure at issue. In support of its

98 Decision C(2016) 5205 final of 4 August 2016 in Case SA.44840 (2016/NN).

99 As notified, that scheme consisted of the Zakon za energiata ot vazobnovyaemi iztochnitsi (ZEVI) (Law on energy from renewable sources), in force since 3 May 2011 (DV No 35 of 3 May 2011), and two regulations of 18 March 2013 on the regulation of electricity prices and of 20 February 2004 on the regulation of electricity prices.

100 The present case concerns Paragraph 18 of the Zakon za izmenenie i dopalnenie na Zakona za energetikata (ZID-ZE) (Law amending and supplementing the Law on Energy) of 24 July 2015 (DV No 56 of 24 July 2015).

claims, Ekobulkos argued more specifically that the measure at issue had the effect of establishing a variable level of support, when setting preferential purchase prices, depending on the date on which the application for aid was submitted. In those circumstances, such a measure was alleged to give rise to inequality between the energy producers concerned which, according to the complainant, was discriminatory.

By letter of 7 October 2020, the Commission replied, stating, first, that it had already examined the measure at issue in the course of the procedure which led to the adoption of the positive decision in 2016, relying in that regard on various elements of analysis set out in the grounds of that decision. In those circumstances, it considered that it had already approved the amendments introduced in 2015, including in particular the measure at issue. Second, the Commission stated that, on the basis of the information provided in the complaint, it did not identify any misapplication of the authorised measure or any new measures liable to constitute State aid. Consequently, it invited the applicant to send it, if it wished, any additional information of use, failing which its complaint would be deemed to have been withdrawn.

By letter of 7 November 2020, Ekobulkos reiterated its analysis, thus maintaining its arguments, and did the same in a final letter of 22 June 2021. In that final letter, presented as a call to act for the purposes of the second paragraph of Article 265 TFEU, Ekobulkos also requested that the Commission use the powers conferred on it by Regulation 2015/1589 [101] in order to order the suspension of the application of the contested provisions until it had given a final decision on their compatibility with the internal market.

It was in that context that, on 30 October 2021, Ekobulkos brought an action for failure to act before the General Court seeking a declaration that the Commission had unlawfully failed to take a position on its complaint.

In its judgment of 21 December 2022, the Court dismisses that action as unfounded.

That judgment is significant in two respects. First, it provides the Court with an opportunity to examine the admissibility of an action for failure to act, from the perspective of the delimitation of the scope of the action by the call to act, in the event of a discrepancy, at least in form, between the subject matter of such a letter of formal notice and the claim for a declaration of failure to act. Second, with regard to the substance of the case, it also gives the Court the opportunity to specify the circumstances in which the Commission is not required to take a position on a complaint concerning an alleged State aid measure submitted to it, in particular where it considers that it has already been called upon to examine the measure at issue in a previous decision.

*Findings of the Court*

First of all, the Court examines a plea of inadmissibility raised by the Commission, alleging infringement of an essential procedural requirement. According to the Commission, the letter of 22 June 2021 cannot be regarded as it being called upon to act, within the meaning of the second paragraph of Article 265 TFEU, in view of the discrepancy between the request submitted on that occasion and the claim for a declaration of failure to act, from the point of view of their respective legal bases.

In that regard, the Court notes at the outset that the call to act referred to in the second paragraph of Article 265 TFEU has the effect of delimiting the scope of the action that is liable to be brought in the event that the institution concerned fails to define its position in that regard within a period of two months. In those circumstances, it is settled case-law that the formal notice required in that regard must have been drafted in a sufficiently clear and precise manner to enable the institution concerned

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[101] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9). The application in the present case referred to Article 13(1) of that regulation.

to understand, specifically, the subject matter and that it is required to adopt a position on that matter.

In the present case, after acknowledging the discrepancy on which the Commission relied, the Court nevertheless refuses to accept, in the light of those case-law principles, that that discrepancy is such as to render the action inadmissible. In those circumstances, the Court continues its examination by analysing the substance, in the light of the relevant criteria set out above, of the letter of 22 June 2021, having regard to all of the evidence adduced by the complainant during the administrative procedure. That examination leads it to find that, since the complaint was sent, Ekobulkos had never changed its principal request, which sought, in the present case, a decision on the compatibility of the measure referred to in the light of State aid law and was, moreover, sufficiently clear and precise within the meaning of the case-law referred to above. That also applies to the letter of 22 June 2021, despite the fact that the claim set out therein consists of a formally different request, with the result that it must be regarded as a call to act. In those circumstances, the Court holds that the action must be declared admissible.

Next, as regards the merits of the claim for a declaration of failure to act, the Court recalls that it cannot give a ruling in that regard until it has ascertained whether, at the time when it was called upon to act, the institution in question was indeed under an obligation to act.

In the present case, in the field of State aid, the Commission's obligations, in particular for the purpose of examining a measure that is liable to constitute State aid, are governed by Regulation 2015/1589. More specifically, Article 15(1) of that regulation provides that the examination of possible unlawful aid is to result in a formal decision. [102] Thus, the Commission is under an obligation to act only when it has examined the measure in question; however, the Commission is not required to do so where, following the lodging of a complaint, it has not succeeded in obtaining sufficient information for the purposes of its examination. [103]

In that regard, as a first step, the Court finds that, in its 2016 decision on compatibility, the Commission took into account the legislative amendments made in 2015, including the measure at issue, as is apparent from the grounds of that decision. Therefore, the Commission correctly informed the complainant that it had already taken a decision on the measure at issue. There is no provision in Regulation 2015/1589 which creates an obligation for the Commission to adopt a new decision on the compatibility of a measure of State aid with the internal market on which it has already taken a decision, as the Court points out, before adding that, if that were not the case, that would allow any interested party to challenge compatibility analyses, including after the expiry of the period for bringing an action for annulment.

As a second step, in so far as the Commission considered, moreover, that, on the basis of the complaint, it was not possible to identify any misapplication of the measure at issue or the introduction of a new measure other than the one already examined, the Court finds that Ekobulkos has not in any way established how that assessment is incorrect.

It follows from all the foregoing that, at the time when the Commission was sent the call to act, it was under no obligation to act. In the absence of any obligation to act, the complainant also cannot validly rely on the allegedly excessive duration of the procedure for examining its complaint.

In conclusion, since, in the present case, the Commission cannot be criticised for having failed to act, the Court holds that the action must be dismissed.

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[102] Under Article 4(2), (3) and (4) of Regulation 2015/1589, to which Article 15(1) of Regulation 2015/1589 refers, the purpose of such a decision is to find either (i) that the measure at issue does not constitute aid, (ii) that the measure is compatible with the internal market, or (iii) that, on the contrary, it is necessary to initiate the formal investigation procedure, in view of the doubts raised by it.

[103] Article 24(2) of Regulation 2015/1589, to which the second subparagraph of Article 12(1) of that regulation refers.

## 4. APPROXIMATION OF LAWS: EU TRADE MARK

**Judgment of the Court of Justice (Grand Chamber), 22 December 2022, Louboutin (Use of an infringing sign on an online marketplace), C-148/21 and C-184/21**

Link to the full text of the judgment

Reference for a preliminary ruling – EU trade mark – Regulation (EU) 2017/1001 – Article 9(2)(a) – Rights conferred by an EU trade mark – Concept of 'use' – Operator of an online sales website incorporating an online marketplace – Advertisements published on that marketplace by third-party sellers using, in those advertisements, a sign which is identical with a trade mark of another person for goods which are identical with those for which that trade mark is registered – Perception of that sign as forming an integral part of the commercial communication of that operator – Method of presenting the advertisements which does not make it possible to distinguish clearly the offerings of that operator from those of the third-party sellers

Since 2016, Mr Louboutin, a French designer of luxury footwear and handbags, has registered the colour red, applied to the outer sole of a high-heeled shoe, as an EU trade mark.

