EN

COURT OF JUSTICE
OF THE EUROPEAN UNION

MONTHLY CASE-LAW DIGEST
March 2023

I. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR FAILURE TO FULFIL OBLIGATIONS

Judgment of the Court of Justice (Third Chamber), 16 February 2023, Commission v Bulgaria (Twofold failure to fulfil obligations – PM_{10} Pollution), C-174/21

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Directive 2008/50/EC – Ambient air quality – Judgment of the Court establishing a failure to fulfil obligations – Article 260(2) TFEU – Obligation to take the necessary measures to comply with such a judgment – Failure to fulfil that obligation alleged by the European Commission – Lack of clarity of the letter of formal notice as to whether the judgment still had to be complied with on the reference date – Principle of legal certainty – Inadmissibility

The Ambient Air Quality Directive [1] requires Member States to comply with concentration limit values for certain atmospheric pollutants in ambient air and requires Member States, in the event of exceedance, to adopt air quality plans so that the exceedance period is kept as short as possible.

In the judgment in Commission v Bulgaria, [2] delivered on 5 April 2017, the Court of Justice held that Bulgaria had failed to fulfil the abovementioned obligations.

Following the delivery of the judgment in Commission v Bulgaria on 5 April 2017, the European Commission, on 9 November 2018, sent Bulgaria a letter of formal notice, in accordance with the procedure laid down in Article 260(1) and (2) TFEU. [3] In that letter, the Commission found that Bulgaria had still not taken the necessary measures to put an end to the infringements established by the Court in its 2017 judgment. It then invited that Member State to submit its observations by the end of the period prescribed in the letter ('the reference date'), namely 9 February 2019, and to inform it of any progress made in the meantime.

Since it was not satisfied with Bulgaria's replies, the Commission brought an action for failure to fulfil obligations before the Court under Article 260(2) TFEU ('an action for twofold failure to fulfil obligations') seeking a declaration that that Member State has failed to comply with that judgment and an order requiring it to pay a lump sum and a daily penalty payment until the judgment of the Court has been complied with in full.

Findings of the Court

By its judgment, the Court considers that in order for a letter of formal notice to be issued in a pre-litigation procedure pursuant to Article 260(2) TFEU, if the requirements of legal certainty are not to be infringed, a failure to fulfil the obligation to take the necessary measures to comply with the judgment of the Court must be capable of being legitimately alleged by the Commission. Given the fact that the action for twofold failure to fulfil obligations is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, the Court states that the Commission is required not only to ascertain, throughout the pre-litigation procedure and before

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

2 Judgment of 5 April 2017, Commission v Bulgaria (C-488/15, EU:C:2017:267).

3 Under Article 260(1) and (2) TFEU, a Member State in respect of which the Court has found that it has failed to fulfil an obligation under the Treaties is required to take the necessary measures to comply with the judgment of the Court, and the Commission may bring the matter before the Court if it considers, after giving the Member State concerned the opportunity to submit its observations, that such measures have not been taken.

issuing the letter of formal notice, whether or not the judgment in question has been complied with in the meantime, but also to allege and establish, prima facie, with clarity, in that letter of formal notice, that the judgment remains to be complied with on the reference date. A Member State cannot legitimately be accused of having failed to fulfil its obligation to take the necessary measures to comply with a judgment of the Court if it is not clear from the letter of formal notice that, on the reference date, the obligation to comply with that judgment has continued to exist since its delivery.

In the present case, the Court notes that, in the letter of formal notice of 9 November 2018, the Commission did not, with the requisite clarity, allege or establish, prima facie, that the judgment of 5 April 2017, Commission v Bulgaria, still had to be complied with on the reference date, namely 9 February 2019.

In that letter, the Commission states that the failures to fulfil obligations established up to 2014 in that judgment continued, in respect of the zones and agglomerations referred to in that letter, in 2015 and 2016. It does not, however, provide detailed explanations or factual analysis indicating that the situation identified during those two years continued without any significant improvement during the period between the delivery of the judgment on 5 April 2017 and the reference date, 9 February 2019, thus making it necessary to take measures to comply with that judgment.

According to the Court, neither the fact that those failures to fulfil obligations continued between the end of the period covered by the Court's judgment, namely 2014, and a subsequent period, which nevertheless preceded the date of delivery of the judgment, namely 2015 and 2016, nor the systematic and persistent nature of those failures to fulfil obligations established by the Court in that judgment, automatically means that, both on the date of its delivery and on the reference date, that judgment still had to be complied with and that Bulgaria could therefore be criticised for not having taken all the measures necessary to comply with it.

Therefore, by failing, in the letter of formal notice, to allege and establish, prima facie, with the requisite clarity, the essential prerequisite that the judgment of 5 April 2017, Commission v Bulgaria, still had to be complied with on the reference date as regards the zones and agglomerations referred to in that letter, the Commission did not legitimately allege that Bulgaria failed to fulfil its obligation to take the necessary measures to comply with that judgment. The Court concludes that the Commission's action for twofold failure to fulfil obligations is inadmissible.

II. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (First Chamber), 30 March 2023, Hauptpersonalrat der Lehrerinnen und Lehrer, C-34/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Article 88(1) and (2) – Processing of data in the employment context – Regional school system – Teaching by videoconference due to the COVID-19 pandemic – Implementation without the express consent of teachers

By two measures adopted in 2020, the Minister for Education and Culture of the Land Hessen (Germany) established the legal and organisational framework for school education during the COVID-19 pandemic, providing, inter alia, for the possibility for pupils who could not be present in a classroom to attend classes live by videoconference. In order to safeguard pupils' rights in relation to the protection of personal data, it was established that connection to the videoconference service would be authorised only with the consent of the pupils themselves or, for those pupils who were

minors, of their parents. However, no provision was made for the consent of the teachers concerned to their participation in that service.

Taking issue with the fact that the live streaming of classes by videoconference, as provided for by the national legislation, was not conditional on the consent of the teachers concerned, the Principal Staff Committee for Teachers at the Ministry of Education and Culture of the Land Hessen brought an action against the Minister responsible for those matters. The Minister contended that the processing of personal data inherent in the live streaming of classes by videoconference was covered by national legislation, so that it could be conducted without the consent of the teachers concerned being sought.

The administrative court hearing the case stated that, in accordance with the intention of the legislature of the Land Hessen, the national legislation on the basis of which the teachers' personal data is processed, falls within the category of 'more specific rules' which the Member States may lay down, in accordance with Article 88(1) of the General Data Protection Regulation, [4] in order to ensure the protection of employees' rights and freedoms with regard to the processing of their personal data in the employment context. [5] However, that court had doubts as to whether that legislation was compatible with the conditions laid down in Article 88(2) of the GDPR. [6] It therefore made a reference to the Court of Justice for a preliminary ruling.

By its judgment, the Court holds that national legislation cannot constitute a 'more specific rule', within the meaning of Article 88(1) of the GDPR, where it does not satisfy the conditions laid down in paragraph 2 of that article. In addition, the Court states that the application of national provisions adopted to ensure the protection of employees' rights and freedoms with regard to the processing of their personal data in the employment context must be disregarded where those provisions do not comply with the conditions and limits laid down in Article 88(1) and (2) of the GDPR, unless the provisions at issue constitute a legal basis for the processing, referred to in another article of the GDPR, [7] which complies with the requirements laid down by that regulation.

Findings of the Court

As a preliminary point, the Court considers that the processing of teachers' personal data during the live streaming by videoconference of the public educational classes which they provide falls within the material scope of the GDPR. It states, next, that that processing of the personal data of teachers who, as employees or civil servants, are part of the public service of the Land Hessen, falls within the personal scope of Article 88 of the GDPR, which concerns the processing of employees' personal data in the employment context.

As a first step, the Court examines whether a 'more specific rule' within the meaning of Article 88(1) of the GDPR must satisfy the conditions laid down in paragraph 2 of that article. According to the Court, it is apparent from the use of the words 'more specific' in the wording of Article 88(1) of the GDPR that the rules referred to in that provision must have the normative content specific to the area regulated which is distinct from the general rules of that regulation. It is also apparent from the wording of Article 88 of the GDPR that paragraph 2 of that article circumscribes the discretion of Member States wishing to adopt 'more specific rules' under paragraph 1 of that article. Thus, the Court considers, first, that those rules cannot merely reiterate the provisions of that regulation laying down the

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

5 Under Article 88(1) of the GDPR, which is an opening clause, Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the performance of the contract of employment, management, planning and organisation of work.

6 Article 88(2) of the GDPR provides that those rules are to include suitable and specific measures to safeguard the data subjects' human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data and monitoring systems at the work place.

7 Article 6(3) of the GDPR.

conditions for the lawfulness of the processing of personal data and the principles of that processing, [8] or merely refer to those conditions and principles. Those rules must seek to protect employees' rights and freedoms in respect of the processing of their data and include suitable and specific measures to protect the data subjects' human dignity, legitimate interests and fundamental rights. Second, particular regard must be had to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity, and monitoring systems at the work place. Consequently, in order to be classified as a 'more specific rule' within the meaning of Article 88(1) of the GDPR, a rule of law must satisfy the conditions laid down in paragraph 2 of that article.

As a second step, the Court specifies the consequences which should be drawn from a finding that the national provisions at issue are incompatible with the conditions and limits laid down in Article 88(1) and (2) of the GDPR. Thus, the Court recalls that it is for the referring court, which alone has jurisdiction to interpret national law, to assess whether the national provisions at issue comply with the conditions and limits laid down in Article 88 of the GDPR.

