COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. FUNDAMENTAL RIGHTS: PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Third Chamber), 16 February 2023, HYA and Others (Grounds for authorising telephone tapping), C-349/21

Link to the full text of the judgment

Reference for a preliminary ruling – Telecommunications sector – Processing of personal data and the protection of privacy – Directive 2002/58/EC – Article 15(1) – Limitation of the confidentiality of electronic communications – Judicial decision authorising the interception, recording and storage of telephone conversations of persons suspected of having committed a serious intentional offence – Practice whereby the decision is drawn up in accordance with a pre-drafted template text that does not contain individualised reasons – Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union – Obligation to state reasons

In the context of criminal proceedings, the President of the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) had, by several decisions, granted applications from the Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) for authorisation to use special investigative methods in order to listen to and record the telephone conversations of various persons suspected of having committed serious offences. In stating the reasons for his decisions, the President followed the current domestic judicial practice of using a pre-drafted template that does not contain individualised reasons, which in essence merely indicates that the requirements laid down by the national legislation on interception of telecommunications, to which the template refers, have been complied with.

Subsequently, the Specialised Public Prosecutor's Office had accused the persons concerned by that telephone tapping of participation in an organised criminal gang. The content of the recorded conversations was of direct relevance in establishing whether the indictments of those persons were well founded.

Hearing the substance of the case, the Specialised Criminal Court, which is the referring court, explained that it must first review the validity of the procedure for authorising the telephone tapping. Faced in particular with doubts as to whether the abovementioned judicial practice was consistent with EU law, that court decided to refer a question to the Court of Justice for a preliminary ruling.

Findings of the Court

The Court notes that the judicial practice at issue forms part of the legislative measures adopted by Bulgaria under the Directive on privacy and electronic communications, [1] which provide for the possibility of reasoned judicial decisions having the effect of restricting the principle of confidentiality of electronic communications and traffic data, enshrined in that directive [2]. That practice is thus intended to implement the duty to state reasons laid down in those legislative measures in accordance with the requirements of the Charter of Fundamental Rights of the European Union [3] to which that directive refers.

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1 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).

2 Article 5(1) of the Directive on privacy and electronic communications.

3 Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

The Court also notes that it is apparent from the legal rules governing those national proceedings that the court entitled to adjudicate and which grants authorisation to use special investigative methods is to take that decision on the basis of a reasoned and detailed application, the content of which, provided for by law, must enable that court to determine whether the conditions for the grant of such authorisation have been met.

In that context, the Court considers that, where the court entitled to adjudicate has examined the grounds of such a detailed application and considers, at the end of that examination, that it is justified, that court, by signing a pre-drafted text in accordance with a template indicating that the legal requirements have been met, endorsed the grounds for the application while ensuring compliance with the legal requirements. It would be artificial to require such an authorisation to contain a specific and detailed statement of reasons, when the application in respect of which that authorisation is granted already contains such a statement of reasons under national law.

The Court adds, however, that once the person concerned has been informed that special investigative methods have been applied to him or her, the obligation to state reasons under the Charter requires that person to be in a position to understand the grounds on which those methods were authorised, in order to be able, where appropriate, to challenge that authorisation effectively. That requirement also applies to any court which, in accordance with its powers, must examine, of its own motion or at the request of the person concerned, the lawfulness of that authorisation.

It is therefore for the referring court to determine whether, in the context of the domestic practice at issue, compliance with the Charter and the Directive on privacy and electronic communications is guaranteed and whether the persons to whom the phone tapping relates, and the court responsible for reviewing the legality of the authorisation to use it, are in a position to understand the reasons for that authorisation.

In that regard, the Court states that, since the authorisation is granted on the basis of a reasoned and detailed application, it must be verified, first, that such persons can have access not only to the authorisation decision but also to the application.

Secondly, those persons must be able to understand easily and unambiguously, by means of a cross-reading of the application and the authorisation decision, the precise reasons why authorisation was granted in the light of the factual and legal circumstances of the individual case underlying the application, just as it is imperative that such a cross-reading should reveal the validity period of the authorisation.

In particular, where the authorisation decision merely indicates the validity period of the authorisation and states that the legal provisions to which it refers have been met, it is essential that the application should clearly state all the information necessary to enable the persons concerned to understand that, on the basis of that information alone, the court which issued the authorisation, by endorsing the statement of reasons contained in the application, reached the conclusion that all the legal requirements had been met. If a cross-reading of the application and subsequent authorisation does not make it possible to understand, easily and unequivocally, the reasons for that authorisation, it must be held that the obligation to state reasons under the Charter has not been complied with.

II. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 805/2004 CREATING A EUROPEAN ENFORCEMENT ORDER FOR UNCONTESTED CLAIMS

Judgment of the Court of Justice (Fourth Chamber), 16 February 2023, Lufthansa Technik AERO Alzey GmbH, C-393/21

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil and commercial matters – Regulation (EC) No 805/2004 – European Enforcement Order for uncontested claims – Article 23(c) – Stay of enforcement of a judgment certified as a European Enforcement Order – Exceptional circumstances – Concept

On 14 June 2019, the Amtsgericht Hünfeld (Local Court, Hünfeld, Germany) served on Arik Air Limited an order for payment with a view to recovering a debt of EUR 2 292 993.32 owed to Lufthansa Technik AERO Alzey GmbH ('Lufthansa'). Then, on 24 October 2019, it issued a European Enforcement Order and, on 2 December 2019, a European Enforcement Order certificate.

A bailiff operating in Lithuania was instructed by Lufthansa to carry out the European Enforcement Order in respect of Arik Air.

The latter company made an application [4] before the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany) for the withdrawal of the European Enforcement Order and the termination of the compulsory recovery of the debt. In its view, the procedural documents had been served improperly by the Local Court, Hünfeld, which had led to a failure to comply with the time limit available to it for objecting to the order for payment at issue.

In Lithuania, Arik Air also requested the bailiff to have the enforcement proceedings stayed until the Regional Court, Frankfurt am Main, has given a final ruling, which the bailiff refused to do, taking the view that the national legislation did not allow for such a stay in those circumstances.

By order of April 2020, the Regional Court, Frankfurt am Main, considering, inter alia, that Arik Air had failed to demonstrate that the European Enforcement Order had been issued improperly, made the suspension of the compulsory execution of the order concerned conditional on the provision of a security of EUR 2 000 000.

By order adopted in June 2020, the Kauno apylinkės teismas (District Court, Kaunas, Lithuania) dismissed the action brought by Arik Air against the bailiff's decision refusing to stay those enforcement proceedings.

On appeal, the Kauno apygardos teismas (Regional Court, Kaunas, Lithuania) set aside that order, staying the enforcement proceedings at issue pending the final ruling of the German court on Arik Air's claims. That court took the view that, given the risk of disproportionate harm liable to arise from the enforcement proceedings against Arik Air, the bringing of an action against the European Enforcement Order certificate before the court of the Member State of origin was a sufficient basis for staying those proceedings. It also found that there was no reason to consider that it was for Regional Court, Frankfurt am Main to decide on the merits of the request for the enforcement measures to be stayed.

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4 That application was made on the basis of Article 10 of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15).

Lufthansa then brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) against that decision.

Seised by that court, the Court of Justice clarifies the meaning and scope of the concept of 'exceptional circumstances' permitting the competent court or authority in the Member State of enforcement, within the meaning of Article 23 of Regulation No 805/2004, [5] to stay the enforcement of a judgment certified as a European Enforcement Order in the Member State of origin.

Findings of the Court

In the first place, the Court states that the concept of 'exceptional circumstances' contained in Article 23(c) of Regulation No 805/2004 covers a situation in which continued enforcement proceedings in respect of a judgment certified as a European Enforcement Order, where the debtor has challenged that judgment or has brought an application for the rectification or withdrawal of the European Enforcement Order certificate in the Member State of origin, would expose the debtor to a real risk of particularly serious harm. The reparation of such harm would prove impossible or extremely difficult if that judgment were to be annulled or the European Enforcement Order certificate were to be rectified or withdrawn. That concept does not refer to circumstances connected with the judicial proceedings brought in the Member State of origin against the judgment certified as a European Enforcement Order or against the European Enforcement Order certificate.

In order to reach that conclusion, the Court observes, first, that the concept of 'exceptional circumstances' is an autonomous concept of EU law. In that regard, it must be inferred from the reference by the EU legislature to that concept that it did not intend to limit the scope of that provision solely to situations of force majeure, which, as a general rule, follow from unforeseeable and unavoidable events arising from a cause external to the debtor. Consequently, the power to stay the enforcement proceedings in respect of a judgment certified as a European Enforcement Order must be considered to be reserved for cases in which continued enforcement would expose the debtor to a real risk of particularly serious harm, the reparation of which would prove to be impossible or extremely difficult if the challenge or the application brought by the debtor in the Member State of origin were to be successful. The initiation of such court proceedings by the debtor is, moreover, a prerequisite for the competent court or authority of the Member State of enforcement to examine of whether there are exceptional circumstances.

In addition, the division of jurisdiction between the courts and authorities of the Member State of origin and those of the Member State of enforcement under Regulation No 805/2004 means that the latter have no jurisdiction to examine, in the context of a request to have the enforcement proceedings stayed, a judgment on an uncontested claim given in the Member State of origin or the certification thereof as a European Enforcement Order. Thus, the courts or authorities of the Member State of enforcement have limited discretion as regards the assessment of the circumstances in the light of which a request for a stay of enforcement may be granted. When examining such a request, those courts or authorities must limit themselves, in order to establish whether there are exceptional circumstances within the meaning of that provision, to weighing up the creditor's interest in ensuring the immediate enforcement of the judgment on his or her claim and the debtor's interest in avoiding harm that is particularly serious and impossible to remedy or difficult to remedy.

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5 Under that provision, entitled 'Stay or limitation of enforcement':

'Where the debtor has:

- challenged a judgment certified as a European Enforcement Order, including an application for review within the meaning of Article 19, or

- applied for the rectification or withdrawal of a European Enforcement Order certificate in accordance with Article 10,

the competent court or authority in the Member State of enforcement may, upon application by the debtor:

(a) limit the enforcement proceedings to protective measures; or

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings.'

In the second place, the Court specifies that Article 23 of Regulation No 805/2004 permits the simultaneous application of the measures limiting the enforcement proceedings and requiring the provision of security laid down in subparagraphs (a) and (b), [6] but that it does not permit the simultaneous application of either one of those two measures and that staying the enforcement proceedings under subparagraph (c).

In the third and last place, the Court rules that, where the enforceability of a judgment certified as a European Enforcement Order has been suspended in the Member State of origin and the certificate referred to in Article 6(2) of Regulation No 805/2004 has been produced before the court of the Member State of enforcement, that court is required to stay, on the basis of that judgment, the enforcement proceedings initiated in the latter State [7].

III. COMPETITION

1. STATE AID

Judgment of the Court of Justice (Fifth Chamber) of 2 February 2023, Spain and Others v Commission, C-649/20 P, C-658/20 P and C-662/20 P

Link to the full text of the judgment

Appeal – State aid – Article 107(1) TFEU – Tax regime applicable to certain finance lease agreements for the purchase of ships (Spanish tax lease system) – Condition relating to selectivity – Obligation to state reasons – Principle of the protection of legitimate expectations – Principle of legal certainty – Recovery of the aid

In 2006, several complaints were made to the European Commission concerning the application of the 'Spanish tax lease system' ('the STL system') to certain finance lease agreements in so far as that system enabled shipping companies to purchase ships built by Spanish shipyards at a 20% to 30% rebate, to the detriment of shipyards in other Member States. According to the Commission, the objective of the STL system was to allow economic interest groupings ('EIGs') and the investors involved in those EIGs to benefit from tax advantages, which they then transferred in part to shipping companies that had purchased a new vessel.

In the contested decision, [8] adopted in July 2013, the Commission took the view that three of the five tax measures comprising the STL system were State aid, within the meaning of Article 107(1) TFEU,

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6 Those measures seek to limit the enforcement proceedings to protective measures (a) and to make enforcement conditional on the provision of such security as determined by the competent court or authority in the Member State of enforcement (b) respectively.

7 On that issue, the Court rules on the basis of Article 6(2) of Regulation No 805/2004, read in conjunction with Article 11.

Article 6 of Regulation No 805/2004, entitled 'Requirements for certification as a European Enforcement Order', provides, in paragraph 2: 'Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.'

Article 11 of that regulation, entitled 'Effects of the European Enforcement Order certificate', states, for its part: 'The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment.'

8 Commission Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System (OJ 2014 L 114, p. 1).

which took the form of a selective tax advantage and was partially incompatible with the internal market. Given that the aid at issue had been put into effect since 1 January 2002 in breach of the notification obligation, [9] the Commission ordered the national authorities to recover that aid from the investors, that is to say, the members of the EIGs.

In September 2013, the Kingdom of Spain, Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión ('PYMAR') SA brought actions for annulment against the decision at issue. In its judgment in Spain and Others v Commission, [10] the General Court ruled that the advantage received by the EIG investors was not selective and the reasoning for that decision regarding the criteria relating to distortion of competition and the effect on trade was insufficient. Consequently, it annulled the decision at issue.

Hearing an appeal brought by the Commission against that judgment, the Court of Justice set it aside by its judgment in Commission v Spain and Others (C-128/16 P) [11] ruling, in particular, that the application of the condition relating to selectivity on which the Commission had based its analysis was erroneous. Nevertheless, it took the view that, since the General Court had not ruled on all the pleas raised before it, the state of the proceedings did not permit it to give final judgment and, consequently, it referred the cases back to the General Court.

By its judgment after the referral in Spain and Others v Commission (the 'judgment under appeal'), the General Court dismissed the actions brought by the Kingdom of Spain, on the one hand, and Lico Leasing and PYMAR, supported by 34 entities which had been granted leave to intervene for that purpose in Case C-128/16 P ('the interveners in the first appeal'), on the other.

In that judgment, the General Court rejected the plea seeking to challenge the selectivity of the STL system by holding, in essence, that the existence of a broad discretion of the tax authority to authorise early depreciation was sufficient to accept that the STL system as a whole was selective. The General Court also rejected the pleas alleging failure to state reasons for the decision at issue, infringement of the principle of equal treatment, infringement of the principles of the protection of legitimate expectations and legal certainty and of the principles applicable to recovery of the aid. As regards that last point, in particular, it found that the Commission had not erred in law in ordering the recovery of all the aid at issue from the EIG investors alone, even though part of the tax advantage obtained had been transferred to third parties, that is to say, the shipping companies.

Next, the Kingdom of Spain, Lico Leasing and PYMAR, as well as the interveners in the first appeal, brought three separate appeals against the judgment under appeal, by which they seek to have that judgment set aside and, accordingly, the decision at issue annulled.

By its judgment, the Court of Justice upholds the Kingdom of Spain's ground of appeal alleging failure to state reasons in the judgment under appeal as far as concerns the recovery of the aid at issue and dismisses the appeals as to the remainder. Having partially set aside that judgment and taking the view that it is in a position to give a final ruling on the part of the actions which remain to be examined, the Court rules, following its review of the case, that the decision at issue must be annulled in so far as it orders the recovery of all the aid referred to from its recipients on the ground that they were erroneously identified.

Findings of the Court

First of all, the Court examines the plea of inadmissibility raised by the Commission against the appeal brought by the interveners in the first appeal, alleging an error of law in granting them the status of intervener in the referral proceedings. In that regard, the Court considers that Article 40 of the Statute

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9 Obligation laid down in Article 108(3) TFEU.