Amazon operates websites selling various goods which it offers both directly, in its own name and on its own behalf, and indirectly, by providing a sales platform for third-party sellers. That operator also offers third-party sellers the additional services of stocking and shipping their goods.

Mr Louboutin stated that those websites regularly display advertisements for red-soled shoes which, in his view, relate to goods which have been placed on the market without his consent. Then, alleging an infringement of the exclusive rights conferred by the mark at issue, he brought two actions for infringement against Amazon before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg) [104] and the tribunal de l'entreprise francophone de Bruxelles (Brussels Companies Court (French-speaking), Belgium) . [105]

Each of those courts then decided to refer a number of questions to the Court of Justice for a preliminary ruling.

In essence, they asked the Court whether the EU trade mark regulation [106] must be interpreted as meaning that the operator of an online sales website incorporating, as well as that operator's own sales offerings, an online marketplace may be regarded as itself using a sign which is identical with an EU trade mark of another person for goods which are identical with those for which that trade mark is registered where third-party sellers offer goods bearing that sign for sale on that marketplace without the consent of the trade mark proprietor. They are unsure, inter alia, whether the following are relevant in that regard:

the fact that that operator uses a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the goods which it sells in its own name and on its own behalf and those relating to goods offered by third-party sellers on that marketplace; the fact that it places its own logo as a renowned distributor on all those advertisements; and the fact that it offers

104 Case C-148/21.

105 Case C-184/21.

106 More specifically, Article 9(2)(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).

third-party sellers, in connection with the marketing of their goods, additional services consisting in providing them support in the presentation of their advertisements and in storing and shipping goods offered on the same marketplace. In that context, the referring courts also ask whether it is necessary to take into consideration, where appropriate, the perception of the users of the website in question.

The Court, sitting as the Grand Chamber, had the opportunity to provide important clarifications on the issue of the direct liability of the operator of an online sales website incorporating an online marketplace for infringements of the rights of the proprietor of an EU trade mark resulting from the fact that a sign which is identical with that mark appears in advertisements from third-party sellers on that marketplace.

*Findings of the Court*

It must be recalled that, under the EU trade mark regulation, [107] the registration of an EU trade mark confers on its proprietor the right to prevent all third parties from using, in the course of trade, any sign which is identical with that trade mark in relation to goods or services which are identical with those for which the mark is registered.

The Court notes at the outset that the concept of 'using' is not defined by the EU trade mark regulation. Nevertheless, that expression involves active behaviour and direct or indirect control of the act constituting the use. Only a third party which has such control is effectively able to stop the use of a trade mark without the consent of its proprietor.

The use, by a third party, of a sign which is identical with or similar to the proprietor's trade mark also implies, at the very least, that that third party uses the sign in its own commercial communication. A person may thus allow its clients to use signs which are identical with or similar to trade marks without itself using those signs. The Court thus considered that, with regard to the operator of an online marketplace, the use of signs which are identical with or similar to trade marks in offers for sale displayed on that marketplace is made only by the sellers which are customers of that operator and not by the operator itself, since the latter does not use that sign in its own commercial communication.

The Court observes, however, that, in its earlier case-law, it was not asked about the impact of the fact that the online sales website in question incorporates, as well as the online marketplace, sales offers of the operator of that site itself, whereas the present cases specifically raise the issue of that impact. Accordingly, in the present case, the referring courts are uncertain whether, in addition to the third-party seller, the operator of an online sales website incorporating an online marketplace, such as Amazon, also uses, in its own commercial communication, a sign which is identical with a trade mark of another person for goods which are identical with those for which that trade mark is registered, and may thus be held liable for the infringement of the rights of the proprietor of that trade mark where that third-party seller offers goods bearing that sign for sale on that marketplace.

The Court finds that that issue arises irrespective of the fact that the role of that operator may, where appropriate, also be examined from the point of view of other rules of law and that, although the assessment of such use by the operator is ultimately a matter for the national court, it may provide elements of interpretation under EU law which may be useful in that regard.

In that connection, as regards commercial communication, the Court states that the use of a sign which is identical with another person's trade mark by the operator of a website incorporating an online marketplace in its own commercial communication presupposes that that sign appears, in the eyes of third parties, to be an integral part of that communication and, consequently, a part of its activity.

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[107] Article 9(2)(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).

In that context, the Court notes that, in a situation in which the operator of a service uses a sign which is identical with or similar to the trade mark of another person in order to promote goods which one of its customers is marketing with the assistance of that service, that operator does itself make use of that sign if it uses it in such a way that it establishes a link between the sign and the services provided by that operator.

Accordingly, the Court has held that such an operator does not itself make use of a sign which is identical with or similar to a trade mark of another person when the service it provides is not comparable to a service aimed at promoting the marketing of goods bearing that sign and does not imply the creation of a link between the service and that sign, since the operator in question is not apparent to the consumer, which excludes any association between its services and the sign at issue.

On the other hand, the Court has held that such a link does exist where the operator of an online marketplace, by means of an internet referencing service and on the basis of a keyword which is identical with a trade mark of another person, advertises goods bearing that trade mark which are offered for sale by its customers on its online marketplace. For internet users carrying out a search on the basis of a keyword, such advertising creates an obvious association between those trade-marked goods and the possibility of buying them through that marketplace. That is why the proprietor of that trade mark is entitled to prohibit that operator from such use, where that advertising infringes the trade mark right owing to the fact that it does not enable well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether those goods originate from the proprietor of that trade mark or from an undertaking economically linked to that proprietor or, on the contrary, from a third party.

The Court concluded from this that, in order to determine whether the operator of an online sales website incorporating an online marketplace does itself make use of a sign which is identical with a trade mark of another person, which appears in the advertisements relating to goods offered by third-party sellers on that marketplace, it is necessary to assess whether a well-informed and reasonably observant user of that website establishes a link between that operator's services and the sign in question.

From that point of view, in order to determine whether an advertisement, published on that marketplace by a third-party seller active on that marketplace, using a sign which is identical with a trade mark of another person may be regarded as forming part of the commercial communication of the operator of that website, it is necessary to ascertain whether it is capable of establishing a link between the services offered by that operator and the sign in question, on the ground that a user might believe that the operator is marketing, in its own name and on its own behalf, the goods for which the sign in question is being used.

The Court highlights that, in the overall assessment of the circumstances of the present case, the method of presenting the advertisements, both individually and as a whole, on the website in question and the nature and scope of the services provided by the operator of the website are particularly important.

As regards, first, the method of presenting the advertisements, EU law requires transparency in the display of advertisements on the internet, so that a well-informed and reasonably observant user can distinguish easily between offers originating from the operator of the website and from third-party sellers active on the online marketplace. However, the Court considers that the operator's use of a uniform method of presenting the offers published, displaying both its own advertisements and those of third-party sellers and placing its own logo as a renowned distributor on its own website and on all of the advertisements may make it difficult to draw such a distinction and thus give the impression that that operator is marketing, in its own name and on its own behalf, the goods offered for sale by those third-party sellers.