However, the Court notes that those national provisions, which make the processing of employees' personal data subject to the condition that such processing is necessary for certain purposes connected with the performance of an employment relationship, appear to reiterate the condition for general lawfulness already set out in the GDPR, [9] without adding a more specific rule within the meaning of Article 88(1) of that regulation. If the referring court were to find that those national provisions do not comply with the conditions and limits laid down in Article 88 of the GDPR, it would, in principle, be required to disregard them. In accordance with the principle of the primacy of EU law, in the absence of more specific rules that comply with the conditions and limits prescribed by Article 88 of the GDPR, the processing of personal data in the employment context, both in the private and public sectors, is directly governed by the provisions of that regulation.

In that regard, the Court notes that other provisions of the GDPR, [10] under which the processing of personal data is lawful where that processing is necessary, respectively, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, or for compliance with a legal obligation to which the controller is subject, may apply to the processing of personal data such as that in the present case. With regard to those two situations where processing is lawful, the GDPR, [11] first, provides that the processing must be based on EU law or on the law of the Member State to which the controller is subject and, second, adds that the purposes of the processing are to be determined in that legal basis or are to be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

Consequently, where the referring court finds that the national provisions on the processing of personal data in the employment context do not comply with the conditions and limits laid down in Article 88(1) and (2) of the GDPR, it must still verify whether those provisions constitute a legal basis for the processing, referred to in another article of the GDPR, [12] which complies with the requirements laid down by that regulation. If that is the case, the application of those national provisions must not be disregarded.

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8 Set out, respectively, in Article 6 and Article 5 of the GDPR.

9 Point (b) of the first subparagraph of Article 6(1) of the GDPR.

10 Points (c) and (e) of the first subparagraph of Article 6(1) of the GDPR.

11 Article 6(3) of the GDPR.

12 Provided for in Article 6(3) of the GDPR, read in conjunction with recital 45.

III. FREEDOM OF MOVEMENT

1. FREE MOVEMENT OF GOODS

Judgment of the General Court (Eighth Chamber, Extended Composition), 1 March 2023, Harley-Davidson Europe and Neovia Logistics Services International v Commission, T-324/21

Link to the full text of the judgment

Customs union – Regulation (EU) No 952/2013 – Determination of the non-preferential origin of certain motorcycles manufactured by Harley-Davidson – Commission Implementing Decision requesting the revocation of decisions relating to binding origin information adopted by the national customs authorities – Concept of 'processing or working operations which are not economically justified' – Right to be heard

In June 2018, in response to the introduction by the United States Government of additional customs duties of 25% and 10% on imports from the European Union of steel and of aluminium, respectively, the Commission adopted a regulation providing for the application of additional customs duties on the importation of products originating in the United States as listed in the annexes to that regulation, [13] including motorcycles with an engine of a cylinder capacity exceeding 800 cm³.

Under that regulation, such motorcycles were to be subject, at a first stage, to additional customs duty of a rate of 25% [14] from 22 June 2018, and, at a second stage, to additional customs duty at a rate of 25% [15] with effect from 1 June 2021 at the latest.

The consequence of such measures for a US company such as Harley-Davidson Europe Ltd, [16] which specialises in the construction of motorcycles, would have been the application to products imported into the European Union from the United States of additional customs duties of 25% from 22 June 2018 and then of a further 25% from 1 June 2021 at the latest, in addition to the conventional rate of duty of 6%, amounting to a total rate, for its motorcycles, of 31% from 22 June 2018, and then of 56% from 1 June 2021 at the latest.

On 25 June 2018, Harley-Davidson issued to the US Securities and Exchange Commission [17] a report [18] to inform its shareholders of the application of the abovementioned additional customs duties and of their consequences for its business. In that report, Harley-Davidson states its intention to transfer production of certain motorcycles for the EU market from the United States to its international facilities in another country, in order to avoid the EU commercial policy measures at issue.

Following publication of that report, Harley-Davidson chose its factory in Thailand as a production site for some of its motorcycles for the EU market.

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13 Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (OJ 2018 L 158, p. 5).

14 Article 2(a) of, and Annex I to, Regulation 2018/886.

15 Article 2(b) of, and Annex II to, Regulation 2018/886.

16 Together with the group to which it belongs, 'Harley-Davidson'. 'SEC'.

17 'SEC'.

18 Form 8-K Current Report.

Wishing to obtain assurances regarding the determination of their origin, Harley-Davidson [19] asked the Belgian customs authorities on 25 January 2019 to adopt two decisions [20] recognising the Thai origin of certain categories of its motorcycles. Further applications, concerning other categories of motorcycle, were lodged subsequently.

Determination of the non-preferential origin of goods varies depending on whether the goods were obtained in a single country or territory, or their production involved more than one country or territory. [21] According to Article 60(2) of the Customs Code, a country or territory is to be regarded as the place of origin of goods, for the purposes of applying the EU measures relating to the origin of imported goods, if the last substantial working or processing is carried out in that place and is 'economically justified'. The rules for implementing the conditions of the abovementioned provision are laid down by a Commission regulation, [22] which includes details of processing or working operations that are not 'economically justified'. [23]

In meetings with the Belgian authorities in January and April 2019, it was the Commission's view that the economic justification test might not be met and that Article 33 of the UCC-DA could apply to the facts of the case, Harley-Davidson having indicated in public statements that the purpose of relocation of the operation was to avoid the application of the measures in the European Union. The Commission did not, however, give a formal opinion in that regard.