10 Judgment of 17 December 2015, Spain and Others v Commission (T- 515/13 and T- 719/13, EU:T:2015:1004).

11 Judgment of 25 July 2018, Commission v Spain and Others (C- 128/16 P, EU:C:2018:591).

of the Court of Justice, respect for the procedural rights guaranteed to interveners by the Rules of Procedure of the General Court and the principle of the proper administration of justice require, in the context of a coherent articulation of the procedures before the Court of Justice and the General Court, that an intervener in the appeal automatically enjoy the status of intervener before the General Court, where a case is referred back to that court following the annulment by the Court of Justice of a decision of the General Court. Thus, contrary to the Commission's claims, the General Court did not err in law by granting such a status to the persons concerned in such circumstances. Consequently, the persons concerned are, as such, entitled to bring an appeal against the judgment under appeal since they are also directly affected by that judgment, [12] because, by dismissing the appeals, that judgment makes them exposed to the risk of having to repay the aid they received. Therefore, their appeal is admissible.

Second, the Court of Justice examines the grounds of appeal of which some relate to the analysis of the selectivity of the STL system and others to the obligation to recover aid.

As regards, in the first place, the assessment of the selectivity condition, the Court notes from the outset that an advantageous tax measure the granting of which depends on the discretionary powers of the tax authority cannot be considered to be general in nature. It follows that the selectivity of such a measure cannot be assessed on the basis of a method specifically designed to reveal the concealed selectivity of advantageous tax measures of general application. [13] In the present case, the General Court was asked to rule on the analysis of a measure the granting of which depended on the discretionary powers of the competent authorities and it therefore cannot be criticised for having failed to analyse it in accordance with the method valid for tax measures of general application.

Considering next the criteria relevant for the assessment of an advantageous tax measure granted in a discretionary manner, the Court concurs with the General Court in recalling that the existence of a system of authorisation does not imply in itself that the measure considered is selective. Such a classification requires that it be demonstrated that the competent authorities have a broad discretion to determine the beneficiaries and the conditions for granting the measure considered, so that the exercise of that discretion must be regarded as favouring the undertakings or productions benefiting from that measure in comparison with others which do not benefit from it but are in a comparable situation in the light of the objective pursued.

In this case, the Court rules that the General Court was thus correct in finding, in the context of its definitive assessment of national law, misinterpretation of which was not, moreover, alleged, that that law conferred on the tax authority significant discretion to authorise early depreciation, in view of, in particular, the imprecise nature of the criteria applied and the lack of a framework for their interpretation. In that regard, the General Court was not required to examine, in practice, whether the exercise of that de jure discretion had actually led to the unjustified favourable treatment of certain operators by comparison with others in a comparable situation.

Consequently, the General Court did not err in law by considering, in finding that the measure consisting in early depreciation is selective, that the existence of discretionary factors was such as to favour the beneficiaries over other taxpayers in a comparable situation. Furthermore, the General Court was correct in finding that the Commission had not erred by inferring from the selective nature of the early depreciation that the STL system was selective as a whole, since it is common ground that the other measures at issue comprising the STL system depended on prior authorisation of the early depreciation. Consequently, the Court of Justice rejects all the grounds of appeal relating to the selectivity of the STL system as unfounded.

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12 That condition is laid down in the second sentence of the second paragraph of Article 56 of the Statute of the Court of Justice.

13 According to that method, the so-called three-step method, the assessment of the selectivity of a measure of a general natural introducing an advantageous tax scheme requires, first of all, identifying the ordinary tax regime, next verifying whether the scheme at issue derogates from the ordinary tax regime, as the reference framework, by treating comparable operators – from a factual and legal point of view – differently and, in that event, lastly establishing whether such differences may be justified by the nature or general scheme of the system.

In the second place, as regards the recovery of the illegal aid, the Court holds that the application of the principles of the protection of legitimate expectations and legal certainty in the judgment under appeal is free from any error of law, except for one error which however had no effect on the assessment of the General Court, and therefore the complaints raised in that regard must also be rejected.

In the third place and final place, the Court rules on a ground alleging failure to state reasons in the judgment under appeal. In this connection, the Court holds that, while that judgment appears reasoned to the requisite legal standard as regards the selective nature of the STL system, by contrast, the same is not true as regards the recovery of the aid at issue.

The Court observes that, to reply to a plea seeking to challenge the recovery order in the decision at issue, in that it orders the recovery of all the aid at issue from the investors where a very significant part of the advantage thus granted was transferred to the shipping companies, the General Court merely stated that, in the decision at issue, the investors alone had been identified as the recipients of the aid and held that that finding was not at issue in the dispute. According to the Court of Justice, even if the parties concerned had not challenged the identity of the recipients, they – by their plea – nonetheless claimed, implicitly but necessarily, that they were not the only recipients of the aid in question. Since the General Court failed to reply to that plea, it therefore failed to adjudicate on it, which constitutes a breach of the duty to state reasons.

In those circumstances, the Court of Justice sets aside the judgment under appeal to the extent that it dismissed the actions in so far as they sought annulment of the decision at issue inasmuch as it designated EIGs and their investors as the sole recipients of the aid referred to and the annulment of the provision requiring the Kingdom of Spain to recover all the aid referred to from the EIG investors. The appeals are dismissed as to the remainder.

Third, finding that the part of the actions for annulment which remain to be examined after the partial annulment of the judgment under appeal relating, in this case, to the validity of the obligation to recover the aid at issue from its recipients, is such that it permits judicial adjudication, the Court decides to give a final ruling itself in the matter. In that regard, it rejects from the outset the grounds and arguments based on infringement of the principles of the protection of legitimate expectations and legal certainty, as well as infringement of the principle of equal treatment, as unfounded, by upholding most of the corresponding pleas in the judgment under appeal.

Considering next, in respect of the examination of the plea which the General Court failed to rule on, the question of the identification of the recipients of the aid at issue, the Court of Justice recalls that the objective of the obligation to recover aid considered by the Commission to be incompatible with the internal market is to restore the situation as it was before the aid was granted, by depriving its recipients, namely the undertakings that actually benefited from it, of the competitive advantage which it gave them.

In this case, it follows from the Commission's own findings that the STL system constituted, as a whole, a tax scheme intended to give an advantage not only to the investors in an EIG, but also to the shipping companies. Moreover, it is apparent from the information put forward by the Commission that the allocation of that advantage between the shipping company and the EIG investors was provided for in legally binding agreements, submitted to the tax authority and which the latter took into account in order to authorise, in the exercise of its discretion, early depreciation. In view of the foregoing, the Court holds that the Commission erred in law, in the light of the objective pursued by the recovery, by designating EIG investors as the sole recipients of the aid at issue essentially on the ground that the advantage obtained by the shipping companies by virtue of the transfer of part of the tax advantage granted to the EIGs resulted from a combination of legal transactions between private entities which, therefore, was not imputable to the State, even though the EIGs were nonetheless required, under the applicable rules, to transfer to those shipping companies part of the tax advantage obtained.

Consequently, the Court partly annuls the decision at issue, that is to say, inasmuch as it designates the EIGs and their investors as the sole beneficiaries of the aid referred to and, consequently, inasmuch as it orders the recovery of all the aid exclusively from the EIG investors.

Judgment of the General Court (Eighth Chamber, Extended Composition), 8 February 2023, Carpatair v Commission, T- 522/20

Link to the full text of the judgment

State aid – Aviation sector – Measures implemented by Romania in favour of Timișoara Airport – Measures implemented by Timișoara Airport in favour of Wizz Air and airlines using that airport – Decision finding, in part, that there was no State aid in favour of Timișoara Airport and airlines using that airport – Airport charges – Action for annulment – Regulatory act – Individual concern – Substantial effect on competitive position – Direct concern – Interest in bringing proceedings – Admissibility – Article 107(1) TFEU – Selective nature – Advantage – Private operator test

Timișoara International Airport, located in the west of Romania, is operated by Societății Naționale 'Aeroportul Internațional Timișoara – Traian Vuia' SA ('AITTV'), a joint stock company in which the Romanian State holds 80% of the shares.

In preparation for the increase in traffic that was expected to result from Romania's accession to the European Union in 2007, and in order to meet the security requirements for acceding to the Schengen area, AITTV received financing from the Romanian State for the construction of a terminal for non-Schengen flights and for security equipment.

Furthermore, in 2008, as part of a strategy intended to attract low-cost airlines and to increase the overall profitability of the airport, AITTV signed agreements with Wizz Air Hungary Légiközlekedési Zrt. ('Wizz Air'), a Hungarian low-cost airline, determining the principles of their cooperation as well as the terms and conditions for the use of the airport infrastructure and services by Wizz Air ('the 2008 agreements'). Two of those agreements were amended in 2010 by way of a new discount scheme agreed between Wizz Air and AITTV ('the 2010 amendment agreements'). Under the Aeronautical Information Publications ('AIPs') of 2007, 2008 and 2010, Wizz Air also received discounts and rebates on airport charges.

In 2010, the Romanian regional airline Carpatair SA submitted a complaint to the European Commission challenging aid granted by the Romanian authorities to Timișoara International Airport in favour of Wizz Air.

By decision of 24 February 2020 ('the contested decision'), the Commission considered, first, that the public financing provided in the period 2007-2009 to AITTV for the non-Schengen terminal development, the improvement of the taxiway and the extension of the apron and the lighting equipment, constitutes State aid which is compatible with the internal market within the meaning of Article 107(3)(c) TFEU. [14] Secondly, the Commission found that the public financing of the access road and the development of the parking area in 2007 and for the security equipment in 2008, the airport charges in the 2007 AIP, 2008 AIP and 2010 AIP, and the 2008 agreements with Wizz Air, including the 2010 amendment agreements, do not constitute State aid within the meaning of Article 107(1) TFEU.

Carpatair SA brought an action for the annulment of that decision in so far as the Commission found that neither the discounts and rebates on the airport charges in the 2010 AIP nor the 2008 agreements, as amended in 2010 ('the measures at issue'), constitute State aid. In upholding that action, the General Court finds that the Commission committed several errors of law in its examination of whether those measures were selective and of whether they conferred an advantage.

[14] 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.

Findings of the General Court

As a preliminary point, the Court rejects the Commission's argument that the action brought by Carpatair SA is inadmissible on the ground that the latter has neither standing to bring an action for annulment of the contested decision nor a vested and present interest in the annulment of that decision.

As regards Carpatair SA's standing to bring proceedings, the Court recalls that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may bring an action against an act which is not addressed to that person if that act is of direct and individual concern to that person or if the action is directed against regulatory acts which are of direct concern to that person and do not entail implementing measures. In the light of that dichotomy, the Court states that the part of the contested decision relating to the airport charges constitutes a regulatory act, with the result that the action brought by Carpatair SA against that part is admissible, provided that Carpatair SA is directly affected by that part. By contrast, since the 2008 agreements and their amendments in 2010 must be classified as individual measures, the action brought by Carpatair SA against the part of the contested decision addressing those agreements is admissible only if Carpatair SA demonstrates that those agreements concern it not only directly, but also individually.

With regard to whether Carpatair SA is individually concerned by the part of the contested decision addressing the 2008 agreements and their amendments in 2010, the Court observes that such individual concern admittedly cannot be inferred from the mere participation of that undertaking in the administrative procedure prior to the adoption of the contested decision. However, since those agreements were liable to have a substantial effect on its competitive position on the markets on which it had a competitive relationship with Wizz Air, Carpatair SA has established to the requisite legal standard that it is individually concerned. Moreover, since the assessment of whether there is a substantial effect must be made in the light of the situation at the time when the measures at issue were granted and were liable to have an effect, the arguments that Carpatair SA changed its business model and terminated its activities at Timișoara International Airport as of 2013 cannot call that conclusion into question.

The Court also considers that Carpatair SA is directly affected by the contested decision since, first, that decision directly affects its right not to be subject on the market in question to competition distorted by the measures at issue and, secondly, the decision leaves intact the effects of the measures at issue in a purely automatic manner resulting from the EU rules alone and without the application of other intermediate rules.

Having upheld the admissibility of the action brought by Carpatair SA, the Court finds, as regards the substance, that the contested decision is vitiated by several errors of law which affect the conclusion that neither the discounts and rebates on the airport charges in the 2010 AIP nor the agreements concluded with Wizz Air in 2008, as amended in 2010, constitute State aid within the meaning of Article 107(1) TFEU, since, according to the Commission, the former are not selective in nature and the latter do not confer an economic advantage on Wizz Air.

As regards, in the first place, the selective nature of the discounts and rebates on the airport charges in the 2010 AIP, the Court recalls that, although only measures which confer an advantage selectively fall within the concept of State aid, it is apparent from the case-law that interventions which, prima facie, apply to undertakings in general may, in relation to their effects, be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. Such de facto selectivity can be established in cases where, although the formal criteria for the application of the measure are formulated in general and objective terms, the structure of the measure is such that its effects significantly favour a particular group of undertakings.

In the present case, the 2010 AIP set out, inter alia, three types of reductions on the airport charges applicable to all airlines using or liable to use Timişoara International Airport. The third type of reduction provided, in that context, for discounts of 72% to 85% for aircraft having a maximum take-off weight above 70 tonnes with more than 10 000 embarked passengers per month.

Although the three types of reductions met different conditions and were not cumulative, the Commission found, on the basis of a joint assessment, that they were not selective. In that context, the Commission also did not take a position on the question whether airlines other than Wizz Air had

in their fleet aircraft of the relevant sizes and sufficient frequencies which actually enabled them to benefit from the third type of reduction mentioned above. In the light of those observations, the Court concludes that, by failing to examine whether the third type of reduction, taken in isolation, favoured Wizz Air owing to the conditions governing its application, as Carpatair SA maintains, the Commission erred in law.

As regards, in the second place, the question whether an economic advantage was conferred on Wizz Air by the 2008 agreements, as amended in 2010, the Court points out that that assessment is made in principle by applying the private operator in a market economy test. In order to examine whether or not the Member State or the public body concerned has adopted the conduct of a prudent private operator in a market economy, the only relevant evidence is the information which was available, and the developments which were foreseeable, at the time when the decision to conduct the operation in question was taken. However, the conclusion reached by the Commission in the contested decision, according to which a prudent private operator in a market economy would have entered into the 2008 agreements, as amended in 2010, with Wizz Air, was based entirely on evidence established ex post and, in particular, on a report drawn up in 2015.

In that latter regard, the Court states that the view cannot be taken, merely because that 2015 report is based on the information which was available and the developments which were foreseeable at the time when the 2008 agreements were adopted, that it amounts to an ex ante analysis capable of demonstrating compliance with the private operator in a market economy test. Furthermore, although the additional economic analyses reconstructed ex post, as provided by Romania and Wizz Air in the administrative procedure, are capable of shedding light on the information existing at the time of the conclusion of the 2008 agreements and must be taken into account by the Commission, the fact remains that those analyses did not supplement evidence generated before the conclusion of those agreements, yet that was the only evidence on which the Commission based its assessment of the 2008 agreements.

Accordingly, the Court finds that the Commission failed to state grounds in law for its conclusion that the 2008 agreements and the 2010 amendment agreements had not conferred an economic advantage on Wizz Air which it would not have obtained under normal market conditions, and that they therefore did not constitute State aid.

In the light of those considerations, the Court upholds the action and annuls the contested decision in so far as it concludes that the airport charges in the 2010 AIP and the 2008 agreements, including the 2010 amendment agreements, do not constitute State aid.

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

Judgment of the Court of Justice (Second Chamber), 16 February 2023, Tráficos Manuel Ferrer, C-312/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Compensation for harm caused by a practice prohibited under Article 101(1) TFEU – Decision of the Commission finding the existence of collusive arrangements on pricing and gross price increases for trucks in the European Economic Area (EEA) – National rule of civil procedure under which, in the event that the claim is upheld in part, costs are to be borne by each party, except in cases of wrongful conduct – Procedural autonomy of the Member States – Principles of effectiveness and equivalence – Directive 2014/104/EU – Objectives and overall balance – Article 3 – Right to full compensation for the harm suffered – Article 11(1) – Joint and several liability of the undertakings that infringe competition law – Article 17(1) – Possibility for national courts to estimate the harm – Conditions – Impossibility or unreasonable difficulties in quantifying harm – Article 22 – Temporal application

By a decision of 19 July 2016, [15] the European Commission found that Daimler AG had infringed the EU law rules prohibiting cartels [16] in that Daimler had concluded, between January 1997 and January 2011, arrangements with 14 other European truck manufacturers on pricing and gross price increases for trucks in the European Economic Area (EEA).