Second, the nature and scope of the services provided by the operator of an online marketplace to sellers, and in particular the services consisting of the storage, shipping and management of returns of those goods, are also likely to give the impression, to a well-informed and reasonably observant user, that those same goods are being marketed by that operator and thus establish a link, in the eyes of those users, between those services and the signs placed on those goods and in the advertisements of third-party sellers.

In conclusion, the Court rules that the operator of an online sales website incorporating, as well as that operator's own sales offers, an online marketplace may be regarded as itself using a sign which is identical with an EU trade mark of another person for goods which are identical with those for which that trade mark is registered, where third-party sellers offer for sale, on that marketplace, without the consent of the proprietor of that trade mark, such goods bearing that sign, if a well-informed and reasonably observant user of that site establishes a link between the services of that operator and the sign at issue, which is in particular the case where, in view of all the circumstances of the situation in question, such a user may have the impression that that operator itself is marketing, in its own name and on its own behalf, the goods bearing that sign. The Court adds that the following are relevant in that regard:

– the fact that that operator uses a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the goods which it sells in its own name and on its own behalf and those relating to goods offered by third-party sellers on that marketplace;

– the fact that it places its own logo as a renowned distributor on all those advertisements; and

– the fact that it offers third-party sellers, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and shipping of those goods.

**Judgment of the General Court (Tenth Chamber), 14 December 2022, Pierre Lannier v EUIPO – Pierre Lang Trading (PL), T-530/21**

Link to the judgment as published in extract form

EU trade mark – Opposition proceedings – Application for an EU figurative mark representing the superposed capital letters 'P' and 'L' – Earlier EU figurative mark representing a mirror image combination of the superposed capital letters 'P' and 'L' – Admissibility of the appeal before the Board of Appeal – Locus standi – Relative ground for refusal – Likelihood of confusion – Article 8(1)(b) of Regulation (EC) No 207/2009 (now Article 8(1)(b) of Regulation (EU) 2017/1001)

On 13 December 2016, Pierre Lannier filed an application for registration of a figurative mark representing the superposed capital letters 'P' and 'L' as an EU trade mark.

In 2017, Pierre Lang Europe Handelsges.m.b.H. filed a notice of opposition to registration of the mark applied for, arguing that there was a likelihood of confusion. [108] The opposition was rejected in its entirety by the Opposition Division of the European Union Intellectual Property Office (EUIPO) in 2020. During those proceedings, Pierre Lang Europe Handelsges.m.b.H. was acquired by Pierre Lang Trading GmbH.

The Board of Appeal of EUIPO, having declared the appeal admissible, annulled the decision of the Opposition Division and upheld the opposition. The notice of the appeal against the decision of the Opposition Division was filed with the Board of Appeal under the name of Pierre Lang Europe Handelsges.m.b.H. However, the statement setting out the grounds of appeal also filed with the Board of Appeal indicated the name Pierre Lang Europe Ges.m.b.H. Noting that that statement had been filed in the name of an undertaking designated by a name different from that entered in the EUIPO Register, the Registry of the Boards of Appeal requested the party which had instituted the

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

appeal proceedings to submit observations in that regard. That error was corrected by Pierre Lang Trading GmbH in its capacity as successor to the company which filed the notice of opposition. [109]

Hearing an action brought by Pierre Lannier, the Court dismisses that action and examines, for the first time, the legal consequences of a failure to register the transfer of an EU trade mark in the EUIPO Register for the new proprietor of the trade mark as regards that person's ability to continue opposition proceedings at the stage of the appeal before the Board of Appeal. In addition, the Court assesses whether clerical errors in the name stated in the notice of appeal, on the one hand, and the statement setting out the grounds of that appeal before the Board of Appeal, on the other, are capable of being rectified.

*Findings of the Court*

First of all, the Court recalls that a notice of appeal must contain the name of the appellant before the Board of Appeal. [110] Where the notice of appeal does not comply with the requirements laid down, [111] the Board of Appeal must reject the appeal as inadmissible, if, despite having been informed thereof, the appellant has not remedied the deficiency within the prescribed time limit.

Next, the Court states that the incorrect identification of the appellant in the notice of appeal filed is a defect capable of being rectified. [112]

In the present case, Pierre Lang Trading GmbH has established that it was the proprietor of the earlier mark at the time when the appeal was brought before the Board of Appeal. In addition, that company corrected the notice of appeal within the prescribed period. Therefore, the Court finds that the response given to EUIPO was satisfactory and that the notice of appeal was corrected.

Lastly, as regards the ability of Pierre Lang Trading GmbH to continue opposition proceedings at the stage of the appeal before the Board of Appeal, the Court notes, first, that the observations submitted by that company and the evidence produced in support thereof were sufficient to enable the Board of Appeal to rule on the admissibility of the appeal. Secondly, Pierre Lang Trading GmbH, in its capacity as successor to the company which filed that notice of opposition and as proprietor of the earlier mark on the date on which the appeal was brought, was in fact the person harmed by the decision of the Opposition Division and, consequently, was entitled to bring an appeal against that decision.

## 5. ENVIRONMENT: AIR QUALITY

### Judgment of the Court of Justice (Grand Chamber), 22 December 2022, Ministre de la Transition écologique and Premier minister (Liability of the State for air pollution), C-61/21

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Directives 80/779/EEC, 85/203/EEC, 96/62/EC, 1999/30/EC and 2008/50/EC – Air quality – Limit values for microparticles (PM10) and nitrogen dioxide

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109 In accordance with Article 21(1)(a) and Article 23(1)(c) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

110 The name of that party must appear in the form prescribed in Article 2(1)(b) of Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Implementing Regulation (EU) 2017/1431 (OJ 2018 L 104, p. 37).

111 Article 21(1)(a) of Delegated Regulation 2018/625.

112 In accordance with Article 2(1)(b), Article 21(1)(a) and Article 23(1)(c) of Delegated Regulation 2018/625, as well as Article 68(1) 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).

(NO2) – Exceeded – Air quality plans – Damage caused to an individual on account of deterioration of the air resulting from the exceedance of those limit values – Liability of the Member State concerned – Conditions for establishing that liability – Requirement that the rule of EU law infringed be intended to confer rights on the individuals who have been harmed – No such intention

In an action brought before the tribunal administratif de Cergy-Pontoise (Administrative Court, Cergy-Pontoise, France), JP, a resident in part of the agglomeration of Paris, sought, inter alia, compensation from the French Republic for damage related to the deterioration of his health alleged to have been caused by the deterioration of the ambient air quality that agglomeration. That deterioration resulted from exceedances of the nitrogen dioxide (NO2) and microparticles (PM10) concentration limit values, fixed by Directive 2008/50 on ambient air quality, [113] owing to the failure of the French authorities to fulfil their obligations under Articles 13 [114] and 23 [115] of that directive.

His action having been dismissed on the ground, in essence, that the provisions relied on by him of Directive 2008/50 on ambient air quality do not confer any right on individuals to obtain compensation for any damage suffered as a result of the deterioration of air quality, JP brought an appeal against that judgment before the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France).

Giving a ruling on a preliminary reference from that court, the Court of Justice, sitting as the Grand Chamber, clarifies the conditions under which a Member State incurs liability for damage caused to an individual by the deterioration of air quality as a result of the limit values for pollutants in the ambient air being exceeded.

*Findings of the Court*

First of all, the Court notes that Directive 2008/50 on ambient air quality, relied on by JP, entered into force on 11 June 2008, namely later, in part, than the damage to health that he alleges was caused, which began in 2003. Thus, in order to assess the potential liability on the part of the French Republic for the damage at issue, it considers it necessary to take into account not only the relevant provisions of that directive, but also those of the directives that preceded it [116] and which laid down analogous obligations.