On 24 June 2019, the Belgian customs authorities adopted [24] two BOI decisions, acknowledging and certifying certain categories of Harley-Davidson motorcycle imported into the European Union as originating in Thailand. The other applications for BOI decisions were dealt with in the same way. The BOI decisions at issue were notified to the Commission by the Belgian customs authorities on 21 August 2019.

On 31 March 2021, in the context of a subsequent verification of BOI decisions adopted by the national customs authorities, the Commission adopted the contested decision, [25] requesting the Belgian authorities to revoke the first two BOI decisions, which were incompatible with Article 60(2)

The applicants brought an action for annulment of that decision and raised a number of pleas in law. By its judgment, the Court dismisses the action in its entirety. In that context, it interprets Article 33 of the UCC-DA for the first time.

Findings of the Court

In the first place, the Court examines the plea alleging that the Commission misused the power of revocation of national BOI decisions, on the basis of an incorrect interpretation and application of Article 33 of the UCC-DA. It determines whether, in adopting the contested decision on the basis of that provision, the Commission erred in law by taking the view that the operation to relocate, to

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19 Jointly with Neovia Logistics Services International, an intermediary which provides it with logistic support services in connection with its importation of motorcycles into the European Union through Belgium.

20 Decisions relating to binding origin information ('BOI decisions').

21 Article 60 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; 'the Customs Code').

22 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation No 952/2013 as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1; 'the UCC-DA').

23 In accordance with the first paragraph of Article 33 of the UCC-DA, 'any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the [Customs Code]', which concerns the application of the Common Customs Tariff and other Union tariff or non-tariff measures relating to the origin of goods imported into the European Union ('the EU measures relating to the origin of goods').

24 Pursuant to Article 33(1) of the Customs Code.

25 Commission Implementing Decision (EU) 2021/563 of 31 March 2021 on the validity of certain decisions relating to binding origin information (OJ 2021 L 119, p. 117; 'the contested decision').

Thailand, the manufacture of certain categories of Harley-Davidson motorcycle for the EU market could not be classified as 'economically justified' since, according to the Commission, it was intended to avoid EU commercial policy measures adopted from 2018 onwards in respect of products originating in the United States.

Interpreting Article 33 of the UCC-DA, the Court notes, first of all, that it follows from the wording of that provision that, where the purpose of a particular operation was to avoid the application of the EU measures relating to the origin of goods, the Commission and the customs authorities of the European Union must consider the condition relating to economic justification to be one that cannot be satisfied.

It states, next, that the use of the term 'purpose' in the singular refers, in situations in which the implementation of a particular relocation operation may have had several purposes, to the idea of a 'principal' or 'dominant purpose'. Therefore, the purpose of avoiding the application of the abovementioned EU measures must have been decisive in terms of the decision to relocate production to another country or territory.

Thus, Article 33 of the UCC-DA, which applies when the European Union has adopted commercial policy measures, such as the tariff measures adopted in the present case, is intended to ensure the implementation of EU commercial policy measures by preventing the goods covered by such measures from acquiring a new origin where the principal or dominant purpose of an operation, such as a transfer of production to another country, was to avoid their application.

Lastly, the Court points out that the words 'on the basis of the available facts' refer to the facts available to the authority responsible for checking the purpose of a relocation operation. Article 33 of the UCC-DA must therefore be interpreted as meaning that if, on the basis of the available facts, it appears that the principal or dominant purpose of a relocation operation was to avoid the application of EU commercial policy measures, that operation cannot, as a matter of principle, be economically justified.

Accordingly, it is for the economic operator concerned to prove that the principal or dominant purpose of a relocation operation was not, at the time when the decision concerning that operation was taken, to avoid the application of EU commercial policy measures. Since such proof differs from the search, after the event, for an economic justification or rationale for that relocation operation, merely demonstrating that there is an economic justification is not sufficient.

In the second place, after examining and rejecting the other pleas put forward in support of the applicants' action, including those alleging that Article 33 of the UCC-DA is invalid and infringement of the obligation to state reasons for the contested decision or a manifest error of assessment, the Court rejects the plea alleging breach of general principles of EU law and of the Charter of Fundamental Rights of the European Union.