Following that decision, the Spanish undertakings Tráficos Manuel Ferrer SL and D. Ignacio ('the applicants in the main proceedings'), which had, inter alia, purchased lorries manufactured by Daimler during the infringement period, brought an action for damages before the Juzgado de lo Mercantil no 3 de Valencia (Commercial Court No 3, Valencia, Spain) against that company on the basis of the wrongful conduct found by the Commission.

In order to quantify the harm suffered, the applicants in the main proceedings produced an expert report finding an average overcharge of 16.35% on the market affected by the cartel.

Since, during the period of the infringement, one of the applicants in the main proceedings had also purchased lorries manufactured by other addressees of the decision of 19 July 2016, namely Renault Trucks SAS and Iveco SpA, Daimler applied to the national court for those companies to be joined to the proceedings. By order of 22 September 2020, that court dismissed that application.

Daimler disputed the merits of the action for damages, in particular by producing its own expert report. Following a preliminary hearing, the applicants in the main proceedings were given access to the data taken into consideration in the expert report submitted by Daimler, with the twofold aim of allowing a more thorough criticism of those data and of leading to a possible reformulation of their own expert report.

After hearing the parties to the main proceedings discuss their respective expert reports, Commercial Court No 3, Valencia, decided to refer the matter to the Court of Justice in order to determine, in essence, whether, in the light of EU law, it was entitled and, if so, under what conditions, to carry out

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

16 Article 101 TFEU and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

an estimation of the amount of the harm caused to the applicants in the main proceedings as a result of the cartel. The referring court also asks whether EU law allows it to require, pursuant to Spanish procedural law, the applicants in the main proceedings to bear half of the legal costs if they are only partially successful.

By its judgment, the Court answers those questions in the light of Article 101 TFEU, Directive 2014/104 [17] and its relevant case-law.

Findings of the Court

The Court rules, in the first place, on whether the right to full compensation for harm suffered as a result of anticompetitive conduct, as recognised and defined in Article 3(1) and (2) of Directive 2014/104 and arising from Article 101 TFEU, precludes Spanish rules of civil procedure which provide that, in the event that an action for compensation in respect of such harm is upheld in part, costs are to be borne by each party and each party bears half of the common costs, except in cases of wrongful conduct.

In accordance with the case-law of the Court, it follows from the principle of effectiveness and the right, arising from Article 101 TFEU, of any person to seek full compensation for loss caused by anticompetitive conduct that injured persons must be able to seek compensation not only for actual loss, but also for loss of profit plus interest. In so far as Article 3(1) In so far as Article 3(3) and (2) of Directive 2014/104 reaffirms that case-law, the national measures transposing those provisions must apply with immediate effect to all actions for damages falling within the scope of that directive.

However, that right to compensation does not concern the rules on the allocation of costs in the context of judicial proceedings, as shown by the exclusion of the issue of costs from the scope of Directive 2014/104.

That said, as regards Article 101 TFEU, the case-law of the Court - according to which the rules relating to actions for safeguarding rights which individuals derive from EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) - applies.

In that regard, the Court points out that, in order to make it easier for persons affected by anticompetitive conduct to bring actions for compensation for the harm caused, Directive 2014/104 requires the Member States to provide for measures enabling those persons to remedy the information asymmetry between those persons and the undertakings which have infringed competition law and which, in many cases, often hold exclusively the evidence necessary to prove a claim for damages.

To that end, first of all, Article 5 of Directive 2014/104 obliges the Member States to confer on the persons affected by anticompetitive conduct the power to ask national courts to require the defendant or a third party, under certain conditions, to disclose relevant evidence in their possession. Next, Article 17(1) of that directive requires those States to empower those courts, under certain conditions, where it is practically impossible or excessively difficult to quantify the harm, to estimate it. Lastly, Article 17(2) of that directive requires Member States to introduce presumptions, in particular that relating to the existence of harm arising from a cartel.

It follows that Directive 2014/104 covers actions involving a balance of power between the parties to the dispute, which, as a result of the effect of the national transposing measures, may have been corrected. In that context, it is the conduct of each of those parties which determines the evolution of that balance of power and, in particular, the answer to the question whether or not the claimant relied on the tools made available to it.

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17 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).

On that point, Directive 2014/104 differs, moreover, from the directive on unfair terms in consumer contracts, [18] which typically involve a weaker party, the consumer, opposing a strong party, the 'professional', with the result that the Court's case-law on the incompatibility of the Spanish rules on costs with the provisions of that directive, read in conjunction with the principle of effectiveness, [19] cannot be transposed to cases concerning Directive 2014/104.

In the light of those considerations, the Court concludes that a national rule of civil procedure under which, in the event that an action for compensation for harm suffered as a result of anticompetitive conduct is upheld in part, costs are to be borne by each party and each party bears half of the common costs, except in cases of wrongful conduct, does not render practically impossible or excessively difficult the exercise of the right to full compensation for that harm, as recognised and defined in Article 3(1) and (2) of Directive 2014/104 and arising from Article 101 TFEU; accordingly, the principle of effectiveness is not infringed. It follows that those provisions must be interpreted as not precluding such a rule of civil procedure.

In the second place, the Court interprets Article 17(1) of Directive 2014/104 under which the Member States must ensure that the national courts are empowered, in accordance with national procedures, to carry out an estimation of the amount of the harm suffered as a result of anticompetitive conduct, if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify that harm on the basis of the evidence available.

In that regard, the referring court asks, in essence, whether the judicial estimation of the harm provided for in that provision is permitted in circumstances such as those of the present case, in which, first, the defendant has given the claimant access to the information on the basis of which it had itself drawn up its expert report in order to rule out the existence of harm in relation to which compensation may be claimed and, second, the claim for damages is brought against only one of the addressees of the decision finding an infringement of Article 101 TFEU, which has marketed only part of the products covered by a cartel acquired by the claimant.

The Court begins by pointing out that the wording of Article 17(1) of Directive 2014/104 limits the scope of the judicial estimation of the harm to situations in which it is practically impossible or excessively difficult to quantify it, once it has been established that the claimant suffered that harm. Noting that Article 17(1)

of Directive 2014/104 is one of the measures intended to remedy the asymmetry of information between persons affected by anticompetitive conduct and undertakings which have infringed competition law, the Court observes, in addition, that that measure may interact with the other corrective measures provided for by that directive. Thus, the need to carry out a judicial assessment of the harm suffered as a result of anticompetitive conduct may depend, in particular, on the result obtained by the claimant following a request for the disclosure of evidence pursuant to the first subparagraph of Article 5(1) of Directive 2014/104.

In that context, the Court states that, because of the key role of the latter provision within Directive 2014/104, it is for the national court, before proceeding to estimate the harm, to determine whether the claimant has made use of it. If the practical impossibility of assessing the harm is the result of inaction on the part of the claimant, it is not for the national court to take the place of the latter or to remedy its shortcomings.

By contrast, the circumstances characterising the situation at issue in the main proceedings and referred to by the referring court in its questions, namely, first, that Daimler made available to the applicants in the main proceedings the data on which it relied in order to refute their expert report and, second, that the applicants in the main proceedings addressed their claim to only one of the

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18 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

19 Judgment of 16 July 2020, Caixabank and Banco Bilbao Vizcaya Argentaria (C-224/19 and C-259/19, EU:C:2020:578).

undertakings responsible for the conduct that constitutes an infringement found by the Commission, are not, in themselves, relevant for the purpose of assessing whether it is permissible for the national court to undertake an estimation of the harm pursuant to Article 17(1) of Directive 2014/104. In the latter regard, the Court recalls in particular the case-law principle, [20] confirmed by Article 11 of Directive 2014/104, according to which an infringement of competition law entails, in principle, the joint and several liability of the infringers.

IV. FISCAL PROVISIONS: TRANSACTIONS SUBJECT TO VAT

Judgment of the Court of Justice (Grand Chamber), 28 February 2023, Fenix International, C- 695/20

Link to the full text of the judgment

Reference for a preliminary ruling – Implementing power of the Council of the European Union – Article 291(2) TFEU – Common system of value added tax (VAT) – Directive 2006/112/EC – Articles 28 and 397 – Taxable person, acting in his or her own name but on behalf of another person – Provider of services by electronic means – Implementing Regulation (EU) No 282/2011 – Article 9a – Presumption – Validity

Fenix International Ltd ('Fenix'), a company registered for value added tax (VAT) purposes in the United Kingdom, operates on the internet a social media platform known as Only Fans. That platform is offered to 'users' throughout the world, who are divided into 'creators' and 'fans'. Each creator has a 'profile' to which he or she uploads and publishes content, such as photos, videos and messages, which fans can access by making ad hoc payments or by paying a monthly subscription. Fenix sets the minimum amount payable both for subscriptions and for tips and the general terms and conditions for use of the platform. In addition, Fenix provides the means of enabling financial transactions to be carried out. Fenix is responsible for collecting and distributing the payments made by fans through a payment services supplier. Fenix levies 20% on any sum paid to a creator and applies VAT at a rate of 20% on the sum which it levies in this way, which appears on the invoices which it issues. All payments appear on the relevant fan's bank statement as payments made to Fenix.

In VAT assessments for the VAT due for the months of July 2017 to January 2020 and April 2020, taking the view that Fenix had to be deemed to be acting in its own name, [21] HMRC required that Fenix pay VAT on all of the sum received from a fan and not only on the 20% of that sum which it levied by way of remuneration.

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20 Judgment of 29 July 2019, Tibor-Trans (C-451/18, EU:C:2019:635, paragraph 36).

21 Under the first subparagraph of Article 9a(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1), as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 (OJ 2013 L 284, p. 1), a taxable person taking part in the supply of electronically supplied services through a telecommunications network, an interface or a portal such as a marketplace for applications, is to be 'presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties'. The second subparagraph of that provision requires two conditions to be satisfied 'in order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person'. Lastly, according to the third subparagraph of that provision, 'a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services.'

Fenix appealed before the referring court, [22] challenging the validity of the legal basis for the tax assessments, and their respective amounts. In support of its appeal, Fenix maintained that, by adopting the contested provision, the Council exceeded the implementing powers exclusively conferred on it by the VAT Directive. [23] The contested provision goes beyond Article 28 of that directive, [24] of which it was intended to constitute a measure implementing, by providing that an agent who takes part in a supply of services by electronic means is to be deemed to have received and supplied those services, even though the identity of the provider is known. It fundamentally alters the liability of the agent in the field of VAT by transferring the tax burden on platforms operated on the internet, since it proves impossible, in practice, to rebut the presumption it laid down.

The question having been raised by the referring court of whether the contested provision is invalid [25] in so far as it had been submitted that the Council exceeded its implementing powers under the FEU Treaty and the VAT Directive, the Court, sitting as the Grand Chamber, holds in its judgment that the examination of that question has disclosed no factor of such a kind as to affect the validity of that provision.

Findings of the Court

As a preliminary point, the Court notes, in the first place, that although it is for the Member States to implement legally binding Union acts, [26] implementing powers may, in duly justified specific cases and in the cases specifically provided for in the EU Treaty, be conferred on the Council under Article 291(2) TFEU. As regards the VAT Directive, the Council, acting unanimously on a proposal from the Commission, is to adopt the measures necessary to implement that directive. That enabling power of the Council is explained and justified, first, the necessity for measures implementing that directive to be uniform and, second, by the intention that the right to adopt such implementing measures be reserved to the Council on account of the impact, sometimes significant, that such measures could have on the budgets of Member States. The contested decision is one of the measures adopted by the Council under that enabling power, intended to ensure the uniform application of Article 28 of that directive.

In the second place, as regards the limits of the implementing powers referred to in Article 291(2) TFEU, the Court notes that the adoption of the essential rules of a matter is reserved to the EU legislature, the provisions laying down the essential elements of the basic legislation cannot be delegated or appear in implementing acts, but must be adopted in compliance with the applicable legislative procedure, namely, as regards the VAT Directive, the special procedure established in Article 113 TFEU. [27]

The Court adds that those considerations relating to the limits of the Commission's implementing powers, in accordance with its case-law, are also valid where, pursuant to Article 291(2) TFEU, such powers are conferred on the Council. First, in referring both to the Commission and to the Council,

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22 The First-tier Tribunal (Tax Chamber), United Kingdom.

23 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive'). Article 397 of that directive provides that 'The Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive.'

24 Article 28 of the VAT Directive provides:that where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself.

25 The Court has jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period as laid down in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7), namely 31 December 2020.

26 Article 291(1) TFEU.

27 Article 113 TFEU provides that 'the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.'

that provision draws no distinction as to the nature and scope of the implementing powers on the basis of the institution on which they are conferred. Second, it follows from the scheme of Articles 290 and 291 TFEU that the Council's exercise of implementing powers cannot be governed by conditions different from those imposed on the Commission when it is called upon to exercise its implementing powers.

Therefore, the implementing powers conferred on the Council entail the power to adopt measures which are necessary or appropriate for the uniform implementation of the provisions of the legislative act on the basis of which they are adopted and which merely specify the content of that act, in compliance with the essential general aims pursued by that act, without amending or supplementing it, in its essential or non-essential elements. In particular, it must be held that an implementing measure merely specifies the provisions of the legislative act concerned where it is intended solely, in general or in certain specific cases, to clarify the scope of those provisions or to determine the detailed rules for their application, provided, however, that in so doing, that measure avoids any contradiction with the objectives of those provisions and does not in any way alter the normative content of that act or its scope of application. Therefore, in order to determine whether, in adopting Article 9a(1) of Implementing Regulation No 282/2011, the Council complied with the limits of the implementing powers conferred on it, pursuant to Article 291(2).

Therefore, in order to determine whether, in the contested provision, the Council complied with the limits of the implementing powers conferred on it, the Court ascertains whether that provision merely clarifies the content of Article 28 of the VAT Directive, which entails examining whether it respects the essential general objectives of that directive and whether it is necessary or appropriate for the uniform implementation of Article 28 and whether it supplements nor amends it in any way.

In that regard, the Court finds, first of all, that the contested provision complies with the essential general aims of the VAT Directive and of Article 28 thereof. The objective of the contested provision is to ensure the uniform application of the current VAT system as regards, inter alia, the taxation of electronically supplied services to a non-taxable person, [28] and of the presumption, provided for in Article 28 of the VAT Directive, according to which a taxable person who, in the context of a supply of services, acts as an intermediary in his or her own name but on behalf of another person, is deemed to be the supplier of those services.

Next, the Court rules that the contested provision is appropriate, or even necessary, for the uniform implementation of the VAT Directive in the light of the importance of ensuring legal certainty for service providers and to avoid double taxation or non-taxation which would have resulted from divergent implementation arrangements between Member States.

Lastly, the Court examines whether the contested provision complies with the prohibition on supplementing or amending the elements of Article 28 of the VAT Directive. In that regard, it finds that it is in no way apparent from the VAT Directive that the EU legislature refrained from ensuring, if necessary, by conferring implementing powers on the Council pursuant to that directive, a uniform application of the conditions referred to in Article 28 of the directive, in particular the condition that, in order to be regarded as the supplier of a service, the taxable person taking part in that supply must act in his or her own name but on behalf of another person. More specifically, the contested provision cannot be regarded as supplementing or amending the elements of Article 28 of the VAT Directive, nor in particular the presumption set out in that article, but is a mere clarification of its elements in the specific context of the supply of electronically supplied services through a telecommunications network, an interface or a portal such as a marketplace for applications. In particular, that provision takes full account of the economic and commercial reality of the transactions as a fundamental criterion for the application of the common system of VAT.