Next, the Court recalls that the engagement of State liability by individuals requires three cumulative conditions to be satisfied, namely that: the rule of EU law infringed must be intended to confer rights on them; the infringement of that rule must be sufficiently serious; and there must be a direct causal link between that infringement and the loss or damage sustained by those individuals.

As regards the first condition requiring that the rule infringed must be intended to confer rights on individuals, those rights arise not only where they are expressly granted by provisions of EU law, but also by reason of positive or negative obligations which those provisions impose in a clearly defined manner, whether on individuals, on the Member States or on the EU institutions. The breach of such

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113 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

114 Under Article 13(1) of that directive, 'Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI' and 'in respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein'.

115 Under Article 23(1) of the same directive, 'where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV'.

116 Namely, Articles 3 and 7 of Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ 1980 L 229, p. 30), Articles 3 and 7 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ 1985 L 87, p. 1), Articles 7 and 8 of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), and Article 4(1) and Article 5(1) of Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41).

positive or negative obligations by a Member State is liable to hinder the exercise of rights implicitly conferred on individuals by the provisions in question and thus to alter the legal situation which those provisions seek to establish for them. That is the reason why the full effectiveness of those rules and the protection of the rights that they confer require that individuals have the possibility of obtaining redress, irrespective of whether the provisions in question have direct effect, the quality of direct effect being neither necessary nor sufficient in itself for that first condition to be satisfied.

In the present case, Article 13(1) and Article 23(1) of Directive 2008/50 on ambient air quality, like the analogous provisions of the preceding directives, oblige Member States, in essence, first, to ensure that the levels of, inter alia, PM10 and NO2 do not exceed, in their respective territories and with effect from certain dates, the limit values set by those directives and, second, where those limit values are nonetheless exceeded, an obligation to provide for appropriate measures to remedy those exceedances, inter alia by means of air quality plans. It follows that those provisions lay down sufficiently clear and precise obligations as to the result to be achieved by Member States. However, those obligations pursue a general objective of protecting human health and the environment as a whole and it cannot be inferred that they implicitly confer rights on individuals, the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to them. Therefore, the first of the three conditions, which are cumulative, for State liability to be incurred is not satisfied.

That finding cannot be altered as a result of the right that individuals are recognised as having, under the Court's case-law, to require the national authorities, if necessary by bringing an action before the courts having jurisdiction, to adopt an air quality plan in the event that the limit values referred to in Directive 2008/50 and the previous directives are exceeded. That right, which stems in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular situation, does not mean that the obligations resulting from Article 13(1) and Article 23(1) of Directive 2008/50 and the analogous provisions of the earlier directives were intended to confer individual rights on interested persons, for the purpose of the first of the three conditions referred to above.

Having regard to all of those considerations, the Court concludes that Article 13(1) and Article 23(1) of Directive 2008/50 on ambient air quality, as well as the analogous provisions of the preceding directives, must be interpreted as meaning that they are not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member State.

## 6. ENERGY

### Judgment of the General Court (Second Chamber, Extended Composition), 7 September 2022, BNetzA v ACER, T-631/19

Energy – Internal market in electricity – Regulation (EU) 2019/942 – Decision of the Board of Appeal of ACER – Action for annulment – Act not open to challenge – Inadmissibility – Competence of ACER – Article 8 of Regulation (EC) No 713/2009 – Article 6(10) of Regulation 2019/942 – Article 9(12) of Regulation (EU) 2015/1222 – Applicable law – Regulation (EU) 2019/943

On 24 July 2015, the European Commission adopted Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management [117] in the electricity sector. That regulation sets out a series of requirements relating to cross-zonal capacity allocation and congestion management in the day-ahead and intraday markets, including in particular a requirement to set a common coordinated capacity calculation methodology ('CCM') in each of the capacity calculation regions ('CCRs'). [118]

In accordance with that regulation, [119] the transmission system operators in the Core CCR [120] submitted two proposals for approval by the national regulatory authorities of the concerned region, relating to the draft regional day-ahead CCM and the draft regional intraday CCM respectively, which were amended at the request of those authorities.

Since the regulatory authorities failed to reach a unanimous agreement to validate the two amended proposals, the European Agency for the Cooperation of Energy Regulators (ACER), under the same regulation, [121] adopted a decision on the day-ahead and intraday CCMs for the Core CCR ('the initial decision').

The applicant, Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), as the national regulatory authority of the Federal Republic of Germany, appealed [122] against the initial decision to ACER's Board of Appeal ('the Board of Appeal'). The Board of Appeal having dismissed its appeal, the applicant brought an action before the General Court seeking, primarily, annulment of certain provisions of the initial decision and of the decision of the Board of Appeal and, in the alternative, annulment of both those decisions in their entirety.

In its judgment, the Court (Second Chamber, Extended Composition), while finding the action to be inadmissible in so far as it concerns the initial decision, annuls the Board of Appeal's decision dismissing the appeal. The Court has taken the opportunity to clarify, first, the extent of ACER's competence in comparison with the competence of the national regulatory authorities in the context of the adoption of the regional CCMs and, secondly, the substantive law applicable to the case.

*Findings of the Court*

As a preliminary issue, the Court finds the applicant's action for annulment to be inadmissible in so far as it concerns the initial decision. It notes in that respect that the admissibility of actions for annulment brought by natural or legal persons against acts of ACER intended to produce legal effects in relation to them must be examined in the light of the specific conditions and arrangements laid down by the act setting up that body, namely Regulation (EU) 2019/942. [123] According to that regulation, where an internal appeal has been lodged against a decision made by ACER, an action for annulment will only be admissible if it concerns the decision by the Board of Appeal dismissing that internal appeal or, as applicable, confirming the initial decision. [124] In consequence, since the decision of the Board of Appeal is based on the grounds stated in the initial decision, and indeed confirms

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117 Commission Regulation of 24 July 2015 (OJ 2015 L 197, p. 24).

118 Articles 20 to 26 of Regulation 2015/1222.

119 Articles 9(7) and 20(2) of Regulation 2015/1222.

120 The 'Core CCR' is the geographical area for the purpose of calculating capacity established under Article 15 of Regulation 2015/1222 and comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia.

121 Article 9(12) of Regulation 2015/1222.

122 Under Article 19 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1).

123 Regulation of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) (OJ 2019 L 158, p. 22).

124 Recital 34 and Articles 28 and 29 of Regulation 2019/942.

those grounds, the pleas in law and arguments directed against those grounds must be found to be fully effective for the purpose of reviewing the legality of the Board of Appeal's decision.

In line with the foregoing finding, the Court continues its analysis on the substance. It examines, first, whether the Board of Appeal erred in law by failing to find that, in adopting the initial decision, ACER exceeded the limits of its competence. It therefore seeks to establish whether the provisions of Regulations 2019/942 [125] and 2015/1222, [126] both in force and applicable at the time the Board of Appeal adopted its decision, empowered ACER to adopt the final day-ahead and intraday CCMs of the Core CCR. According to those provisions, ACER is competent to decide on or to adopt individual decisions on regulatory issues or problems having effects on cross-border trade or cross-border system security, such as the adoption of the day-ahead and intraday CCMs of each CCR where, as in the present case, the competent national regulatory authorities have failed to reach agreement. In contrast to the line of argument put forward by the applicant, it does not emerge from those provisions that ACER's competence is confined to the points of disagreement between the authorities concerned. Regulatory issues or problems that initially fall within the competence of the national regulatory authorities before becoming the competence of ACER because those authorities fail to reach agreement [127] are instead understood as an inseparable whole that is referred to the national regulatory authorities and then to ACER globally with no distinction drawn between points of agreement and points of disagreement.