It finds, in particular, with regard to the right to be heard, that it is common ground that the Commission did not give the applicants an opportunity to submit observations in the procedure that culminated in the adoption of the contested decision. By requiring the Belgian authorities to revoke the first two BOI decisions at issue, and given that it was not possible for those authorities to fail to comply, that decision constitutes an individual measure which affects the applicants adversely. Even if there is no provision for it in the procedure for the adoption of the contested decision, the right to be heard applies even in the absence of specific rules. Furthermore, the fact that the applicants were or would have been able to submit their observations to the Belgian customs authorities before the adoption of the BOI decisions, or between the adoption of the contested decision and the adoption of the decision revoking the BOI decisions, does not permit the inference that the Commission complied with its obligation to hear the applicants before adopting the contested decision.

However, such an irregularity can result in the annulment of the contested decision only if, because of that irregularity, the administrative procedure could have resulted in a different outcome. As it is, by confining itself in the contested decision to requesting that the Belgian customs authorities revoke the BOI decisions that incorrectly applied Article 33 of the UCC-DA, the Commission merely exercised the power conferred on it by the Customs Code to request a Member State to revoke BOI decisions in order to ensure a correct and uniform determination of the origin of goods.

Since the contested decision correctly interprets and applies Article 33 of the UCC-DA, even if the applicants had been able to submit observations in the procedure that led to the adoption of that decision, the Commission could not have interpreted and applied Article 33 of the UCC-DA differently in that decision. In any event, the applicants have not produced before the Court any specific evidence that the relocation in question was justified mainly on the basis of considerations unconnected with the introduction of the additional customs duties, although the burden of proof rests with them.

2. FREEDOM TO PROVIDE SERVICES

Judgment of the Court of Justice (Fifth Chamber), 16 March 2023, Beobank, C-351/21

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Payment services in the internal market – Directive 2007/64/EC – Article 47(1)(a) – Information for the payer after receipt of the payment order – Articles 58, 60 and 61 – Payment service provider's liability for unauthorised transactions – Obligation of that service provider to refund unauthorised transactions to the payer – Framework contracts – Obligation of that service provider to provide that payer with information relating to the payee concerned

ZG, a Belgian resident, is the holder of a bank account with Beobank, in Belgium, for which he has a debit card. On the night of 20 to 21 April 2017, he made a payment for EUR 100 by means of that card, in an establishment located in Valencia (Spain). Thereafter, two further payments were made with that card on the same mobile payment terminal for the amounts of EUR 991 and EUR 993 respectively.

Before the referring court, ZG seeks, in particular, the refund of the latter two payments which he maintains were 'unauthorised'. He explains that he no longer remembers the name and address of the establishment nor what happened after having a drink in the establishment concerned and claims to have been the victim of fraud facilitated by the administration of a drug. Beobank refuses, however, to refund those payments contending that ZG authorised them or at the very least that ZG was 'grossly negligent'.

Thereafter, Beobank provided only the digital reference and the geolocation of the payment terminal used without stating the identity of the payee of the contested payments other than by the following entry: 'COM SU VALENCIA ESP'. That payee's bank, for its part, refuses to pass on the information identifying the payee to Beobank.

In that context, the referring court raises the question as to the extent of the obligation of the payment service provider, provided for in a provision of Directive 2007/64, [26] to provide 'where appropriate' the payer with the information relating to the payee of a payment transaction. The response to that question by the Court of Justice will enable the referring court to draw the appropriate conclusions as to Beobank's obligation to refund the disputed payments.

By its judgment, the Court ruled that the payer's payment service provider is required, under that provision, to provide that payer with information enabling the natural or legal person who benefited from a payment transaction debited from that payer's account to be identified and not only the

[26] That obligation is provided for by Article 47(1)(a) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1).

information which that provider, after making its best efforts, has available with regard to that payment transaction.

Findings of the Court

As a preliminary point, the Court recalls that the payment service provider's liability for unauthorised payment transactions, provided for in Article 60(1) of Directive 2007/64 has been the subject of full harmonisation. Therefore, a parallel liability regime in respect of the same operative event is incompatible with that directive, as is a competing liability regime, allowing the payment service user to trigger that liability on the basis of other operative events.

A national court cannot ignore the distinction made in that directive as regards payment transactions, depending on whether or not they are authorised. Therefore, such a court cannot rule on a claim for reimbursement of payments such as the payments at issue in the main proceedings without first classifying those payments as authorised or unauthorised. Article 60(1), cited above, read in conjunction with Article 86(1) of Directive 2007/64, [27] precludes a payment service user from being able to hold the provider of those services liable because that service provider has failed to fulfil its obligation to provide information laid down in Article 47(1)(a) of that directive, in so far as that liability concerns the refund of payment transactions.