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28 Which are, from 1 January 2015, taxable in the Member State where the customer is established, has his or her permanent address or usually resides, regardless of where the taxable person supplying those services is established.

The Court therefore holds that, by adopting the contested decision, for the purposes of ensuring that Article 28 of the VAT Directive is implemented under uniform conditions throughout the European Union, the Council did not exceed the implementing powers conferred on it by the VAT Directive, pursuant to Article 291(2) TFEU.

V. APPROXIMATION OF LAWS

1. COMMUNITY DESIGNS

Judgment of the Court of Justice (Fifth Chamber), 16 February 2023, Monz Handelsgesellschaft International, C-472/21

Link to the full text of the judgment

Reference for a preliminary ruling – Intellectual property – Design – Directive 98/71/EC – Article 3(3) and (4) – Conditions for obtaining protection for a component part of a complex product – Concepts of 'visibility' and 'normal use' – Visibility of a component part of a complex product during normal use of that product by the end user

Monz, a company incorporated under German law, is the holder of the design representing the underside of a bicycle or motorcycle saddle that has been registered since 2011 at the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office, Germany; 'the DPMA').

On 27 July 2016, Büchel, a company incorporated under German law, filed an application with the DPMA for a declaration of invalidity of that design, claiming that it did not meet the requirements for legal protection as a design. [29] In its view, that design applied to a bicycle saddle, which is a component part of a complex product such as a bicycle or a motorcycle, was not visible during normal use of that product.

The DPMA rejected the application for a declaration of invalidity, holding that there were no grounds for excluding the design at issue from legal protection. It took the view that the component part to which the design is applied remains visible during normal use of the complex product, since such normal use covers also the disassembly and reassembly of the saddle for purposes other than maintenance, servicing or repair work.

Hearing an action brought against that decision, the Bundespatentgericht (Federal Patent Court, Germany) declared the design at issue invalid on the ground that it did not meet the requirements of novelty and individual character. According to that court, a component part which is visible only when it is separated from a complex product does not satisfy the condition of visibility and cannot therefore benefit from that legal protection. That court is of the view, moreover, that only the acts of riding a bicycle and getting on and off a bicycle can be considered to be normal use, and the underside of the saddle is not visible during such use.

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29 For the purposes of Paragraph 4 of the Gesetz über den rechtlichen Schutz von Design (Law on the legal protection of designs) of 24 February 2014 (BGBl. 2014 I, p. 122), transposing Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).

It is against that background that the Bundesgerichtshof (Federal Court of Justice, Germany), hearing an appeal brought by Monz, asked the Court of Justice, in essence, first, whether the requirement of the visibility of designs applied to or incorporated in a product which constitutes a component part of a complex product must be assessed on the basis of certain conditions of use of the complex product or, rather, only on the objective possibility of recognising the design applied to the component part as integrated into the complex product. Second, it asked, in essence, what the relevant criteria are for determining the normal use of a complex product by the end user.

By its preliminary ruling, the Court clarifies, first, the requirement of visibility that must be met in order for a design applied to or incorporated in a product which constitutes a component part of a complex product to be eligible to benefit from the legal protection of designs and, second, the criteria characterising the concept of 'normal use' of that product, within the meaning of Article 3(3) and (4) of Directive 98/71.

Findings of the Court

In the first place, the Court focuses on the matter of the visibility of a component part once it has been incorporated into a complex product. At the outset, it recalls that Article 3(3) of Directive 98/71 lays down a special rule for designs applied to or incorporated in a product which constitutes a component part of a complex product. It points out, in that regard, that it is the appearance of the whole or part of a product which is the subject matter of the legal protection for designs.

As regards the requirements which must be met in order for the appearance of a component part of a complex product to be eligible for protection as a design, the Court refers to its earlier case-law according to which that component part must be visible and defined by features which constitute its particular appearance, which presupposes that the appearance of the component part cannot be completely lost in the overall product. The Court points out that that case-law, which was created in the context of the protection of designs provided for by Regulation No 6/2002, [30] is also applicable to the design protection system under Directive 98/71.

However, in order to benefit from the legal protection of designs, the component part, once it has been incorporated into the complex product, must remain visible during normal use of that product. Thus, an assessment in abstracto of the visibility of the component part incorporated into a complex product, unconnected to any practical situation of use of that product, is not sufficient to allow a component part to benefit from legal protection. Nevertheless, Article 3(3) of Directive 98/71 does not require a component part that is incorporated into a complex product to remain fully visible the whole time that the complex product is being used.

Therefore, the visibility of a component part incorporated into a complex product cannot be assessed solely from the perspective of the end user of that product, but must also be assessed from the perspective of an external observer.

In the second place, the Court examines the concept of 'normal use' of such a product by the end user, within the meaning of Article 3(4) of Directive 98/71. As regards, first, the question whether the 'normal use' of a complex product corresponds to the use intended by the manufacturer of the component part, to that intended by the manufacturer of the complex product or to the customary use of that product by the end user, the Court states that that provision covers the normal use of the complex product by the end user.

The Court specifies in that connection that the normal or customary use of a complex product by the end user corresponds, as a general rule, to a use consistent with the intended purpose of the complex product, as intended by the manufacturer or designer of that product. However, the EU legislature intended to refer to the customary use of the complex product by the end user in order to exclude the use of that product at other stages of trade and thus to prevent circumvention of the

30 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

visibility condition. Accordingly, the assessment of the normal use of a complex product cannot be based solely on the intention of the manufacturer of the component part or of the complex product.

Second, as regards the question of what use of a complex product by the end user constitutes 'normal use' within the meaning of Article 3(4) of Directive 98/71, the Court takes the view that the fact that that provision does not specify what type of use of the product is covered by that concept and refers, generally, to the use of such a product by the end user supports a broad interpretation of that concept. In that regard, in view of the fact that, in practice, the use of a product in its principal function often requires various acts which may be performed before or after the product has fulfilled that principal function, the Court concludes that the normal use of a complex product covers all those acts, with the exception of those which are expressly excluded, namely acts relating to maintenance, servicing and repair work.

Consequently, the concept of 'normal use' must cover acts relating to the customary use of a product as well as other acts which may reasonably be carried out during such use and which are customary from the point of view of the end user, including those which may be performed before or after the product has fulfilled its principal function, such as the storage and transportation of that product.

In the light of those considerations, the Court holds that the requirement of visibility of designs applied to or incorporated in a product which constitutes a component part of a complex product must be assessed in the light of a situation of normal use of the complex product, so that the component part concerned, once it has been incorporated into that product, remains visible during such use. To that end, the visibility of a component part of a complex product during its normal use by the end user must be assessed from the perspective of that user as well as from the perspective of an external observer. That normal use must cover acts performed during the principal use of a complex product as well as acts which must customarily be carried out by the end user in connection with such use, with the exception of maintenance, servicing and repair work.

2. PLANT PROTECTION PRODUCTS

Judgment of the General Court (Seventh Chamber), 15 February 2023, UPL Europe and Indofil Industries (Netherlands) v Commission, T-742/20

Link to the judgment as published in extract form

Plant protection products – Active substance mancozeb – Non-renewal of approval – Regulation (EC) No 1107/2009 and Implementing Regulation (EU) No 844/2012 – Procedure for assessing the application for renewal of approval of an active substance – Designation of a new rapporteur Member State due to the withdrawal of the previous rapporteur Member State from the European Union – Rights of the defence – Principle of sound administration – Manifest error of assessment – Procedure for harmonised classification and labelling – Regulation (EC) No 1272/2008 – Legitimate expectations

Mancozeb, an active substance used as a fungicide to combat pathogens affecting potato, vine, pome fruit, tree fruit, carrot and onion crops, was first approved in the European Union in 2005.[31] Applications for renewal of that approval were submitted in 2013 and 2014.

[31] The active substance was included in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1) by Commission Directive 2005/72/EC of 21 October 2005 amending Council Directive 91/414/EEC to include chlorpyrifos, chlorpyrifos-methyl, mancozeb, maneb, and metiram as active substances (OJ 2005 L 279, p. 63).

By Implementing Regulation No 2020/2087, [32] the European Commission refused to renew the approval of mancozeb. In that regard, the recitals of the contested implementing regulation refer, inter alia, to the conclusions of the European Food Safety Authority (EFSA), in which EFSA noted, inter alia, that mancozeb had been classified as toxic for reproduction category 1B and that the new criteria for identifying endocrine disrupting properties were met for humans and most likely for non-target organisms.

The applicants UPL Europe Ltd and Indofil Industries (Netherlands) BV, companies which market plant protection products containing mancozeb, brought an action for annulment of the contested implementing regulation. The action is dismissed by the General Court.

This case raises two novel issues in the case-law of the General Court, concerning, first, the designation, during the procedure for the renewal of a substance, of a new rapporteur Member State ('RMS') for the assessment of an active substance and, second, the impact of the procedure for harmonised classification and labelling on the procedure for the renewal of an active substance.

Findings of the General Court

In the first place, the General Court rejects the complaint alleging failure to comply with the renewal procedure laid down in Implementing Regulation No 844/2012. [33]

As a preliminary matter, the General Court finds, first, that given that Implementing Regulation No 844/2012 is silent as to the conduct of the procedure for the renewal of an active substance in the event of the designation of a new RMS in the course of that procedure, the designation of a new RMS cannot be regarded as requiring the assessment procedure to be recommenced. [34]

Second, in accordance with the second subparagraph of Article 13(1) of that regulation, it is compulsory for that assessment to be submitted to EFSA and the applicant and be the subject of public consultation, followed by the adoption of EFSA's conclusions, unless the Commission decides to inform EFSA that such conclusions are not necessary.

In the present case, the designation of the new RMS for the assessment of mancozeb and its assessment of that substance were made after the completion of the mancozeb risk assessment process by the initial RMS and EFSA. Therefore, the applicants had already had the opportunity to submit comments.

It is true that, in updating its draft renewal assessment report ('the draft RAR') of September 2020, the new RMS found that it was, under certain conditions, possible to identify a use that was safe for human health in relation to non-dietary exposure to mancozeb. However, the new RMS's assessment led to the same conclusion as that of the initial RMS, namely that mancozeb did not satisfy the conditions for approval laid down in Article 4 of Regulation No 1107/2009. [35] Furthermore, the new RMS's conclusions are not substantively different from EFSA's conclusions as regards the concerns identified. It follows that the concerns identified by the new RMS had already been assessed by the initial RMS and EFSA.

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32 Commission Implementing Regulation (EU) 2020/2087 of 14 December 2020 concerning the non-renewal of approval of the active substance mancozeb, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2020 L 423, p. 50) ('the contested implementing regulation').

33 Commission Implementing Regulation (EU) No 844/2012 of 18 September 2012 setting out the provisions necessary for the implementation of the renewal procedure for active substances, as provided for in Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (OJ 2012 L 252, p. 26).

34 The procedure laid down in Articles 12 and 13 of Implementing Regulation No 844/2012.

35 Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

In addition, the General Court rejects the applicants' argument that, given the new RMS's conclusions as to the existence of a safe use for human health, they could apply for application of the derogation provided for in Article 4(7) of Regulation No 1107/2009. It observes that that derogation is not applied at the scientific assessment stage, but at the risk management stage. In that regard, the General Court notes, as is apparent from recital 12 of Regulation No 1107/2009, that it is the Commission which assumes the risk management role and takes the final decision concerning an active substance.

Therefore, in the circumstances of the present case, and having regard to the broad discretion conferred on the Commission by Regulation No 1107/2009 to adopt appropriate protection measures at the stage of managing risks initially identified during the scientific evaluation, the Commission could choose to continue with the procedure for the renewal of mancozeb without submitting the new RMS's assessment to public consultation and without ensuring that EFSA would produce its conclusions on that particular aspect.

In addition, the General Court notes that Article 12(3) of Implementing Regulation No 844/2012 does not require EFSA's conclusions to be the subject of public consultation.

Lastly, given that the Commission sent the applicants and the Standing Committee on Plants, Animals, Food and Feed the updated version of its draft renewal report following the submission by the new RMS of the updated version of the draft RAR, it cannot be maintained that the Commission adopted its renewal report before the new RMS completed its own risk assessment.

In the second place, the General Court considers that the Commission made no manifest error of assessment in the mancozeb renewal procedure.

First, the Commission was entitled to take into consideration, for the purposes of the procedure for the renewal of mancozeb, the opinion of the Committee for Risk Assessment ('RAC') of the European Chemicals Agency ('ECHA'), which is based on the ECHA's finding on the classification of that substance as toxic for reproduction category 1B, despite the fact that it is not legally binding for the purposes of the procedure for harmonising classification and labelling provided for in Regulation No 1272/2008. [36] The fact that that opinion, adopted in the context of the harmonised classification and labelling procedure for mancozeb, is not legally binding does not diminish its scientific value. Furthermore, the existence of a formal classification of an active substance is not decisive for the purposes of its approval under Regulation No 1107/2009.

Second, unless otherwise specified, the decisions which the Commission takes in the context of Regulation No 1107/2009 must always take account of the latest scientific and technical knowledge.

The General Court finds that the Commission could regard the RAC's opinion as a document showing the most recent scientific knowledge concerning the classification of mancozeb as a toxic substance. That opinion had been adopted on a proposal from the initial RMS and before EFSA's conclusions were adopted in the procedure for the renewal of that substance, namely when the scientific assessment of mancozeb was under way in that procedure.

As regards the complaint alleging that the RAC's opinion is based on an old study, the General Court finds that the applicants may not rely on an alleged material infringement occurring in the context of the procedure for the harmonisation of the classification and labelling of substances in accordance with Regulation No 1272/2008 in order to call into question the lawfulness of the contested implementing regulation. It was under Regulation No 1272/2008, and not under Regulation No 1107/2009, that the RAC adopted its opinion on the classification of mancozeb as a toxic substance for reproduction category 1B.

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

As regards the Republic of Malta's notification concerning its intention to submit a new classification dossier for that substance to ECHA in the procedure for the harmonisation of the classification and labelling of substances in accordance with Regulation No 1272/2008, allegedly confirming the classification of mancozeb as a toxic substance for reproduction category 2, the General Court notes that, on the date of adoption of the contested implementing regulation, that proposal by the Republic of Malta had not yet been assessed from a scientific point of view.

Third, in the absence of any well-founded arguments formulated by the applicants, the General Court rejects the complaint alleging that the RAC's opinion accorded undue influence to the metabolite ETU rather than to the substance itself.

3. RELEASE OF GENETICALLY MODIFIED ORGANISMS (GMO)

Judgment of the Court of Justice (Grand Chamber), 7 February 2023, Confédération paysanne and Others (In vitro random mutagenesis), C-688/21

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Deliberate release of genetically modified organisms – Directive 2001/18/EC – Article 3(1) – Point 1 of Annex I B – Scope – Exemptions – Techniques/methods of genetic modification which have conventionally been used and have a long safety record – In vitro random mutagenesis

In 2015, the Confédération paysanne, a French agricultural union, and eight associations whose purpose is the protection of the environment and the dissemination of information concerning the hazards posed by genetically modified organisms (GMOs) brought an action before the Conseil d'État (Council of State, France) concerning the exclusion of certain techniques or methods of mutagenesis [37] from the scope of the French legislation intended to transpose Directive 2001/18 [38] on the deliberate release into the environment of GMOs. In that context, the Conseil d'État (Council of State) had submitted to the Court of Justice a request for a preliminary ruling, which gave rise to the judgment in Confédération paysanne and Others (528/16), delivered in 2018. [39]

The present case follows on from that judgment, in which the Court ruled that the scope of the Directive 2001/18 excludes only organisms obtained by means of techniques/methods of mutagenesis which have conventionally been used in a number of applications and have a long safety record. The Conseil d'État (Council of State) took the view that it follows from that judgment that the organisms obtained by means of techniques/methods which appeared or were mainly developed after the date of the adoption of that directive, namely by virtue of techniques of 'in vitro random mutagenesis' must be included in the scope of Directive 2001/18. [40] Accordingly, the Conseil d'État (Council of State) issued an order and, to ensure its implementation, the French Government, in

37 Technique that enables mutations to be artificially caused, with the help of chemical or physical factors, at a much faster rate (between 1 000 and 10 000 times greater) than spontaneous mutations.