That literal interpretation is borne out by the context and the objectives pursued by the legislation of which those provisions form part. It can be seen from the explanatory memoranda to the proposals for Regulation 2019/942 and for Regulation No 713/2009, which applied previously, that the EU legislature clearly intended to make decision-making on cross-border issues faster and more efficient, by strengthening ACER's individual decision powers in a manner compatible with keeping the central role of the national regulatory authorities in energy regulation and in accordance with the principles of subsidiarity and proportionality. It is also clear from the preamble of Regulation 2019/942 [128] that ACER was established to fill the regulatory gap at EU level and to contribute towards the effective functioning of the internal markets for electricity and natural gas.

Accordingly, not only the purpose of the provisions being interpreted and the context of which they form part but also the specific circumstances of the present case confirm that ACER is empowered to decide itself on the development of the regional CCMs where the regulatory authorities at Member State level have failed to reach a decision on the matter, while keeping the central role conferred on the national regulatory authorities through assent by the Board of Regulators on which those authorities are represented, and that its competence is not confined to the specific aspects around which those authorities' disagreement crystallised. Similarly, since ACER has been given its own decision-making powers to perform its regulatory functions independently and efficiently, ACER is empowered to amend the proposals from the transmission system operators in order to ensure that they comply with EU energy law, and must not be bound by any points of agreement there may be between the competent national regulatory authorities.

The Court therefore finds that the Board of Appeal did not err in law by failing to find that ACER had exceeded the limits of its competence by determining, in the initial decision, points of the day-ahead and intraday CCMs of the Core CCR on which the national regulatory authorities of that CCR had reached agreement.

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125 Article 6(10) of Regulation 2019/942, formerly Article 8(1) of Regulation No 713/2009.

126 Article 9(12) of Regulation 2015/1222.

127 Article 6(10) of Regulation 2019/942, formerly Article 8(1) of Regulation No 713/2009.

128 Recital 10 of Regulation 2019/942, formerly recital 5 of Regulation No 713/2009.

Secondly, the Court seeks to determine whether, because it did not review the legality of the CCMs in ACER's initial decision in the light of the requirements governing the adoption of CCMs laid down in Articles 14 to 16 of Regulation 2019/943, the Board of Appeal erred in law in its determination of the applicable law.

The Court notes in that respect that Articles 14 to 16 of Regulation 2019/943 govern capacity allocation on the markets in day-ahead and intraday cross-border exchanges in electricity and therefore dictate the requirements to be taken into consideration when day-ahead and intraday CCMs are adopted. It also calls to mind that a new legal rule, in principle, applies from the entry into force of the act introducing it and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects and to new legal situations. At the time the initial decision was adopted, namely 21 February 2019, Articles 14 to 16 of Regulation 2019/943 had not yet entered into force or become applicable, whereas they had, with certain limits with regard to Article 16, at the time the Board of Appeal adopted its decision, namely 11 July 2019. Accordingly, where, as in the present case, an appeal is lodged before the Board of Appeal against a decision of ACER concerning day-ahead or intraday CCMs, it is the decision of the Board of Appeal confirming that decision that definitively establishes ACER's position on that methodology, following a full examination by the Board of Appeal of the situation at issue, in fact and in law, in the light of the law applicable at the time it makes its decision. In consequence, since Articles 14 to 16 of Regulation 2019/943 were already applicable by that date, the Board of Appeal was obliged to determine whether the CCMs approved by ACER in the initial decision complied with the new rules emanating from those articles.

It follows that, by not reviewing the legality of the day-ahead and intraday CCMs of the Core CCR in the light of the requirements of Articles 14 to 16 of Regulation 2019/943, the Board of Appeal erred in law in its determination of the law applicable at the time of final adoption of those CCMs.

The Board of Appeal's decision is therefore annulled.

## 7. EUROPEAN CIVIL SERVICE: CONDITIONS FOR ADMISSION TO COMPETITIONS

### Judgment of the General Court (Fourth Chamber), 7 September 2022, OQ v Commission, T-713/20

Civil service – Recruitment – Notice of open competition EPSO/AD/378/20 (AD 7) – Croatian-language lawyer-linguists at the Court of Justice of the European Union – Decision of the selection board not to admit the applicant to the next stage of the competition – Conditions for admission – Condition relating to a level of education corresponding to completed university studies attested by a diploma in Croatian law – Possession of a French diploma in law – Freedom of movement for workers – Action for annulment

In April 2020, the applicant, OQ, a Croatian national, applied for open competition EPSO/AD/378/20. The aim of that competition was to compile a reserve list with a view to the recruitment of Croatian-language lawyer-linguists within the Court of Justice of the European Union.

The competition notice stated, inter alia, that no professional experience was required and laid down as a condition of admission to the competition a level of education corresponding to completed university studies attested by one of the qualifications in Croatian law listed. After examining the information provided by the applicant in his application form, the selection board informed him of its decision not to admit him to the next stage of the competition on the ground that he did not satisfy that condition. According to the information provided, the applicant held a diploma in French law of an equivalent level and had professional experience, both as regards the practice of Croatian law and in the field of translation into Croatian, which was in part acquired outside Croatia.

By decision of 12 October 2020 ('the contested decision'), on the ground that a selection board is bound by the competition notice which determines the competencies required for the posts to be

filled, the selection board rejected the request for review lodged by the applicant, in which he had claimed that his French diploma had been recognised in Croatia as equivalent to a Croatian diploma. In that regard, the selection board pointed out that the posts concerned presupposed a thorough knowledge of the Croatian legal system and Croatian legal terminology which could be ensured only by holding a university degree in Croatian law, which the applicant did not have.

The applicant therefore brought an action for annulment before the General Court.

The Court upholds that action by applying, on this occasion, the principles deriving from Article 45 TFEU on freedom of movement for workers within the Union to a procedure for recruitment by competition in an EU institution.

*Findings of the Court*

Before ruling on the substance, the Court first of all rejects the plea of inadmissibility, raised by the European Commission, alleging that the applicant, by relying on Article 45 TFEU at the reply stage, raised a new plea in law. In that regard, the Court notes that the selection board of a competition is bound by the terms of the notice of that competition, with the result that it may neither add selection criteria to those set out, nor remove them. In so far as, in the present case, the competition notice referred expressly, in respect of qualifications, to Croatian law diplomas, that notice could not be interpreted by the selection board as allowing it to accept equivalents to the possession of those diplomas. The Court considers that, by his complaints, the applicant must therefore be regarded as raising, implicitly, a plea of illegality in respect of the provision of the competition notice relating to the qualifications required, on the ground that it is contrary to Article 45 TFEU. Moreover, the Court finds that the applicant's reliance on Article 45 TFEU in the reply is merely an amplification of the pleas in law expressly raised in the application since the applicant complained in the application that account had not been taken of the value of his French diploma in Croatia, which had enabled him to enter the legal profession, and of his professional experience, in part acquired outside Croatia.