However, in so far as the referring court considers it necessary, in its assessment of whether or not the payments at issue in the main proceedings are authorised, to know the nature and extent of the information which the payer's payment service provider concerned must provide to the payer, pursuant to Article 47(1)(a) of Directive 2007/64, the relevance of the questions referred for the resolution of the dispute in the main proceedings cannot be called into question. As regards specifically the nature and extent of the information obligations provided for in that provision, the Court considers that, in light of the fact that Directive 2007/64 carries out a full harmonisation, those obligations are necessarily obligations which the Member States must implement without being able to derogate from them and without even being able to mitigate them by categorising them as obligations to use best endeavours and not as obligations as to the result to be achieved. There is nothing in the scheme of Article 47 that leads to the conclusion that, by providing for obligations which indicate precisely the action to be taken, the EU legislature sought only to ensure that efforts were made in that regard. Moreover, the phrase 'where appropriate' in Article 47(1) must be understood as meaning that the information relating to the payee of a payment transaction which the payment service provider must provide to the payer concerned, after the amount of a payment transaction has been debited from that payer's account or at the time agreed in accordance with Article 47(2) of that directive, includes information which that payment service provider has or should have at its disposal in accordance with EU law. That interpretation is supported by the objective pursued by Directive 2007/64, which consists, inter alia, in ensuring that the users of those services can easily identify payment transactions by having 'the same high level of clear' information.

In order to guarantee the fully integrated and straight-through processing of the operations concerned and to improve the efficiency and speed of payments, that information must be both necessary and sufficient with regard to the payment service contract and the payment transactions themselves, and proportionate to the needs of those users.

In the present case, in order to meet those requirements, the information which the payment service provider had to provide to the payer concerned, pursuant to Article 47(1)(a) of Directive 2007/64, had to be sufficiently accurate and meaningful. In the absence of such a description, the payer would not be able, with the help of that information, to identify with certainty the payment transaction concerned. The 'reference enabling the payer to identify each payment transaction', referred to in the first part of the sentence in Article 47(1)(a) of Directive 2007/64, does not put the payer concerned in a position to link that reference to a specific payment transaction. It is therefore necessarily in the

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27 That provision governs, for the Member States, the consequences of full harmonisation carried out by that directive.

context of the additional element referred to in the second limb of Article 47(1)(a), namely the 'information relating to the payee', that the payment service provider of the payer concerned had to provide to the payer the information necessary to meet fully the requirements stemming from that provision.

IV. BORDER CONTROLS, ASYLUM AND IMMIGRATION

1. ASYLUM POLICY

Judgment of the Court of Justice (First Chamber), 30 March 2023, Staatssecretaris van Justitie en Veiligheid (Suspension of the transfer time limit on Appeal), C-556/21

Link to the full text of the judgment

Reference for a preliminary ruling – Regulation (EU) No 604/2013 – Determination of the Member State responsible for examining an application for international protection – Article 27 – Appeal against a decision to transfer an asylum seeker – Article 29 – Transfer time limit – Suspension of that time limit on appeal – Interim measure requested by the authorities

In the course of 2019 and 2020, E.N., S.S. and J.Y. submitted applications for international protection in the Netherlands. Between October 2019 and January 2021, the authorities of other Member States agreed to take charge of or take back those applicants. Accordingly, the competent Dutch authority decided not to consider the applications for international protection and to order the transfer of the applicants under the Dublin III Regulation [28] to those Member States. The courts of first instance hearing the applicants' appeals against the transfer decisions annulled those decisions and ordered the competent Dutch authority to take fresh decisions on the applications for international protection. The competent Dutch authority appealed against those judgments before the Raad van State (Council of State, Netherlands). It attached to its appeals applications for interim relief seeking an order, first, that it not be required to take a fresh decision before decisions had been taken on the appeals and, second, that the transfer time limit be suspended.

By three decisions in 2020 and 2021, the referring court's judge hearing applications for interim measures granted those applications for interim measures. The referring court is uncertain, however, whether the provisions of the Dublin III Regulation concerning appeals against transfer decisions [29] and time limits for transfer [30] preclude the granting of an application for interim relief lodged by the competent national authority, as an adjunct to its appeal against a judicial decision annulling a transfer decision, and seeking to suspend the transfer time limit. If that were required to be the case, it would be for that court to find that that period has expired and that the Kingdom of the

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

29 Article 27 of the Dublin III Regulation deals with appeals against transfer decisions. Paragraph 3 requires Member States to provide the persons concerned with a remedy that may lead to the suspension of the implementation of the transfer decision taken against them.

30 Article 29 of the Dublin III Regulation deals with the modalities and time limits for the transfer of the persons concerned to the Member State responsible for examining an application for international protection.

Netherlands has therefore become responsible for examining the applications for international protection lodged by the respondents in the main proceedings. [31]

In its judgment, the Court rules that an interim measure enabling the competent authority, pending the outcome of the appeal lodged by it against a judgment annulling a transfer decision, to refrain from taking a fresh decision and having the object or effect of suspending the running of the transfer time limit may be adopted only where the implementation of the transfer decision has been suspended during the examination of the appeal at first instance.

Findings of the Court

As a preliminary point, the Court points out that, under Article 29(1) of the Dublin III Regulation, the transfer of the person concerned to the Member State responsible is to be carried out, at the latest, within six months of the acceptance by another Member State of the request to take charge or take back that person or of the final decision on an appeal where there is suspensive effect in accordance with Article 27(3) of the Dublin III Regulation.