38 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).

39 Judgment of 25 July 2018, Confédération paysanne and Others (C-528/16, EU:C:2018:583).

40 Random mutagenesis refers to a process in which, after artificially causing, with the help of chemical or physical factors, mutations at a much faster rate than spontaneous mutations, the mutations are randomly induced in the organisms. In vitro random mutagenesis is a technique subjecting plant cells cultivated in vitro to chemical or physical mutagenic agents, unlike in vivo random mutagenesis, which is practised on whole plants or on parts of plants.

particular, drew up a draft decree relating to the modification of the list of techniques for obtaining GMOs which have been traditionally used without proven harm for public health or the environment. That draft decree provided that random mutagenesis, with the exception of in vitro random mutagenesis, had to be regarded as falling within such use.

Following notification of that draft decree, [41] the European Commission issued a detailed opinion, in which it stated that it was not justified, in the light of EU law and in the light of scientific advances, to draw a distinction between in vivo random mutagenesis and in vitro random mutagenesis. Since the draft decree was not adopted by the French authorities, the Confédération paysanne and the group of environmental protection associations again referred the matter to the Conseil d'État (Council of State) seeking enforcement of the order which had been declared.

The supreme administrative court considered that it needed clarification as to the scope of the judgment in Confédération paysanne and Others, in order to determine whether, in the light of the characteristics and uses of in vitro random mutagenesis, that technique/method should be regarded as falling within the scope of Directive 2001/18. It therefore referred the question to the Court of Justice for a preliminary ruling.

By its judgment, delivered by the Grand Chamber, the Court specifies the conditions under which organisms obtained through the application of a technique/method of mutagenesis which is based on the same processes of modification, by the mutagenic agent, of genetic material as a technique/method of mutagenesis which has conventionally been used in a number of applications and has a long safety record, but which differs from that second technique/method of mutagenesis by other characteristics, are, in principle, excluded from the exemption provided for by Directive 2001/18. [42]

Findings of the Court

First of all, the Court states that the limitation of the scope of the exemption provided for by Directive 2001/18 as regards the applicability of that exemption to techniques/methods of mutagenesis, by reference to the dual criterion of, first, [43] conventional use in a number of applications, and, second, having a long safety record, is closely linked to the very objective of that directive, [44] namely to protect human health and the environment, in accordance with the precautionary principle. The application of that dual criterion thus makes it possible to ensure that, on account of the age and variety of uses of a technique/method of mutagenesis and the information available as to its safety, organisms obtained through that technique/method may be released into the environment or placed on the market within the European Union, without it being necessary, in order to avoid adverse effects on human health and the environment, to subject those organisms to risk assessment procedures. [45]

In that context, the Court finds that a general extension of the benefit of the exemption from the scope of Directive 2001/18 to organisms obtained through the application of a technique/method of mutagenesis which is based on the same processes of modification, by the mutagenic agent, of the genetic material of the organism concerned as a technique/method of mutagenesis which has been conventionally used in a number of applications and which has a long safety record, but which

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41 In application of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services (OJ 2015 L 241, p. 1).

42 Exemption provided for in Article 3(1) of Directive 2001/18, read in conjunction with point 1 of Annex I B thereto. Under that provision, that directive does not apply to organisms obtained through the techniques of genetic modification listed in Annex I B to that directive, which include mutagenesis.

43 That dual criterion was established by the Court in the judgment in Confédération paysanne and Others (528/16).

44 Under Article 1 of Directive 2001/18, that refers, in accordance with the precautionary principle, to protect human health and the environment when, first, GMOs are deliberately released into the environment for any purpose other than placing on the market within the European Union, and, secondly, when GMOs are placed on the market within the European Union as or in products.

45 Referred to in Part B and Part C of Directive 2001/18 respectively.

combines those processes with other characteristics, distinct from those of that second technique/method of mutagenesis, would not respect the intention of the EU legislature.

The release into the environment or the placing on the market, without having carried out a risk assessment procedure, of organisms obtained by means of such a technique/method of mutagenesis is capable, in certain cases, of entailing negative effects, which may be irreversible and affecting several Member States, on human health and the environment, even where those characteristics do not relate to the processes of modification, by the mutagenic agent, of the genetic material of the organism concerned.

However, to consider that organisms obtained through the application of a technique/method of mutagenesis which has conventionally been used in a number of applications and with a long safety record necessarily fall within the scope of Directive 2001/18 where that technique/method has undergone any modification would be liable to render largely redundant the exemption provided for by that directive. Such an interpretation could make all forms of adaptation of techniques/methods of mutagenesis excessively difficult, even though that interpretation is not necessary to achieve the objective of protecting the environment and human health pursued by that directive, in accordance with the precautionary principle.

Therefore, the Court considers that the fact that a technique/method of mutagenesis includes one or more characteristics distinct from those of a technique/method of mutagenesis conventionally used in a number of applications and which has a long safety record justifies the exclusion of the exemption provided for by the directive only in so far as it is established that those characteristics are liable to result in modifications of the genetic material of the organism concerned that differ, by their nature or by the rate at which they occur, from those obtained by the application of that second technique/method of mutagenesis.

That being said, in the final part of its analysis, the Court examines the distinction between in vivo and in vitro mutagenesis techniques at the heart of the dispute in the main proceedings. It notes in that regard, following an analysis of the scheme laid down in Directive 2001/18 on techniques/methods involving in vitro cultures, that to hold that, because of the effects inherent in in vitro cultures, an organism obtained through the in vitro application of a technique/method of mutagenesis initially used in vivo is excluded from the exemption provided for by Directive 2001/18 would fail to have regard to the fact that the EU legislature did not consider that those inherent effects were relevant for the purpose of defining the scope of that directive. In particular, the Court states that Directive 2001/18 provides for the exclusion of several techniques of genetic modification involving the use of in vitro cultures from the GMO control scheme provided for by that directive.

VI. ENERGY

Judgment of the General Court (Second Chamber), 8 February 2023, Aquind Ltd and Others v Commission, T-295/20

Link to the full text of the judgment

Energy – Trans-European energy infrastructure – Regulation (EU) No 347/2013 – Delegated regulation amending the list of projects of common interest – Second paragraph of Article 172 TFEU – Refusal of a Member State to give its approval to a proposed electricity interconnector with a view to granting the status of a project of common interest – Non-inclusion by the Commission of the project in the amended list – Obligation to state reasons – Principle of good administration – Equal treatment – Legal certainty – Legitimate expectations – Proportionality – Article 10 of the Energy Charter Treaty

The applicants, Aquind Ltd, Aquind SAS and Aquind Energy Sàrl, are the promoters of a proposed electricity interconnector connecting the electricity transmission systems of the United Kingdom and France ('the proposed Aquind interconnector'). Considered to be fundamental in the infrastructure needed for the completion of the internal energy market, that project was included in the list of 'projects of common interest' ('PCIs') of the European Union by Delegated Regulation 2018/540. [46]

Since that Union list of PCIs is to be drawn up every two years, the list established by Delegated Regulation 2018/540 was replaced by the one established by Delegated Regulation 2020/389 [47] ('the contested regulation'). The new list in annex to the contested regulation listed the proposed Aquind interconnector as one of the projects which are no longer considered to be Union PCIs.

The applicants then brought an action before the General Court seeking annulment of the contested regulation, in so far as it removes the proposed Aquind interconnector from the Union list of PCIs.

The Court dismisses that action in its entirety. In its judgment, it holds, inter alia, that where a Member State decides to refuse the inclusion, in the list provided for in Regulation No 347/2013, [48] of a PCI located in its territory, that Member State has a discretion in the matter which the European Commission cannot call into question.

Findings of the General Court

In the first place, the Court examines the question whether the Commission's statement of reasons for not including the proposed Aquind interconnector in the contested regulation as a Union PCI, on the basis of the French Republic's refusal to give its approval to the inclusion of that project in the Union list of PCIs, could be regarded as a sufficient statement of reasons. [49]

In that regard, after recalling the wording of the second paragraph of Article 172 TFEU, according to which guidelines and PCIs which relate to the territory of a Member State are to require that Member State's approval, the Court considers that, in view of its clear wording, which presents no difficulty in interpretation, that provision confers a discretion on the Member State concerned to give its approval

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46 Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2018 L 90, p. 38).

47 Commission Delegated Regulation (EU) 2020/389 of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2020 L 74, p. 1).

48 Article 3 of Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39).

49 In the light of the settled case-law on the matter.

to the inclusion of a project in the Union list of PCIs or to refuse to do so. The legislature's choice to introduce a form of right of veto in favour of the Member State concerned is explained by the fact that the trans-European network policy includes territorial aspects and thus, in some way, touches upon town and country planning, which is an area that traditionally falls within the sovereignty of the Member States.

In the present case, the Court finds that the Commission fulfilled the obligation to state reasons [50] by referring to the French Republic's refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs. Similarly, the Commission cannot be criticised for not having asked the French Republic for explanations of the detailed reasons for that refusal. In that context, the provisions of Regulation No 347/2013 [51] cannot be interpreted as meaning that the Commission could be held liable for a possible unlawful act committed by a Member State where that Member State refuses to give its approval to a project and that it must therefore answer for a potential infringement of the obligation to state reasons committed by that Member State. According to the Court, such an approach would be contrary to the rules governing the division of powers between the Member States and the Commission, as provided for in Article 172 TFEU and reiterated in Regulation No 347/2013. The FEU Treaty has clearly established limits on the competence of the European Union in the field of Union PCIs, since the Commission is prevented from including in the list of those PCIs a project which has not received the approval of the Member State on whose territory the project is to be implemented.

In the second place, the Court examines an alleged infringement of the procedural and substantive rules laid down in Regulation No 347/2013 [52]. In that regard, it finds that the applicants have not demonstrated that the fact that the proposed Aquind interconnector was the most uncertain of the projects that could have been included in the Union list of PCIs could call into question the legality of the contested regulation. The Court points out that, under Regulation No 347/2013, [53] the Commission was required to take into consideration the French Republic's refusal to approve the inclusion of the proposed Aquind interconnector in the Union list of PCIs and that it could not call into question the reasons why that project was the most uncertain. It adds that Regulation No 347/2013 [54] provided that the grounds for the refusal put forward by a Member State must be examined if a Member State of the regional group concerned so requests. The Commission was therefore not entitled to request that the grounds relied on by the French Republic be examined and therefore it did not commit any error in that regard. In the present case, no Member State came forward to ask the French Republic to explain the reasons for its refusal. Even if the French Republic's conclusion that the proposed Aquind interconnector was the most uncertain is based on an error of assessment, the Commission did not have the power to correct it, any more than the Court itself has jurisdiction to examine that issue.

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50 Under point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 and Annex III.2(10) to that regulation.

51 Article 3(1) and (4) and Article 16 of Regulation No 347/2013.

52 In particular, Article 5(8) of Regulation No 347/2013.

53 Under point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 and Annex III.2(10) to that regulation.

54 Annex III.2(10) to Regulation No 347/2013.

Judgment of the General Court (Second Chamber, Extended Composition), 15 February 2023, Austrian Power Grid AG and Others v ACER, T-606/20

Link to the full text of the judgment

Energy – Internal market in electricity – Framework for the implementation of the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation – Procedure for the adoption of terms, conditions and methodologies – Rejection of the joint proposal of the system operators – Competence of ACER – Error of law – Rights of the defence – Obligation to state reasons

Judgment of the General Court (Second Chamber, Extended Composition), 15 February 2023, Austrian Power Grid AG and Others v ACER, T-607/20

Link to the full text of the judgment

Energy – Internal market in electricity – Framework for the implementation of the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation – Procedure for the adoption of terms, conditions and methodologies – Rejection of the joint proposal of the system operators – Competence of ACER – Error of law – Rights of the defence – Obligation to state reasons

European Commission Regulation 2017/2195 [55] on electricity balancing provides for the implementation of several European platforms for the exchange of balancing energy. Those platforms include, first, the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation ('the aFRR platform') and, secondly, the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation ('the mFRR platform'). [56]

In accordance with the procedure set out in Regulation 2017/2195, [57] all transmission system operators ('TSOs') have submitted for approval by the national regulatory authorities ('the NRAs') [58] common methodology proposals for the implementation of the aFRR platform and the mFRR platform.

Following a joint request by the NRAs, the EU Agency for the Cooperation of Energy Regulators (ACER), under that regulation, [59] took a decision on those proposals, as amended following exchanges and consultations between ACER, the NRAs and the TSOs. Thus, ACER adopted two decisions, one on the aFRR methodology and the other on the mFRR methodology ('the ACER decisions'), to which the methodologies in question, as amended and approved by ACER, were attached as an annex.

Austrian Power Grid, ČEPS, a.s., Polskie sieci elektroenergetyczne S.A., Red Eléctrica de España SA, RTE Réseau de transport d'électricité, Svenska kraftnät, TenneT TSO BV and TenneT TSO GmbH brought

55 Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6).

56 Articles 20 and 21 of Regulation 2017/2195, respectively.

57 Article 20(1) and Article 21(1) of Regulation 2017/2195.

58 Article 5(1) and (2)(a) of Regulation 2017/2195.

59 Article 5(7) of Regulation 2017/2195.

an action [60] before the Board of Appeal of ACER ('the Board of Appeal') against those decisions. Their appeals having been dismissed, they brought two actions before the General Court seeking annulment of the decisions of the Board of Appeal, in so far as they concern them, of certain provisions of the ACER decisions and of the methodologies attached to them.

Those actions were dismissed by the Court (Second Chamber, Extended Composition), which, on that occasion, ruled, first, on the division of competences between ACER and the NRAs in the context of the adoption of the aFRR and mFRR methodologies and, secondly, on the functions required for the operation of the aFRR and mFRR platforms under Regulation 2017/2195.

Findings of the General Court

As a preliminary point, the Court declares the actions for annulment inadmissible in so far as they are directed against the ACER decisions and their annexes. In that regard, it notes that, in accordance with the fifth paragraph of Article 263 TFEU and the act establishing ACER, namely Regulation 2019/942, [61] the applicants, as non-privileged parties, [62] may only seek annulment before the Court of the decisions adopted by the Board of Appeal, but not of the ACER decisions and their annexes. Consequently, the Court is limited, in the present case, to reviewing the legality of the decisions of the Board of Appeal, in particular in so far as they confirm in their entirety the ACER decisions and the aFRR and mFRR methodologies attached thereto.

In accordance with the determination made above, the Court continues its analysis on the merits. In the first place, it rejects the applicants' argument that the Board of Appeal erred in law by failing to find that ACER had exceeded the limits of its competence in adopting the decisions concerned.

On that point, the Court notes that, under Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195, as applicable at the time of the adoption of the decisions of the Board of Appeal, ACER is competent to decide or adopt individual decisions on regulatory issues or problems having an effect on cross-border trade or on the security of the cross-border network, such as the aFRR and mFRR methodologies, where, as in the present case, the NRAs make a joint request to that effect. In the Court's view, it does not follow from those provisions that ACER's competence is limited to points of disagreement between the authorities concerned.

That literal interpretation is supported by the context and the objectives pursued by the regulation of which those provisions form part. In that regard, the explanatory memorandum of the proposed Regulation 2019/942 and the previously applicable Regulation No 713/2009 [63] indicate a clear intention of the EU legislator to make decision-making on cross-border issues more efficient and expeditious by strengthening ACER's individual decision-making powers in a way that is consistent with the maintenance of the central role of NRAs in the field of energy regulation, in accordance with the principles of subsidiarity and proportionality. It is also clear from the preamble of Regulation 2019/942 [64] that ACER was established to fill the regulatory vacuum at EU level and to contribute to the efficient functioning of the internal markets in electricity and natural gas.