Next, ruling on the substance of the case, the Court rejects, in the first place, the plea in law alleging that the competition notice led the selection board to encroach upon the powers of the Croatian authorities which are said to have recognised the applicant's French diploma as equivalent to a Croatian diploma by virtue of a professional recognition of foreign higher education diplomas for the purposes of employment in Croatia. That national recognition did not mean that that diploma had to be recognised automatically, for the purposes of a recruitment competition in an EU institution, as equivalent to the Croatian diplomas requested in the notice of that competition, since the Croatian authorities do not have the competence to determine the conditions of recruitment in such an institution.

Lastly, as regards, in the second place, the plea in law alleging that the competition notice published in the present case is, in the light of the applicant's situation as presented in his application, contrary to Article 45 TFEU, the Court clarifies that, where a worker has exercised his or her freedom of movement between Member States, he or she may rely on that article before an EU institution in the same way as before the authorities of the Member States. Since, in the present case, the applicant completed his university studies in Member States other than that of which he is a national, he may usefully rely on that provision in a recruitment process in an EU institution where that institution does not place the diploma which he obtained in France on the same footing as the Croatian diplomas of an equivalent level which were requested in the competition notice.

The Court nevertheless points out that, while Article 45 TFEU requires account to be taken of other diplomas, awarded in other Member States, in order to make a comparison between the skills attested by those diplomas and the skills attested by the diplomas requested by an entity, that provision does not require any automatic recognition of equivalence between those various diplomas, even if they attest to the same level of studies in the same field. An EU institution has a wide discretion in deciding upon the criteria of ability required by the posts to be filled. It follows that the competition notice at issue did not infringe Article 45 TFEU merely because it did not provide that qualifications awarded in Member States other than Croatia, attesting to the same level of study as that attested by the Croatian diplomas requested, would automatically be recognised as equivalent in the context of that competition.

However, the failure to take into account the diplomas and the professional experience acquired by a worker by making use of the freedom of movement enshrined in Article 45 TFEU in order to determine whether he or she has the qualifications required for recruitment would have the effect of restricting the scope of that freedom. Accordingly, the applicant's application could not be rejected solely on the ground that he did not hold one of the Croatian law diplomas requested in the competition notice since, in his application form, he noted not only his French diploma, which was recognised in Croatia, but also professional experience which included inter alia legal experience in Croatia. Such evidence was capable of establishing that he had the same qualifications as those attested by the Croatian diplomas requested, acquired in particular in the context of the exercise of his freedom of movement within the Union. In view of the wording of the competition notice, the selection board was not in a position to verify, in accordance with the principles deriving from Article 45 TFEU, whether the evidence submitted by the applicant in support of his application could attest to knowledge of the Croatian legal system and terminology at the same level as that attested by the possession of the Croatian diplomas requested. In that regard, the fact that the competition notice did not require any professional experience cannot preclude it from being taken into account in order to verify whether the qualifications attested by the national diplomas requested are met in some other way by a candidate who does not hold those diplomas and who may rely on the provisions contained in Article 45 TFEU.

Accordingly, the competition notice is unlawful in so far as its provision relating to qualifications led to the rejection of the applicant's application solely because he did not hold one of the Croatian diplomas requested in that notice. Therefore, that provision is declared inapplicable to the applicant under Article 277 TFEU.

## 8. COMMON COMMERCIAL POLICY: ANTI-DUMPING

### Judgment of the General Court (Seventh Chamber, Extended Composition), 21 December 2022, Grünig v Commission, T-746/20

Anti-dumping – Imports of certain polyvinyl alcohols originating in the People's Republic of China – Definitive anti-dumping duties – Exemption of imports for a particular end-use – Severability – Regulatory act entailing implementing measures – Direct concern – Challengeable act – First subparagraph of Article 9(5) of Regulation (EU) 2016/1036 – Duty imposed on a non-discriminatory basis – Equal treatment and non-discrimination

By Implementing Regulation 2020/1336, [129] the European Commission imposed a definitive anti-dumping duty on imports of certain polyvinyl alcohols ('PVAs') originating in the People's Republic of China. The regulation also provides that imports of PVAs for use in the manufacturing of dry-blend adhesives are exempt from the imposition of that anti-dumping duty ('the exemption at issue'). [130]

Grünig KG and EOC Belgium, two companies which use PVAs in the manufacturing of liquid adhesives, brought an action for annulment of the regulation at issue in so far as it relates to the exemption at issue.

The Commission raised several objections of inadmissibility against that action.

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[129] Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China (OJ 2020 L 315, p. 1; 'the regulation at issue').

[130] Article 1(4) of the regulation at issue.

Those objections of inadmissibility are rejected by the Court, which, on this occasion, clarifies the concept of a 'severable act' in a context in which it is an exemption, and not the imposition of anti-dumping duties, that is contested. The Court also concludes that the applicants are directly concerned, applying the judgment in Montessori [131] to a situation other than that of a competitor of the beneficiaries of a State aid scheme, namely that of users of the product concerned who, unlike other users of that product, do not benefit from an exemption from anti-dumping duties. Lastly, it clarifies the scope of the concept of a 'challengeable act' as referred to in the judgment of 11 November 1981, IBM v Commission. [132]

*Findings of the Court*

First, as regards the severability of the provision governing the exemption at issue, the Court observes that in order to establish whether elements of an EU act are severable, it is necessary to examine their scope, so as to be able to make an objective assessment as to whether the annulment of those elements would alter the spirit and substance of that act. In that regard, the exemption at issue, inasmuch as it provides for an exception to a rule imposing anti-dumping duties, is, in principle, severable from the regulation which lays down that rule.

However, in the judgment of 9 November 2017, SolarWorld v Council, [133] the Court of Justice set out factors enabling it to be determined in which situations an exemption from anti-dumping duties may not be severable from the regulation laying down that rule, namely that the measure imposing anti-dumping duties pursues the same objectives as that providing for an exemption, that those two measures are complementary, and that the exemption provided for is not in the nature of an exception. The General Court finds that none of those factors is present in the case at hand, and that there is no other factor indicating that the exemption at issue does not constitute an exception to the rule providing for the imposition of anti-dumping duties.

Secondly, as regards the applicants' standing to bring proceedings, the Court notes that the regulation at issue is not addressed to them. In that context, it observes that, in accordance with the third limb of the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act which is not addressed to them if those proceedings are directed against a regulatory act not entailing implementing measures which is of direct concern to them.

In that regard, having established that the regulation at issue is a regulatory act, the Court finds that it does not entail implementing measures with regard to the applicants. It states that, where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which that part of the act may entail that must, as the case may be, be taken into consideration. Even supposing that the exemption at issue entailed the adoption of implementing measures by the national authorities, those measures could not apply to the applicants, since they are not the beneficiaries of the exemption at issue.

As regards the condition relating to direct concern, two criteria must be satisfied, namely that the measure directly affects the legal situation of the person in question and that it leaves no discretion to the addressees entrusted with the task of implementing it. Since the second of those criteria is not relevant in the context of a measure which does not entail implementing measures with regard to the applicant, the Court concentrates its analysis on the first criterion.

In that context, the Court notes that the applicants are in a situation comparable to that of the appellants in the judgment in Montessori. In that judgment, the Court of Justice stated that the objective of the rules on State aid is to preserve competition, and that the State aid provisions of the

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131 Judgment of 6 November 2018, Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci (C-622/16 P to C-624/16 P, EU:C:2018:873).