It is apparent that the EU legislature envisaged that, where the implementation of the transfer decision has been suspended, the transfer time limit would not start to run until the point at which the decision on an appeal against a transfer decision has become final. However, it did not specify the detailed procedural arrangements for the application of that rule in the event of an appeal at second instance and, in particular, whether the application of that rule may involve the imposition of interim measures by the court hearing that appeal.

In the absence of EU legislation governing the matter, where the national legal order of a Member State has decided to establish such a second level of jurisdiction, it is for that Member State, in accordance with the principle of procedural autonomy, to lay down the detailed procedural rules of that second level of jurisdiction, including the granting of any interim measures. Those rules must, however, comply with the principles of equivalence and effectiveness.

In that context, if national legislation provides that the court hearing such an appeal at second instance may order interim measures at the request of the competent authorities, it cannot derogate from Article 29(1) of the Dublin III Regulation by providing that such measures have the effect, outside the cases referred to in that provision, of postponing the running of the transfer time limit and thus of delaying its expiry. It follows from that provision that the transfer time limit can begin to run from the final decision on the appeal brought against the transfer decision only in so far as the implementation of that decision has been suspended during the examination of the appeal at first instance.

Therefore, an interim measure having the effect of suspending the transfer time limit pending the outcome of an appeal at second instance can be adopted only where the implementation of the transfer decision has been suspended pursuant to Article 27(3) or (4) of that regulation pending the outcome of the appeal at first instance. In such a situation, on the one hand, extending the postponement of the running of the transfer time limit until the outcome of the appeal at second instance ensures equality of arms and the effectiveness of appeal proceedings. It guarantees that that time limit does not expire while implementation of the transfer decision has been made impossible by the lodging of an appeal against that decision. On the other hand, rendering the extension, in an appeal at second instance, of the suspensive effect had by the appeal at first instance on the running of the transfer time limit subject to the adoption of an interim measure, prevents the introduction of an appeal against a judgment annulling a transfer decision from systematically leading to the running of that time limit being postponed. That would be liable to delay the examination of the application for international protection made by the person concerned.

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31 In accordance with Article 29(2) of the Dublin III Regulation, where the transfer does not take place within the six-months' time limit, the Member State responsible for examining an application for international protection is, in principle, relieved of its obligations to take charge or take back the person concerned and responsibility is then transferred to the requesting Member State.

Such a rule is apt to further the achievement of the objectives of the Dublin III Regulation. Those are to establish a clear and workable method based on objective, fair criteria both for the Member States and for the persons concerned for rapidly determining the Member State responsible for examining an application for international protection.

By contrast, where the implementation of the transfer decision was not suspended pending the outcome of the appeal at first instance, the adoption, in an appeal at second instance, of an interim measure such as that at issue in the main proceedings would in fact allow the competent authorities – which had neither exercised the option of suspending the implementation of the transfer decision offered by the Dublin III Regulation, [32] nor implemented the transfer decision during the examination of that appeal – to postpone the running of the transfer time limit provided for in that regulation [33] and thus to prevent responsibility for processing the applications of those persons from being transferred to the requesting Member State pursuant to that regulation. [34] That would improperly delay the progress of the international protection procedure, undermining the abovementioned objectives of that regulation.

2. IMMIGRATION POLICY

Judgment of the Court of Justice (Fifth Chamber), 23 March 2023, Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle *ne bis in idem*), C-365/21

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Convention implementing the Schengen Agreement – Article 54 – Principle ne bis in idem – Article 55(1)(b) – Exception to the application of the principle ne bis in idem – Offence against the security or other essential interests of the Member State – Article 50 of the Charter of Fundamental Rights of the European Union – Principle ne bis in idem – Article 52(1) – Limitations to the principle ne bis in idem – Compatibility of a national declaration providing for an exception to the principle ne bis in idem – Criminal organisation – Financial crime

In September 2020, MR, an Israeli national, last resident in Austria, was sentenced by an Austrian court to a term of imprisonment of four years for serious commercial fraud and money laundering. After having served part of that sentence and having been released on parole for the remainder, he was remanded in custody in Austria pending his surrender pursuant to a European arrest warrant (EAW) issued in December 2020 by a German court for formation of a criminal organisation and investment fraud.

By an order made in March 2021, MR's appeal against that EAW was dismissed on the ground that the acts with which those two sets of proceedings were concerned were different, so that the principle ne

32 Article 27(4) of the Dublin III Regulation authorises the Member States to provide that the competent authorities may decide, acting ex officio, to suspend the implementation of the transfer decision, in cases where suspension does not result from either the effects of legislation or of a judicial decision, where the circumstances surrounding that implementation imply that the person concerned must, in order to ensure his or her effective judicial protection, be allowed to remain in the territory of the Member State which adopted the transfer decision until a final decision on the appeal brought against that decision has been taken.