Therefore, the purpose and context of the relevant provisions of Regulations 2019/942 and 2017/2195, as well as the specific circumstances of the present case, confirm that ACER is empowered

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60 Under Article 28 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22).

61 Recital 34, Article 28(1) and Article 29 of Regulation 2019/942.

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

63 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).

64 Recital 10 of Regulation 2019/942, previously recital 5 of Regulation No 713/2009.

to decide on the development of the aFRR and mFRR methodologies, in case of a joint request from the NRAs to do so. Similarly, as ACER has been granted its own decision-making powers to enable it to carry out its regulatory functions independently and effectively, it is entitled to modify the TSOs' proposals in order to ensure their compliance with EU energy law, without being bound by any points of agreement between the competent NRAs.

It follows that the Board of Appeal of ACER did not err in law in upholding ACER's competence to rule on points in the aFRR and mFRR methodologies that were agreed between the NRAs.

In the second place, the Court rejects the applicants' claims that the Board of Appeal erred in law by finding that the inclusion of the capacity management function among the functions required for the operation of the aFRR and mFRR platforms had not been imposed on the TSOs by ACER, but resulted directly from the application of Regulation 2017/2195.

The Court makes clear from the outset that that inclusion is decisive in assessing whether the proposals developed by the TSOs had to comply with the additional requirements set out in Regulation 2017/2195 [65] where, as in the present case, the TSOs envisage designating several entities to perform the different functions required. In that regard, it notes that, in accordance with that regulation, the proposed methodologies submitted by the TSOs must include the definition of the functions required for the operation of the aFRR and mFRR platforms. [66] While it follows from Regulation 2017/2195 that those platforms are to include at least the activation optimisation function and the TSO-TSO settlement function, [67] it is not excluded that another function, such as capacity management, is also considered to be required for the operation of those platforms, in particular if the addition of such a function appears to be necessary to ensure a high-level design of that platform in line with common governance principles and business processes.

An interpretation of the notion of function required for the operation of the aFRR and mFRR platforms, in the light of the context and objectives pursued by Regulation 2017/2195, suggests that it is a function which, both technically and legally, appears to be necessary for the efficient and safe establishment and operation of those platforms.

In the Court's view, the capacity management function meets such a condition of necessity. From a legal point of view, Regulation 2017/2195 requires TSOs to update continuously available cross-zonal transmission capacity for the purpose of balancing energy exchange or imbalance compensation. Technically, as is evident from the proposed aFRR and mFRR methodologies developed in the present case, the continuous updating of that capacity, which underpins the capacity management function, is an essential input to the activation optimisation function. Moreover, the capacity management function has been added to the platforms by the TSOs themselves, in order for them to meet the requirements of a high-level design in terms of efficiency and safety required by Regulation 2017/2195.

In the light of the above considerations in particular, the decisions of the Board of Appeal are upheld.

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65 Article 20(3)(e)(i) to (iii) and Article 21(3)(e)(i) to (iii) of Regulation 2017/2195.

66 Article 20(3)(c) and Article 21(3)(c) of Regulation 2017/2195.

67 Article 20(2) and Article 21(2) of Regulation 2017/2195.

Judgment of the General Court (Second Chamber), 15 February 2023, Aquind Ltd and Others v ACER, T-492/21

Link to the full text of the judgment

Energy – Competence of the ACER – Withdrawal of the United Kingdom from the European Union – Error of law – Article 2(1) of Regulation (EU) 2019/943 – Article 92 of the Withdrawal Agreement – Ad hoc exemption regime under Article 308 of and Annex 28 to the Trade and Cooperation Agreement

The company Aquind Ltd is the promoter of a project for a proposed electricity interconnector connecting the electricity transmission systems in the United Kingdom and France ('the Aquind interconnector'). For the purposes of that project, Aquind Ltd submitted a request to the French and British regulatory authorities for a temporary exemption from the general principles governing the use of revenue, the unbundling of transmission systems and operators of transmission systems, and third-party access to distribution or transmission systems under Regulation No 714/2009 on conditions for access to the network for cross-border exchanges in electricity. [68]

As the national regulatory authorities failed to reach an agreement, the European Union Agency for the Cooperation of Energy Regulators (ACER) rejected the request for an exemption on the ground that Aquind Ltd did not satisfy the condition according to which the level of risk attached to the investment for the new interconnector is to be such that the investment would not take place unless an exemption is granted ('ACER's decision').

On appeal brought by Aquind Ltd, ACER's decision was upheld by the Board of Appeal of ACER [69] ('the Board of Appeal'). Aquind Ltd brought an action before the General Court for annulment of the decision of the Board of Appeal, which was upheld by the judgment of 18 November 2020, Aquind v ACER[70] ('the annulment judgment').

After having resumed the proceedings, the Board of Appeal declared that the action brought by Aquind Ltd against ACER's decision was inadmissible on the ground that, following Brexit, it was no longer competent to rule on the request for an exemption for the Aquind interconnector ('the contested decision').

The companies Aquind Ltd, Aquind Energy Sàrl and Aquind SAS brought an action for annulment of the contested decision before the Court. By its judgment, the Court dismisses that action and rules on the consequences of Brexit in the field of energy.

Findings of the General Court

In the first place, the Court recalls that, under Article 266 TFEU, the institution, body, office or entity whose act has been annulled is required to take the necessary measures to comply with the judgment annulling that act. That obligation to act is not, however, a source of competence, nor does it make it possible for compliance measures to be based on a legal basis which has in the meantime been repealed. Thus, the institution, body, office or entity in question is required to base the act containing the compliance measures on a legal basis that gives it the power it to adopt that act, and is in force on the date of adoption of that act.

It is clear furthermore from the case-law that if there is no valid legal base in force at the moment when an institution, body, office or entity seeks to take a particular decision, it is not possible to rely

68 Article 17 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15).

69 Decision A-001-2018 of the Board of Appeal of ACER of 17 October 2018.

70 Judgment of 18 November 2020, Aquind v ACER (T-735/18, under appeal, EU:T:2020:542).

on the principles governing the succession of legal rules to apply substantive provisions that had previously governed past acts.

In the light of those considerations, the Court ascertains whether, following Brexit, the Board of Appeal had the power to rule on ACER's decision by taking the necessary measures to comply with the annulment judgment.

After having found that, following the annulment judgment, the Board of Appeal was required to carry out a fresh review of ACER's decision, which was not restricted to that of whether there was a manifest error of assessment, the Court examines whether, at the date on which the contested decision was adopted, namely 4 June 2021, there was a legal basis giving the Board of Appeal the power to carry out such a review.

In that regard, the Court finds that, while the regulation establishing ACER [71] and Regulation 2019/943 [72] on the internal market for electricity, which were in force at the time that the contested decision was adopted, gave ACER the power, first, to examine requests for exemptions relating to an interconnector and, second, the Board of Appeal to review those decisions by ACER on such requests, it remained the case that those powers were only applicable on the assumption that the transmission line crosses or spans a border between Member States and connects the national transmission systems of the Member States. However, as the Aquind interconnector project became, after Brexit, an interconnector between a Member State and a third State, neither ACER nor the Board of Appeal were entitled to base a decision containing measures to comply with the annulment decision on the provisions of those regulations.

In addition, ACER and the Board of Appeal were also not entitled to adopt a decision containing measures to comply with the annulment judgment on the basis of the agreements governing the relationship between the European Union and the United Kingdom following Brexit.

On that point, the Court finds that ACER and the Board of Appeal could not adopt such a decision on the basis of Article 92 of the Agreement on the withdrawal of the United Kingdom from the European Union and from Euratom, [73] to the extent that that provision grants competence to the institutions, bodies, offices and agencies of the European Union only in certain ongoing administrative procedures which were initiated before the end of the transition period that raise issues against the institutions of the United Kingdom or natural or legal persons residing or established in the United Kingdom regarding compliance with EU law. In that context, the Court emphasises that that provision is an exception to the general principle that EU law, and therefore the competence of EU bodies does not apply to the United Kingdom after its withdrawal from the European Union.

As regards the Trade and Cooperation Agreement between the European Union and the United Kingdom, [74] the Court adds that Article 309 of that agreement, which concerns exemptions granted to interconnectors between the European Union and the United Kingdom under Regulation 2019/943 on the internal market for electricity covers only existing exemptions and not therefore pending requests for an exemption, such as the request for exemption for the Aquind interconnector. In addition, while the agreement provides for a regime of exemption from its rules relating to third-party access to transmission and distribution systems and to the management of systems and the unbundling of transmission systems and transmission systems operators, it does not confer any competence on

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71 Articles 10 and 28 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22).

72 Article 63(5) of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54).

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

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

ACER, nor, consequently, the Board of Appeal to rule on requests for exemptions for electricity interconnectors.

Having regard to all the foregoing, the Court concludes that the Board of Appeal did not err in law in declaring that it lacked competence, following Brexit, to rule on ACER's decision by taking the necessary measures to comply with the annulment judgment.

VII. INTERNATIONAL AGREEMENTS: INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court of Justice (Second Chamber), 9 February 2023, Staatssecretaris van Justitie en Veiligheid and Others (Withdrawal of the right of residence of a Turkish worker), C-402/21

Link to the full text of the judgment

Reference for a preliminary ruling – EEC-Turkey Association Agreement – Decision No 1/80 – Articles 6 and 7 – Turkish nationals already integrated into the labour market of the host Member State and enjoying an associated right of residence – Decisions of national authorities withdrawing the right of residence of Turkish nationals who have been lawfully resident in the Member State concerned for more than 20 years on the ground that they constitute a present, genuine and sufficiently serious threat to a fundamental interest of society – Article 13 – Standstill clause – Article 14 – Justification – Grounds of public policy)

In the Netherlands, a foreign national's unlimited residence permit may be withdrawn, inter alia, where he or she has been convicted of offences punishable by a term of imprisonment of three years or more and the total length of the sentences imposed reaches a certain threshold. Until 2012, however, withdrawal was prohibited when the foreign national had been legally resident in that country for at least 20 years. Following a legislative amendment adopted in July 2012, on the ground of the changed perception of public policy protection within Netherlands society, that prohibition was removed. [75]

Pursuant to that new legislation, S, E and C, three Turkish nationals who had been legally resident in the Netherlands for more than 20 years, had their residence permits of unlimited duration withdrawn by decisions of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands). The reasons for the withdrawal were that, during their residence, they had been the subject of several criminal convictions, the seriousness of the offences and the total duration of the fixed prison sentences reaching the required threshold, and that that conduct constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The actions brought by S, E and C respectively against those decisions before the rechtbank Den Haag (District Court, The Hague, Netherlands) led to different conclusions as regards the applicability, in the present case, of Article 13 of Decision No 1/80 of the Association Council, [76] which has been applicable

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75 Besluit houdende wijziging van het Vreemdelingenbesluit 2000 in verband met aanscherping van de glijdende schaal (Decree amending the Decree on foreign nationals as regards the tightening of the sliding scale) of 26 March 2012 (Stb. 2012, No 158).

76 Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey.

since 1 December 1980. That article lays down a standstill clause prohibiting Member States from introducing new restrictions on the conditions of access to employment applicable to Turkish workers and members of their families legally resident and employed in their respective territories. However, according to Article 14 of Decision No 1/80, the application of the provisions of that decision relating to employment and the freedom of movement of workers may be subject to limitations justified, inter alia, on grounds of public policy.

Hearing an appeal in those actions, the Raad van State (Council of State, Netherlands) decided to ask the Court of Justice about the scope of, and relationship between, Articles 13 and 14 of Decision No 1/80.

In its judgment, the Court confirms that Article 13 of Decision No 1/80 applies to Turkish nationals who already hold employment and freedom of movement rights under that decision. It also specifies the circumstances in which a new restriction of those rights, against which Turkish nationals may rely on Article 13, may be justified by public policy requirements within the meaning of Article 14 of Decision No 1/80.

Findings of the Court

In the first place, the Court examines the scope of the standstill clause laid down Article 13 of Decision No 1/80. It recalls its case-law according to which that clause has direct effect and must, in the light of the objective of Decision No 1/80, which is to allow freedom of movement for workers, be interpreted broadly. Both a new restriction which tightens the conditions of access to the first professional activity of a Turkish worker or members of his or her family and that which, once that worker or members of his or her family benefit from rights in the field of employment under Article 6 or Article 7 of Decision No 1/80, [77] restricts his or her access to paid employment guaranteed by those rights, are contrary to the objective of that decision.

Furthermore, it follows from the case-law that measures taken by a Member State which seek to define the criteria for the lawfulness of the situation of Turkish nationals, by adopting or amending, inter alia, the conditions relating to the residence of those nationals in its territory, are capable of constituting new restrictions within the meaning of Article 13 of Decision No 1/80.

Therefore, national legislation which permits the withdrawal of the right of residence of the persons concerned which they enjoy pursuant to Articles 6 and 7 of Decision No 1/80 restricts their right to freedom of movement in relation to the right to freedom of movement which they enjoyed at the time of the entry into force of that decision and, accordingly, constitutes a new restriction within the meaning of Article 13 of that decision. That provision may therefore be relied on by the Turkish nationals concerned.

In the second place, the Court examines the relationship between Article 13 and Article 14 of Decision No 1/80. It notes that the exception to the prohibition on adopting 'new restrictions' for public policy requirements, laid down in Article 14 is a derogation from the freedom of movement of workers and must therefore be interpreted strictly. In addition, any national measure covered by those requirements must be suitable for securing the attainment of the objective of protecting public policy pursued and must not go beyond what is necessary in order to attain it.

Furthermore, as regards Turkish nationals who, like S, E and C, have been resident for more than 10 years in the host Member State, the Court refers, for the purposes of the application of Article 14, to Article 12 of Directive 2003/109 [78] concerning the protection of long-term residents. Measures justified on grounds of public policy or public security concerning such residents presuppose that the

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77 Articles 6 and 7 of Decision No 1/80 provide for the employment rights of Turkish workers and of members of their families who have been authorised to join them, respectively.

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

national authorities assess on a case-by-case basis, in compliance with the principle of proportionality and the fundamental rights of the person concerned, whether the personal conduct of the person concerned constitutes a present, genuine and sufficiently serious threat to a fundamental interest of society.

In the light of the foregoing, the Court finds that the legislative measure at issue is covered by the Netherlands authorities' discretion laid down in Article 14 of Decision No 1/80. However, the reference to the changed social perceptions and the justification based on public policy are not sufficient in themselves to give legitimacy to that measure. It is also for the referring court to assess, taking into account the rights conferred by Decision No 1/80, whether the national measure is suitable for securing the attainment of the objective pursued, whether it does not go beyond what is necessary in order to attain it, and whether it provides for a prior and individual assessment of the current situation of the Turkish worker concerned.

VIII. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Fifth Chamber), 15 February 2023, Belaeronavigatsia v Council, T-536/21

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures taken in view of the situation in Belarus – Lists of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion and maintenance of the applicant's name on the lists – Concept of 'person responsible for repression' – Error of assessment – Proportionality

Since 2004, restrictive measures have been adopted by the European Union in view of the situation in Belarus with regard to democracy, the rule of law and human rights. Accordingly, in May 2006, the Council of the European Union adopted Regulation (EC) No 765/2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus, [79] and then, in October 2012, Decision 2012/642/CFSP concerning restrictive measures against Belarus. [80] Those measures provide for, inter alia, the freezing of funds and economic resources belonging to persons, entities or bodies responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus. [81]

In the light of the intensification of the persistent violation of human rights and the repression of opponents of the regime following the Presidential elections of 9 August 2020, the Council adopted

79 Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus (OJ 2006 L 134 p. 1).

80 Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus (OJ 2012 L 285, p. 1).