132 Judgment of 11 November 1981, IBM v Commission (60/81, EU:C:1981:264).

133 Judgment of 9 November 2017, SolarWorld v Council (C-204/16 P, EU:C:2017:838).

FEU Treaty create a right, on the part of a competitor of an undertaking benefiting from a national measure, not to be subject to competition distorted by such a measure. It concluded that a Commission decision that had been adopted in the field of State aid and was liable to place an economic operator in an unfavourable competitive position could be regarded as directly affecting the legal situation of that operator. In the present case, the General Court holds, in the same way, that the interests of some of the users of the product concerned in having their competitive situation protected from the distortion which might result from a measure adopted by the Commission under the basic anti-dumping regulation [134] fall within the Union interest within the meaning of Article 21(1) of that regulation, given that the objective of that regulation is not merely to restore the competitive position of Union industry producers, but also to preserve effective competition within the internal market. Consequently, users of the product concerned, such as the applicants, have the right not to be subject to distorted competition caused by an act adopted by the Commission under the basic regulation. In view of the existence of that right, the exemption at issue, which is capable of infringing it, has effects on the legal situation of the applicants and is therefore of direct concern to them.

Thirdly, as regards the classification of the provision governing the exemption at issue as a challengeable act, the Court holds that the requirement, introduced by the judgment in IBM, for the binding legal effects of the contested measure to be capable of affecting the interests of the applicant, by bringing about a distinct change in its legal position, is not applicable to natural or legal persons who are not addressees of the contested act and already meet the conditions laid down in the third limb of the fourth paragraph of Article 263 TFEU.

As to the substance, the Court rejects a plea alleging infringement of Article 9(5) of the basic anti-dumping regulation which had been raised on the basis that the exemption at issue discriminates between PVA users within the European Union. Under that provision, anti-dumping duties must be imposed in the appropriate amounts in each case, on a non-discriminatory basis, on imports of a product from all sources found to be dumped and causing injury. In that regard, the Court holds, having regard to the way in which the corresponding provision of the Agreement on Implementation of Article VI of the Anti-Dumping Agreement [135] – namely the first sentence of Article 9.2 thereof – has been interpreted by the WTO bodies involved in the dispute settlement process, that Article 9(5) of the basic anti-dumping regulation cannot be interpreted as meaning that the discrimination to which it refers covers a difference in the treatment of users of the product concerned established in the territory of the WTO member imposing the anti-dumping duties.

In addition, the Court observes that it is not apparent from the documents in the file that the exemption at issue would give rise to de facto discrimination between Chinese exporters of PVAs.

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

### Judgment of the General Court (Seventh Chamber, Extended Composition), 21 December 2022, EOC Belgium v Commission, T-747/20

Anti-dumping – Imports of certain polyvinyl alcohols originating in the People's Republic of China – Definitive anti-dumping duties – Exemption of imports for a particular end-use – Severability – Regulatory act entailing implementing measures – Direct concern – Challengeable act – First subparagraph of Article 9(5) of Regulation (EU) 2016/1036 – Duty imposed on a non-discriminatory basis – Equal treatment and non-discrimination

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134 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic anti-dumping regulation'), Article 21(1).

135 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103).

By Implementing Regulation 2020/1336, [136] the European Commission imposed a definitive anti-dumping duty on imports of certain polyvinyl alcohols ('PVAs') originating in the People's Republic of China. The regulation also provides that imports of PVAs for use in the manufacturing of dry-blend adhesives are exempt from the imposition of that anti-dumping duty ('the exemption at issue'). [137]

Grünig KG and EOC Belgium, two companies which use PVAs in the manufacturing of liquid adhesives, brought an action for annulment of the regulation at issue in so far as it relates to the exemption at issue.

The Commission raised several objections of inadmissibility against that action.

Those objections of inadmissibility are rejected by the Court, which, on this occasion, clarifies the concept of a 'severable act' in a context in which it is an exemption, and not the imposition of anti-dumping duties, that is contested. The Court also concludes that the applicants are directly concerned, applying the judgment in Montessori [138] to a situation other than that of a competitor of the beneficiaries of a State aid scheme, namely that of users of the product concerned who, unlike other users of that product, do not benefit from an exemption from anti-dumping duties. Lastly, it clarifies the scope of the concept of a 'challengeable act' as referred to in the judgment of 11 November 1981, IBM v Commission. [139]

*Findings of the Court*

First, as regards the severability of the provision governing the exemption at issue, the Court observes that in order to establish whether elements of an EU act are severable, it is necessary to examine their scope, so as to be able to make an objective assessment as to whether the annulment of those elements would alter the spirit and substance of that act. In that regard, the exemption at issue, inasmuch as it provides for an exception to a rule imposing anti-dumping duties, is, in principle, severable from the regulation which lays down that rule.

However, in the judgment of 9 November 2017, SolarWorld v Council, [140] the Court of Justice set out factors enabling it to be determined in which situations an exemption from anti-dumping duties may not be severable from the regulation laying down that rule, namely that the measure imposing anti-dumping duties pursues the same objectives as that providing for an exemption, that those two measures are complementary, and that the exemption provided for is not in the nature of an exception. The General Court finds that none of those factors is present in the case at hand, and that there is no other factor indicating that the exemption at issue does not constitute an exception to the rule providing for the imposition of anti-dumping duties.

Secondly, as regards the applicants' standing to bring proceedings, the Court notes that the regulation at issue is not addressed to them. In that context, it observes that, in accordance with the third limb of the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act which is not addressed to them if those proceedings are directed against a regulatory act not entailing implementing measures which is of direct concern to them.

In that regard, having established that the regulation at issue is a regulatory act, the Court finds that it does not entail implementing measures with regard to the applicants. It states that, where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which

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136 Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China (OJ 2020 L 315, p. 1; 'the regulation at issue').

137 Article 1(4) of the regulation at issue.

138 Judgment of 6 November 2018, Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci (C-622/16 P to C-624/16 P, EU:C:2018:873).

139 Judgment of 11 November 1981, IBM v Commission (60/81, EU:C:1981:264).

140 Judgment of 9 November 2017, SolarWorld v Council (C-204/16 P, EU:C:2017:838).

that part of the act may entail that must, as the case may be, be taken into consideration. Even supposing that the exemption at issue entailed the adoption of implementing measures by the national authorities, those measures could not apply to the applicants, since they are not the beneficiaries of the exemption at issue.

As regards the condition relating to direct concern, two criteria must be satisfied, namely that the measure directly affects the legal situation of the person in question and that it leaves no discretion to the addressees entrusted with the task of implementing it. Since the second of those criteria is not relevant in the context of a measure which does not entail implementing measures with regard to the applicant, the Court concentrates its analysis on the first criterion.

In that context, the Court notes that the applicants are in a situation comparable to that of the appellants in the judgment in Montessori. In that judgment, the Court of Justice stated that the objective of the rules on State aid is to preserve competition, and that the State aid provisions of the FEU Treaty create a right, on the part of a competitor of an undertaking benefiting from a national measure, not to be subject to competition distorted by such a measure. It concluded that a Commission decision that had been adopted in the field of State aid and was liable to place an economic operator in an unfavourable competitive position could be regarded as directly affecting the legal situation of that operator. In the present case, the General Court holds, in the same way, that the interests of some of the users of the product concerned in having their competitive situation protected from the distortion which might result from a measure adopted by the Commission under the basic anti-dumping regulation [141] fall within the Union interest within the meaning of Article 21(1) of that regulation, given that the objective of that regulation is not merely to restore the competitive position of Union industry producers, but also to preserve effective competition within the internal market. Consequently, users of the product concerned, such as the applicants, have the right not to be subject to distorted competition caused by an act adopted by the Commission under the basic regulation. In view of the existence of that right, the exemption at issue, which is capable of infringing it, has effects on the legal situation of the applicants and is therefore of direct concern to them.