81 Point (a) of Article 4(1) of Decision 2012/642 and Article 2(4) of Regulation No 765/2006, as amended by Council Regulation (EU) No 1014/2012 of 6 November 2012 (OJ 2012 L 307, p. 1). The criterion thus set out is referred to as 'the general criterion at issue'.

Decision (CFSP) 2021/1001 and Implementing Regulation (EU) 2021/999 [82] concerning restrictive measures in respect of Belarus, and then renewed those measures by Decision (CFSP) 2022/307 and Implementing Regulation (EU) 2022/300 concerning the same subject matter [83] ('the contested acts').

The applicant, Belaeronavigatsia, is a Belarusian State-owned enterprise responsible for regulating airspace and providing air traffic assistance in Belarus. By the contested acts, it had its name included and then maintained on the lists of persons and entities targeted by those measures on the ground that it bore responsibility for diverting flight FR4978 to Minsk airport without valid justification on 23 May 2021. That diversion was motivated by political considerations, namely the arrest and detention of journalist and opponent Raman Pratasevich and Sofia Sapega, who were passengers on that flight.

The applicant brought an action for annulment of those measures. It criticised the Council for having made an error of assessment and alleged, as regards the measures adopted against it, a failure to have regard to the principle of proportionality. The General Court, which was required for the first time to interpret the concept of 'person responsible for the repression' in the context of the restrictive measures adopted in view of the situation in Belarus, dismisses the action, taking the view that the adoption and maintenance of the restrictive measures against the applicant was justified.

Findings of the General Court

As regards the first plea in law, alleging an error of assessment, according to which the Council wrongly considered that the criterion linked to the responsibility for the repression of civil society and democratic opposition was an objective criterion, linked to the activities of persons targeted by the restrictive measures, which did not require it to be established that the person or entity targeted by the restrictive measures had intended to participate in the act of repression committed, the General Court finds that the terms 'responsible for the repression' used in Decision 2012/642 [84] and Regulation No 765/2006 [85] are not defined in those measures. The meaning and scope of those terms must therefore be established according to their usual meaning in everyday language, taking into account the context in which they occur and the purposes of the rules at issue.

In that respect, the General Court notes, first, that the terms 'responsible for' refer to the person whose acts and/or activities have produced a consequence of which the perpetrator of those acts and/or activities is aware or cannot reasonably be unaware. Secondly, it follows from the context in which those terms are used, and in particular from the use of the wording 'persons, entities or bodies responsible for … the repression of civil society and democratic opposition, or whose activities otherwise seriously undermine democracy or the rule of law in Belarus', [86] that the Council intended to target, in general, any person, entity or body whose activities seriously undermine democracy or the rule of law in Belarus. The term 'otherwise' demonstrates, in addition, that the repression of civil society and democratic opposition is regarded as a type of activity seriously undermining democracy or the rule of law in Belarus. The use of the term 'activities' is, moreover, an indication of the Council's intent to target persons, entities or bodies whose activities contribute to seriously undermining democracy or the rule of law in Belarus, irrespective of whether or not there is an intentional element in that regard.

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82 Council Decision (CFSP) 2021/1001 of 21 June 2021 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2021 L I 219, p. 67), and Council Implementing Regulation (EU) 2021/999 of 21 June 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (OJ 2021 L I 219, p. 55).

83 Council Decision (CFSP) 2022/307 of 24 February 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 46, p. 97), and Council Implementing Regulation (EU) 2022/300 of 24 February 2022 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 46, p. 3).

84 Article 4(1)(a).

85 Article 2(4)

86 Point (a) of Article 4(1) of Decision 2012/642 and Article 2(4) of Regulation No 765/2006.

Thirdly, as regards the objectives pursued by Decision 2012/642 and by Regulation No 765/2006, the General Court recalls that, according to the TEU, [87] the consolidation of and support for democracy, the rule of law, human rights and the principles of international law on the international scene are among the objectives of the European Union in the framework of the common foreign and security policy (CFSP). In the present case, the restrictive measures against Belarus were adopted on account of the continued lack of respect for human rights, democracy and rule of law in that country. Those measures are intended to put pressure on the regime of President Lukashenko to put an end to human rights violations and the repression of civil society and democratic opposition. Those measures are therefore not inappropriate with respect to the objective pursued, including where no intentional element could be identified on the part of the perpetrators of the acts and/or activities targeted. Thus, according to the General Court, persons, entities or bodies whose acts and/or activities contribute to that repression are responsible for the repression of civil society and democratic opposition, irrespective of their intent, if they are aware or cannot reasonably be unaware of the consequences of their acts and/or activities.

In the present case, it is sufficient that the Council's file includes a set of indicia sufficiently specific, precise and consistent to establish that the acts alleged against the applicant in connection with the diversion of flight FR4978 contributed to the repression of civil society and democratic opposition in Belarus and that the applicant was aware or could not reasonably have been unaware of the consequences of its actions. The fact that the applicant is a legal person governed by public law responsible for regulating airspace and providing air traffic assistance in Belarus has, in that respect, no implications as regards the burden of proof borne by the Council or as regards the scope of judicial review carried out by the General Court. According to the General Court, the applicant could not reasonably have been unaware, having regard to the political context in Belarus at the material time, that its activities carried out in order to divert flight FR4978 to Minsk for reasons unrelated to aviation safety contributed to the repression of civil society and democratic opposition. Consequently, the Council did not make an error of assessment in finding that, by its involvement in the diversion of that flight, the applicant is responsible for the repression of civil society and democratic opposition in Belarus.

Lastly, the General Court makes clear that that interpretation of the general criterion at issue does not imply that any act and/or any activity which contributes in an equivalent manner to the repression of civil society and democratic opposition is covered by that criterion irrespective of its substantive classification. The objective nature thereof must necessarily be determined in accordance with Decision 2012/642 [88] and Regulation No 765/2006, [89] which refer only to acts and/or activities that may be classified as acts of repression, excluding acts which, by their nature, lack any intrinsic connection with the repression of civil society and democratic opposition.

As regards the second plea in law, based on an alleged failure to have regard to the principle of proportionality, the General Court rejects the plea and, accordingly, dismisses the action in its entirety.

87 Article 21(2)(b) TEU.

88 Article 4(1)(a).

89 Article 2(4)

IX. JUDGMENTS PREVIOUSLY DELIVERED

1. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN ARREST WARRANT

Judgment of the Court of Justice (Grand Chamber), 31 January 2023, Puig Gordi and Others, C-158/21

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Surrender procedures between Member States – Conditions for execution – Jurisdiction of the issuing judicial authority – Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union – Right of access to a tribunal previously established by law – Possibility of issuing a new European arrest warrant relating to the same person

Following the adoption of the laws relating to the independence of the Autonomous Community of Catalonia (Spain) and the holding of a referendum to that end, criminal proceedings were initiated against a number of individuals before the Tribunal Supremo (Supreme Court, Spain), the referring court. In the autumn of 2019, several European arrest warrants (EAWs) were thus issued by that court. The procedures for the execution of the EAWs issued against Mr Puigdemont Casamajó and Mr Comín Oliveres were suspended after their election to the European Parliament. As regards the EAW issued against Mr Puig Gordi, the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium), by order adopted in August 2020, refused to execute it on the ground that, in its view, the referring court did not have jurisdiction to issue that EAW. By judgment delivered in January 2021, the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) dismissed the appeal brought against that order.

Against that background, the referring court asks the Court of Justice a series of questions aimed, essentially, at establishing whether an executing judicial authority may refuse to execute an EAW on the ground that, it its view, the issuing judicial authority does not have jurisdiction to issue that warrant or to try the person prosecuted, and whether the framework decision on the EAW [90] precludes the issuing of a new EAW after the execution of a first EAW has been refused.

By its judgment, the Court, sitting as the Grand Chamber, clarifies, inter alia, the conditions under which the executing judicial authority may refuse to act on an EAW on account of the risk of infringement, where the requested person is surrendered, of that person's fundamental right to a fair trial, [91] in connection with such a lack of jurisdiction.

Findings of the Court

First of all, the Court states that an executing judicial authority may not refuse to execute an EAW on the basis of a ground for non-execution which stems not from Framework Decision 2002/584, but solely from the law of the executing Member State. In that regard, the Court states that the grounds relied on in its case-law as requiring or authorising that no action be taken in respect of an EAW all

90 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').

91 That right is enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

derive from Framework Decision 2002/584. Furthermore, to accept that a Member State may add other grounds, based on national law, to those grounds for not executing an EAW would hinder the proper functioning of the simplified system for the surrender of persons established by that framework decision. The Court adds, however, that a Member State is entitled, exceptionally, to invoke a ground for non-execution based on the obligation to ensure respect for the fundamental rights afforded to the person concerned under EU law, [92] subject to compliance with the strict conditions set out in the Court's case-law in that regard.

In the second place, the Court rules that the executing judicial authority may not verify whether an EAW has been issued by a judicial authority which had jurisdiction for that purpose and refuse to execute that EAW where it considers that that is not the case. [93] In that regard, Article 6(1) of Framework Decision 2002/584 provides that the issuing judicial authority is the judicial authority of the issuing Member State which is competent to issue an EAW by virtue of the law of that State. Although the executing judicial authority must ensure, before executing an EAW, that it was indeed issued by a judicial authority, it cannot, however, verify that the authority in question has jurisdiction to issue such a warrant in the light of the rules of the law of the issuing Member State. Within the framework of the procedural autonomy afforded to each Member Sate, it is for the latter to designate the judicial authorities that have jurisdiction to issue an EAW, those judicial authorities then having to assess themselves their jurisdiction for that purpose in the light of the law of the issuing Member State.

In the third place, the Court states that the executing judicial authority called upon to decide on the surrender of a person for whom an EAW has been issued may not refuse to execute that warrant on the ground that that person is at risk, following his or her surrender to the issuing Member State, of being tried by a court which lacks jurisdiction for that purpose unless,

- first, that judicial authority has objective, reliable, specific and properly updated information showing that there are systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which the person concerned belongs, in the light of the requirement for a tribunal established by law, which mean that the individuals concerned are generally deprived, in that Member State, of an effective legal remedy enabling a review of the jurisdiction of the criminal court called upon to try them, and
- secondly, that judicial authority finds that, in the particular circumstances of the case in question, there are substantial grounds for believing that, taking into account the information that is provided by the person for whom that EAW has been issued, the court which is called upon to hear the proceedings to which that person will be subject manifestly lacks jurisdiction for that purpose.

In particular, the Court states that the jurisdiction of a court to hear a case is part of the requirement for a 'tribunal established by law', flowing from Article 47 of the Charter. Consequently, where a person for whom an EAW has been issued claims that he or she will be exposed, following his or her surrender, to an infringement of his or her right to an effective remedy before an impartial tribunal because the court called upon to try him or her lacks jurisdiction, it is for the executing judicial authority to assess whether that allegation is well founded in the context of that two-step examination. Where the executing judicial authority considers that the information available to it does not demonstrate the existence of the abovementioned deficiencies, that authority cannot refuse to execute that EAW on that ground. Where, in the issuing Member State, legal remedies make it possible to review the jurisdiction of the court called upon to try such a person (in the form of an examination of its own jurisdiction by that court or an action available before another court), the risk, for that same person, of being tried by a court of that Member State which has no jurisdiction for that purpose may, in principle, be ruled out by the exercise, by that person, of those legal remedies. In the

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92 Article 1(3) of Framework Decision 2002/584.

93 The Court rules on the basis of Article 1(1) and (2) and Article 6(1) of Framework Decision 2002/584.

absence of evidence to demonstrate the existence of the deficiencies referred to above, the executing judicial authority cannot presume that such legal remedies are lacking, since that authority is, on the contrary, required, in accordance with the principle of mutual trust, to base its analysis on the existence and effectiveness of those legal remedies.

In the fourth place and lastly, the Court finds that several successive EAWs may be issued against a requested person with a view to obtaining his or her surrender by a Member State after the execution of a first EAW concerning that person has been refused by that Member State, provided that the execution of a new EAW does not result in an infringement of the fundamental rights and legal principles enshrined in Article 6 TEU, [94] and provided that the issuing of the latter EAW is proportionate. The issuing of a new EAW may prove necessary, in particular after the evidence which prevented execution of the previous EAW has been rejected. In the context of the examination of whether it is proportionate to issue a new EAW, the issuing judicial authority must nevertheless take into account the nature and gravity of the offence for which the requested person is being prosecuted, the consequences for that person of the EAW or EAWs previously issued against him or her, or the prospects of execution of any new EAW.

2. COMPETITION: STATE AID

Judgment of the Court of Justice (Grand Chamber), 31 January 2023, Commission v Braesch and Others., C-284/21 P

Link to the full text of the judgment

Appeal – State aid – Articles 107 and 108 TFEU – Restructuring aid – Banking sector – Preliminary examination stage – Decision declaring the aid compatible with the internal market – Restructuring plan – Commitments given by the Member State concerned – Burden-sharing measures – Conversion of subordinated debts into equity – Bondholders – Action for annulment – Admissibility – Fourth paragraph of Article 263 TFEU – *Locus standi* – Natural or legal person directly and individually concerned – Breach of the procedural rights of interested parties – Failure to initiate the formal investigation procedure – Article 108(2) TFEU – Concept of 'parties concerned' – Regulation (EU) 2015/1589 – Article 1(h) – Concept of 'interested party' – National measures taken into account by the European Commission – Inadmissibility of the action

In 2008, the Italian bank Banca Monte dei Paschi di Siena ('BMPS') undertook a capital increase of EUR 950 million underwritten in full by J.P. Morgan Securities Ltd ('JPM'), under the terms of contracts concluded between them ('the FRESH contracts'). JPM obtained the funds necessary to finance that transaction from Mitsubishi UFJ Investor Services & Banking (Luxembourg) SA ('MUFJ') which issued the bonds entitled FRESH in an amount of EUR one billion. The bondholders receive, for their part, fees in the form of coupons passed on to them by MUFJ.

At the end of 2016, BMPS requested extraordinary public financial support in the form of a precautionary recapitalisation under Italian legislation. In response to that request, the Italian authorities notified the European Commission of aid for the recapitalisation of BMPS in the amount of EUR 5.4 billion. That aid was to be added to EUR 15 billion of individual liquidity aid to BMPS, which the Commission had temporarily approved by decision of 29 December 2016.

94 That obligation is laid down in Article 1(3) of Framework Decision 2002/584.

By decision of 4 July 2017, [95] the Commission approved, following the preliminary examination stage, both the EUR 15 billion of individual liquidity aid to BMPS and the aid for precautionary recapitalisation of BMPS in the amount of EUR 5.4 billion ('the decision at issue'). Those aid measures, which were accompanied by a restructuring plan for BMPS and commitments offered by the Italian authorities, were considered to constitute State aid compatible with the internal market for reasons of financial stability. [96]

BMPS's restructuring plan provided, inter alia, for the possibility of cancelling the FRESH contracts concluded between BMPS and JPM. Following the annulment of those contracts, several holders of FRESH bonds brought an action before the General Court seeking annulment of the decision at issue. In support of their actions, those applicants submitted, inter alia, that they had suffered a substantial economic loss as a result of the cancellation of the FRESH contracts and that that annulment stemmed from the restructuring plan accompanying the aid measures notified by the Italian Republic.

Before the General Court, the Commission raised a plea of inadmissibility on the ground that the appellants do not have an interest in bringing proceedings or standing to bring proceedings for the purposes of Article 263 TFEU. Since that objection of inadmissibility was rejected by the General Court, [97] the Commission brought an appeal before the Court of Justice limited to the question of *locus standi*. In upholding that appeal, the Grand Chamber of the Court of Justice clarifies the concept of 'party concerned' within the meaning of Article 108(2) TFEU, conferring standing to bring proceedings as a person directly and individually concerned, within the meaning of Article 263 TFEU.

Findings of the Court

By its single ground of appeal, the Commission complains, in essence, that the General Court erred in law in holding that, as 'parties concerned' within the meaning of Article 108(2) TFEU and 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589, [98] the appellants have standing to bring an action for annulment, under the fourth paragraph of Article 263 TFEU, [99] against the decision at issue in order to safeguard their procedural rights under Article 108(2) TFEU.

In that regard, the Court of Justice recalls that it follows from its case-law that a 'party concerned', within the meaning of Article 108(2) TFEU, is entitled to bring an action for annulment of a Commission decision not to raise objections to notified State aid, adopted at the end of the preliminary examination stage, provided that that person seeks to safeguard the procedural rights available to him or her under the latter provision. Since the decision at issue was adopted at the conclusion of the preliminary examination stage, without the formal investigation procedure provided for in Article 108(2) TFEU being initiated, and since the appellants are seeking to safeguard their procedural rights under that provision, the General Court was right to examine whether they have the status of 'parties concerned' in order to determine whether their action is admissible under the fourth paragraph of Article 263 TFEU.

However, the General Court erred in law in concluding that the appellants have the status of 'parties concerned' in the context of the procedure for reviewing notified aid, as conducted by the Commission under Article 108 TFEU.

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95 Decision C(2017) 4690 final of 4 July 2017 on State Aid SA.47677 (2017/N) – Italy – New aid and amended restructuring plan of Banca Monte dei Paschi di Siena.

96 Under Article 107(3)(b) TFEU, concerning aid intended to remedy a serious disturbance in the economy of a Member State.

97 Judgment of 24 February 2021, *Braesch and Others* v *Commission* (T-161/18, EU:T:2021:102).

98 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).

99 The fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute annulment proceedings against an EU act which is not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to those persons. Secondly, they may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them.

Regulation 2015/1589 defines the concept of 'interested party' – which is analogous to the concept of 'party concerned' within the meaning of Article 108(2) TFEU – as any person, undertaking or association of undertakings whose interests might be affected by the granting of aid. Since that concept is interpreted broadly in the case-law, it may encompass any person capable of demonstrating that the grant of State aid is likely to have a specific effect on its situation.

In that regard, the General Court held that the commitments given by the Italian authorities concerning BMPS's restructuring plan, which accompanied the notified aid measures and which, according to the appellants, entailed a significant economic loss for holders of the FRESH bonds, formed an integral part of the notified aid measures, since the Commission had, by the decision at issue, rendered those measures binding, with the result that that decision concerns both the notified aid measures and the commitments given by the Italian authorities. The General Court inferred from this that the grant of the notified aid and, accordingly, the adoption of the decision at issue had a specific effect on the appellants' situation, with the result that they must be classified as 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589.

In so ruling, the General Court misconstrued the rules of EU law governing the scope of the decision at issue.

On that point, the Court states that where a notified aid measure incorporates, on a proposal from the Member State concerned, commitments granted by that State, it does not follow that those commitments must be regarded as being imposed as such by the Commission and that any adverse effects they may have on third parties are therefore attributable to the decision adopted by that institution.

By a decision adopted at the conclusion of the preliminary examination stage, the Commission cannot impose or prohibit any action by the Member State concerned, but is only entitled to approve, by a decision not to raise objections, the planned aid as notified by that Member State, declaring that aid compatible with the internal market.

It follows that, by the decision at issue, the Commission merely authorised the Italian Republic to implement the notified State aid while taking note of the factual framework already defined by that Member State in the restructuring plan for BMPS and the commitments which it notified in order to dispel any doubt as to the compatibility of that aid with the internal market, for the purposes of Article 107(3)(b) TFEU. It cannot therefore be considered that the commitments proposed by the Italian Republic in the context of the preliminary examination procedure were imposed by the decision at issue itself, since those commitments result solely from acts adopted by that Member State.

Accordingly, the annulment of the FRESH contracts, when the restructuring plan accompanying the notified aid was implemented, cannot be regarded as a binding effect of the decision at issue, since it does not result from the implementation of that aid as such. Rather, it results from measures – which are indeed linked de facto, but which are legally distinct – adopted by the Member State that notified that aid to the Commission. The fact that those measures were, inter alia, adopted by that Member State with a view to obtaining from the Commission a decision authorising that aid and that they are the subject of commitments taken into account in such a decision of the Commission is irrelevant in that regard.

Thus, contrary to what was held by the General Court, the commitments referred to in the decision at issue were not imposed or rendered binding by the Commission in that decision, but constitute purely national measures notified by the Italian Republic, under Article 108(3) TFEU, under its own responsibility, which were taken into account by the Commission as a factual element in assessing whether the State aid in question could, in the absence of any doubt in that regard, be declared compatible with the internal market at the conclusion of the preliminary examination stage.

In response to the appellants' argument based on the Commission's obligation to verify that the aid measures notified by the Italian Republic comply with EU law as a whole, the Court also notes that, according to settled case-law, the procedure provided for in Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid which, as such or by reason of some modalities thereof, contravenes provisions or general principles of EU law cannot be declared compatible with the internal market. Thus, in accordance with that case-law, the Commission verified, in the decision at issue, that the notified aid complied with Directive 2014/59. [100] In that context, the Commission verified, inter alia, that the burden-sharing measures provided for in the restructuring plan proposed by the Italian Republic, which led to the annulment of the FRESH contracts, were adequate for the purpose of limiting the amount of aid granted to the strict minimum necessary to achieve the objective of recapitalising BMPS.

However, the Commission was not required to verify whether those burden-sharing measures themselves infringed the rights which the appellants claim to derive from EU law or national law. Such an infringement, even if it were established, would not arise from the aid as such, its object or its indissociable modalities, but rather from the measures taken by the Italian Republic in order to obtain from the Commission a decision authorising that aid at the conclusion of the preliminary examination stage.

In those circumstances, the fact that the burden-sharing measures form part of a restructuring plan requiring the payment of State aid, notified by the Italian Republic to the Commission in order to seek the approval of that aid at the conclusion of the preliminary examination stage, does not confer on the appellants, who consider that they have been affected by those measures, the status of 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589, in the context of the procedure conducted by the Commission under Article 108 TFEU. If the appellants consider that, as a result of the adoption of the burden-sharing measures provided for in BMPS's restructuring plan, the Italian Republic has infringed EU law, they must challenge the legality of those measures before the national court, which has sole jurisdiction in that regard and which has the power, or even the obligation, if it rules at last instance, to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, if necessary, in order to question it as to the interpretation or validity of the relevant provisions of EU law. That is precisely the situation in the present case, since the appellants do not claim to be affected by the aid in question, but claim only to be adversely affected by the burden-sharing measures provided for in the restructuring plan referred to in the decision at issue.

In the light of those clarifications, the Court of Justice upholds the single ground raised by the Commission in its appeal and sets aside the judgment of the General Court. Since the state of the proceedings permits final judgment to be given, the Court also upholds the objection of inadmissibility raised by the Commission at first instance and, accordingly, dismisses the appellants' action as inadmissible.

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

3. AGRICULTURE AND FISHERIES

Judgment of the General Court (Fourth Chamber), 18 January 2023, Roumanie v Commission, T-33/21

EAGGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Romania – National rural development programme 2007-2013 – Methods for calculating the rates of support relating to sub-measure '1a' of Measure 215 – Welfare payments for 'fattening pigs' and 'gilts' – Increase of at least 10% of the available space allocated to each animal – Obligation to state reasons – Legitimate expectations – Legal certainty – Legal classification of the facts – Article 12(6) and (7) of Delegated Regulation (EU) No 907/2014 – Guidelines on the calculation of the financial corrections in the framework of the conformity and financial clearance of accounts procedures

In July 2008, the European Commission approved Romania's national rural development programme for 2007-2013 ('the NRDP 2007-2013'). In 2012, following a request for a review submitted by the Romanian authorities, the Commission approved an amendment of the NRDP 2007-2013. [101] When that amendment was made, Measure 215 – Animal welfare payments ('Measure 215'), inter alia, was introduced. That measure consisted of a number of sub-measures establishing compensatory payments for farmers, poultry and pig breeders, who voluntarily undertook to implement certain animal welfare standards.

In 2015, during an audit mission in Romania, the European Union Court of Auditors found errors in relation to the payments made in application of Measure 215. Among the sub-measures of Measure 215 affected by its findings was sub-measure '1a': 'fattening pigs', 'gilts' and 'sows' – Increase of at least 10% of the available space allocated to each animal (with regard only to 'fattening pigs' and 'gilts') ('the sub-measure at issue').

In 2018, following a first administrative audit launched by the Commission, which covered Measure 215 for the financial years 2014 to 2016, and at the end of the ensuing procedure, the Commission applied to Romania a flat-rate financial correction of 25% for the financial years 2015 and 2016, owing to the overestimation of the amount of the payments made under the sub-measure at issue. [102] The action which Romania brought for annulment in part of that decision was dismissed as inadmissible on the ground that it was out of time.

After the close of the financial year 2016, the Commission carried out a second audit, covering the financial years 2017 to 2019, during which it found the same errors as in the first audit. It found, in particular, that there had been an infringement of Article 40(3) of Regulation No 1698/2005. [103]

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101 By Commission Implementing Decision C(2012) 3529 final of 25 May 2012.

102 By Commission Implementing Decision (EU) 2018/873 of 13 June 2018 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2018 L 152, p. 29).

103 Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ 2005 L 277, p. 1). Under Article 40(3) of that regulation, animal welfare payments 'shall be granted annually and shall cover additional costs and income foregone resulting from the commitment made. Where necessary, they may cover also transaction cost'.

By the contested decision, [104] the Commission applied to Romania a flat-rate financial correction under which 25% of the expenditure incurred by that Member State under the European Agricultural Fund for Rural Development (EAFRD), namely an amount of EUR 18 717 475.08, was excluded from European Union financing because of the overestimation of the amount of compensation payments made under the sub-measure at issue, during the financial years 2017 to 2019.

The action which Romania brought against that decision is upheld by the General Court.

This case leads the Court to clarify the application of the principle of the protection of legitimate expectations in the context of EU financing of the expenditure incurred by the Member States in relation to agriculture.

Findings of the Court

In the first place, as regards legitimate expectations, the Court finds that, when adopting the contested decision, the Commission did not comply with the principle of the protection of legitimate expectations [105] and, consequently, the principle of legal certainty, of which the protection of legitimate expectations is a corollary.

In that regard, the Court finds, first, that when the Commission approved the amendment of the NRDP 2007-2013, it had information allowing it to assess the conformity with Regulation No 1698/2005 of the sub-measure at issue and of the methods for calculating the support rates specific to that measure. The discussions between the Romanian authorities and the Commission before that approval covered, in particular, the methods for calculating the compensatory payments under the sub-measure at issue, and both the final result and the way in which that result had been calculated were made available to the Commission. That approval therefore represented the Commission's 'informed' consent to the implementation of the sub-measure at issue.

Second, those discussions and the documents exchanged while they were in progress support the view that the Commission provided precise information when it approved the amendment of the NRDP 2007-2013. That information, moreover, was unconditional and consistent.

The Commission therefore caused the Romanian authorities to have a legitimate expectation that the compensatory payment rates in respect of the sub-measure at issue were consistent with the EU rules and, consequently, that those payments were covered by EU financing.

Third, the Romanian authorities' expectations continued to be legitimate, even after the findings of the Court of Auditors. Those authorities acted with all due diligence in order to clarify the situation as quickly as possible and to identify a legally feasible option. They pointed out on a number of occasions that it was objectively impossible to amend the NRDP 2007-2013 and requested the Commission's assistance in identifying a solution.

Having regard to the fact that the methods for calculating the payment rates in respect of the sub-measure at issue and its financial results had been the subject of a specific negotiation with the Commission, which had expressly accepted them as being consistent with Regulation No 1698/2005, the findings of the Court of Auditors were not capable of invalidating those methods and the results obtained with immediate effect, such as to put an end to Romania's legitimate expectations.

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104 Commission Implementing Decision (EU) 2020/1734 of 18 November 2020 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGGF) and under the European Agricultural Fund for Regional Development (EAFRD) (OJ 2020 L 390, p. 10), in that it excluded certain expenditure which Romania incurred for the financial years 2017 to 2019 in the amount of EUR 18 717 475.08 ('the contested decision').

105 The principle of protection of legitimate expectations confers the right to that protection on any person whom an institution of the European Union has caused, by giving him precise assurances, to entertain justified hopes. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such assurances. See, to that effect, judgment of 13 September 2017, *Pappalardo and Others* v *Commission* (C-350/16 P, EU:C:2017:672, paragraph 39 and the case-law cited).

As the legitimate expectations that the compensatory payment rates relating to the sub-measure at issue would be respected for the entire duration of the commitments given by the beneficiaries persisted after the findings of the Court of Auditors, the Commission breached those expectations when it adopted the contested decision.

That conclusion is not called into question by the argument that Romania could have found a means of reducing the compensatory payment rates. Owing to the undertakings signed by the beneficiaries in the context of Measure 215, which are to be regarded as contracts, and given the expiry of the period prescribed for proposing an amendment of the NRDP 2007-2013, it was not possible for the Romanian authorities to apply compensatory payments that did not correspond to the level stated in the technical data sheet of Measure 215 of the NRDP 2007-2013. In any event, the fact that Romania might be in a position to reduce the payments and thus to reduce its losses incurred due to that expenditure not being borne by the agricultural funds cannot deprive it of the possibility of properly relying on its legitimate expectation that the compensatory rates relating to the sub-measure at issue, fixed by the NRDP 2007-2013, would be respected. Furthermore, the need to initiate the procedures for amending the contracts and to deal with any ensuing legal proceedings would, specifically, be the adverse consequences of a breach of the principle of the protection of Romania's legitimate expectations.

In the second place, as regards the imposition of a flat-rate financial correction, the Court holds that the Commission made an error in its legal classification in relying on Article 12(7)(c) of Delegated Regulation No 907/2014, [106] read in conjunction with its Guidelines on the calculation of financial corrections, [107] in order to justify the application of a rate of 25%.

Indeed, since it was the existence and the gravity of the irregularities and the negligence on the part of the Romanian authorities, resulting from the systematic nature of the application of overestimated payment rates, that led the Commission to presume that there was a risk of financial harm to the budget of the European Union, both the 'existence' of alleged irregularities or negligence and their 'gravity or systematic nature' must be rejected in the present case.

First of all, the legal classification of the calculation method relating to the sub-measure at issue and its financial result as 'generalised irregularities' and 'widespread negligence in countering irregular or fraudulent practices' is not correct.

Next, the systematic nature of the failure to adopt measures aimed at reducing the compensatory payments, or even at suspending them, cannot be treated as a 'generalised irregularity'.

Last, the conduct of both the Romanian authorities and the beneficiaries concerned cannot be treated as 'widespread' negligence in countering irregular or fraudulent practices. In the present case, owing to the legitimate expectation acquired by the Romanian authorities that the calculation method discussed with the Commission was consistent with the rules in force, no irregular or fraudulent practice can be identified.

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106 Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and the use of the euro (OJ 2014 L 255, p. 18). According to Article 12(7)(c) of that regulation, the circumstances demonstrating a higher gravity of the deficiencies revealing a greater risk of loss for the Union's budget include cases where there is evidence of wide-spread irregularity and negligence in countering irregular or fraudulent practices.

107 Guidelines on the calculation of the financial corrections in the framework of the conformity and financial clearance of accounts procedures, as set out in Communication from the Commission C(2015) 3675 final of 8 June 2015. It is apparent from point 3.2.5 of those guidelines that, when 'the Member State's application of a control system is found to be absent or gravely deficient, and [when] there is evidence of wide-spread irregularity and negligence in countering irregular or fraudulent practices …, that a correction of 25% is justified as it can reasonably be assumed that the freedom to submit irregular claims with impunity will occasion exceptionally high financial damages to the Union's budget'.

Nota bene:

The résumés 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 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