Thirdly, as regards the classification of the provision governing the exemption at issue as a challengeable act, the Court holds that the requirement, introduced by the judgment in IBM, for the binding legal effects of the contested measure to be capable of affecting the interests of the applicant, by bringing about a distinct change in its legal position, is not applicable to natural or legal persons who are not addressees of the contested act and already meet the conditions laid down in the third limb of the fourth paragraph of Article 263 TFEU.

As to the substance, the Court rejects a plea alleging infringement of Article 9(5) of the basic anti-dumping regulation which had been raised on the basis that the exemption at issue discriminates between PVA users within the European Union. Under that provision, anti-dumping duties must be imposed in the appropriate amounts in each case, on a non-discriminatory basis, on imports of a product from all sources found to be dumped and causing injury. In that regard, the Court holds, having regard to the way in which the corresponding provision of the Agreement on Implementation of Article VI of the Anti-Dumping Agreement [142] – namely the first sentence of Article 9.2 thereof – has been interpreted by the WTO bodies involved in the dispute settlement process, that Article 9(5) of the basic anti-dumping regulation cannot be interpreted as meaning that the discrimination to which it refers covers a difference in the treatment of users of the product concerned established in the territory of the WTO member imposing the anti-dumping duties.

In addition, the Court observes that it is not apparent from the documents in the file that the exemption at issue would give rise to de facto discrimination between Chinese exporters of PVAs.

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[141] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic anti-dumping regulation'), Article 21(1).

[142] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103).

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

## 9. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: GRANT AGREEMENTS

**Judgment of the General Court (Ninth Chamber), 21 December 2022, EWC Academy v Commission, T-330/21**

Link to the full text of the judgment

Social policy – Grants for actions to promote corporate governance initiatives – Call for proposals VP/2020/008 – Exclusion of European works councils not having legal personality – Article 197(2)(c) of Regulation (EU) 2018/1046

On 2 June 2020, a call for proposals was published concerning the award of grants for actions to promote corporate governance initiatives. [143] As part of a decision of the European Commission, [144] the call for proposals specified that single applicants, lead applicants and co-applicants eligible to participate in the call had to be, inter alia, legal entities or workers' representatives, such as works councils. Similarly, the call stated that organisations of social partners without legal personality pursuant to the applicable national law were also eligible to submit applications. [145] Finally, it specified that single applicants, lead applicants and joint applicants had to have strong financial capacity to maintain their activities for the period of the action and to help finance it as necessary.

The applicant, a training and consultancy company specialising in issues relating to employee representation in a cross-border context, and the European works councils of Mayr-Melnhof Packaging and DS Smith plc, joined together in a consortium to respond to the call for proposals. On 30 July 2020, the applicant submitted an application for a grant and designated the abovementioned European works councils as co-applicants ('the co-applicant works councils'). The application was accompanied by a declaration on their honour by the chairs of said works councils stating that they possessed the required financial and operational capacity.

The Commission initially asked the applicant to provide evidence that the co-applicant works councils were registered with the national public authorities. The applicant replied that they did not require registration and that they were represented by their chairs. Subsequently, the Commission invited the applicant to submit additional documents, including the 'Legal Entity' form. In response to that request, the applicant declared that the co-applicant works councils were not legal entities and that, consequently, no document could be produced to that effect.

On the basis of the Financial Regulation, the Commission then called on the applicant to provide evidence of the financial capacity of one of the two European works councils concerned by requesting

143 Call for proposals VP/2020/008 (information, consultation and participation of representatives of undertakings) ('the call for proposals').

144 Commission Decision C(2019) 6522 final of 16 September 2019 on the adoption of the 2020 annual work programme for grants and procurements concerning the prerogatives and specific competencies of the Directorate-General for Employment, Social Affairs and Inclusion, serving as financing decision.

145 Pursuant to Article 197(2)(c) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1, 'the Financial Regulation').

its balance sheet and profit and loss account. The applicant stated that it was not in a position to comply with that request.

By decision of 14 April 2021, the Commission rejected the applicant's application for a grant submitted in the context of the call for proposals, as the consortium's coordinator ('the contested decision'). The Commission considered, in particular, that the co-applicant works councils did not fulfil the conditions set out in Article 197(2)(c) of the Financial Regulation or those relating to point 8.1 of the call for proposals. Following the finding that those works councils were ineligible, the Commission considered that the applicant did not meet the minimum eligibility criterion set out in point 6.1(b) of the call for proposals, and that therefore the application must be rejected in its entirety.

By an action under Article 263 TFEU, the applicant sought annulment of the contested decision. In support of its action, the applicant puts forward, in essence, three pleas in law, the first alleging infringement of Article 197(2)(c) of the Financial Regulation, read in conjunction with point 8.1 of the call for proposals, the second alleging infringement of Article 197(3) of that regulation and the third alleging infringement of the principle of the protection of legitimate expectations.

In its judgment, the General Court upheld the applicant's action, holding that the contested decision was adopted in breach of the Financial Regulation.

This is the first case in which the General Court has interpreted Article 197(2)(c) of the Financial Regulation, [146] dealing with the participation of entities without legal personality in the European Union's calls for proposals.

*Findings of the Court*

The Court notes that the aim of Article 197(2)(c) of the Financial Regulation is to enable entities which do not have legal personality to participate, in the same way as legal persons, in Union calls for proposals. It also points out that the information and supporting documents referred to in Article 196(1)(c) of that regulation as necessary to demonstrate financial capacity in the context of a grant application and which consist, in particular, of the profit and loss account and the balance sheet for up to the last three financial years for which the accounts were closed, cannot be the only elements sufficient to demonstrate the existence of that capacity. An interpretation of Article 197(2)(c) of the Financial Regulation that would have the effect of requiring entities without legal personality to submit evidence generally associated with the possession of such personality would undermine the useful effect of that provision by creating obstacles to their participation in grant applications.

Although the elements provided must make it possible to verify that the entity without legal personality is able to offer guarantees for the protection of the financial interests of the Union equivalent to those offered by a legal person, the Financial Regulation does not, in the view of the Court, stipulate that these elements are restricted to evidence that they have annual accounts (balance sheets and/or profit and loss accounts) or own bank accounts.

[146] Article 197(2)(c) of the Financial Regulation provides that entities which do not have legal personality are eligible to participate in a call for proposals provided that they offer guarantees for the protection of the financial interests of the Union equivalent to those offered by legal persons.

Nota bene:

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 the Court of Justice (First Chamber), 16 June 2022, Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists), C-577/20, EU:C:2022:467
- Judgment of the Court of Justice (Grand Chamber), 31 January 2023, Puig Gordi and Others, C-158/21, EU:C:2023:57
- Judgment of the Court of Justice (Grand Chamber), 31 January 2023, Commission v Braesch and Others, C-284/21 P, EU:C:2023:58
- Judgment of the General Court (Grand Chamber), 27 July 2022, RT v Council, T-125/22, EU:T:2022:483
- Judgment of the General Court (Seventh Chamber, Extended Composition), 16 November 2022, Netherlands v Commission, T-469/20, EU:T:2021:182
- Judgment of the General Court (Second Chamber), 30 November 2022, ADS L. Kowalik, B. Włodarczyk v EUIPO – ESSAtech (Accessory for a wireless remote control), T-611/21, EU:T:2022:739
- Judgment of the General Court (Fourth Chamber, Extended Composition), 18 January 2023, Romania v Commission, T-33/21, EU:T:2023:5