33 Article 29(1) of the Dublin III Regulation.

34 Article 29(2) of the Dublin III Regulation.

bis in idem, laid down in the CISA, [35] did not apply. In the alternative, it was noted that MR was being prosecuted for an offence covered by the declaration made by the Federal Republic of Germany when ratifying the CISA. As a result of that declaration, that Member State is not bound by the principle ne bis in idem where the acts to which the foreign judgment relates constitute an offence against Germany's national security or other equally essential interests. [36]

In those circumstances, the referring court, before which a further appeal was brought against that order, is uncertain as to whether the authorisation to make such a declaration that is granted to Member States by the CISA is compatible with Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which lays down the principle ne bis in idem. If it is, the referring court asks whether that declaration can also cover criminal organisations engaged exclusively in financial crime.

The Court of Justice answers both questions in the affirmative and specifies the conditions under which such a declaration can cover that type of criminal organisation.

Findings of the Court

In the first place, while confirming the validity, in the light of Article 50 of the Charter, of the provision of the CISA that provides for the possibility of making the declaration concerned, [37] the Court finds, first of all, that that provision of the CISA represents a limitation of the fundamental right guaranteed by that article. However, such a limitation may be justified in so far as it is provided for by law and respects the essence of that right. [38] Furthermore, subject to the principle of proportionality, that limitation must be necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. [39]

In that context, the Court recalls that a limitation of the principle ne bis in idem respects the essence of Article 50 of the Charter where that limitation does no more than allow for further proceedings and penalties in respect of the same acts in pursuit of a distinct objective. In that regard, the exception to that principle provided for by the CISA [40] applies only where the acts to which the foreign judgment relates constitute an offence against the security or other equally essential interests of the Member State intending to rely on it. The Court considers that the concept of 'national security' must be compared to the same term as referred to in the EU Treaty, [41] and emphasises that the objective of safeguarding national security corresponds to the primary interest in protecting the essential functions of the State and the fundamental interests of society. It follows that the offences in respect of which the CISA permits an exception to that principle must affect the Member State itself. The same applies to offences against the other interests of the Member State. Consequently, the contested provision of the CISA [42] respects the essence of the principle ne bis in idem, since it permits the Member State applying it to punish offences which affect the Member State itself and, in so doing,

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35 Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed in Schengen on 19 June 1990 and which entered into force on 26 March 1995 ('the CISA'). The principle ne bis in idem is laid down in Article 54 of the CISA, which states that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

36 The possibility of making such a declaration is provided for in Article 55(1)(b) of the CISA.

37 See Article 55(1)(b) of the CISA.

38 See the first sentence of Article 52(1) of the Charter.

39 See the second sentence of Article 52(1) of the Charter.

40 See, in particular, Article 55(1)(b) of the CISA.

41 That concept is included in Article 4(2) TEU.

42 See Article 55(1)(b) of the CISA.

to pursue objectives that necessarily differ from those for which the person prosecuted has already been tried in another Member State.

Next, as regards the principle of proportionality, the possibility of justifying a limitation of the principle ne bis in idem must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness. On that basis, the option provided for in the abovementioned provision of the CISA [43] is appropriate for achieving the general interest objective of punishment by a Member State of harm to its security or to its other equally essential interests.

Lastly, in view of the nature and the particular seriousness of such harm, the importance of that general interest objective goes beyond that of combating crime in general, even serious crime. Such an objective is, therefore, capable of justifying measures entailing interferences with fundamental rights which would not be authorised for the purpose of prosecuting and punishing criminal offences generally.

In the second place, the Court finds that the CISA, [44] read in the light of the Charter, [45] does not preclude the courts of a Member State from interpreting the declaration made by that Member State under the CISA as meaning that, so far as concerns the offence of forming a criminal organisation, that Member State is not bound by the provisions of the CISA enshrining the principle ne bis in idem [46] where the criminal organisation in which the person prosecuted participated has engaged exclusively in financial crime, in so far as the prosecution of that person is, in the light of the actions of that organisation, intended to punish harm to the security or other equally essential interests of that Member State.

In that regard, the Court observes, first, that the exception provided for by the CISA [47] primarily covers offences – such as espionage, treason or serious harm to the functioning of public authorities – which, by their very nature, relate to the security or other equally essential interests of the Member State concerned. However, it does not follow from this that the scope of that exception is necessarily limited to such offences. Indeed, it cannot be ruled out that a prosecution for offences whose constituent elements do not specifically include harm to the security or other equally essential interests of the Member State may be equally capable of falling within that exception where, in the light of the circumstances in which the offence was committed, it can be duly established that the prosecution in respect of the acts in question is intended to punish harm to that security or to those other equally essential interests.

Secondly, a prosecution conducted in respect of an offence referred to in a declaration exercising the option provided for in the abovementioned provision of the CISA [48] must relate to acts which, particularly seriously, affect the Member State concerned itself. However, not every criminal organisation necessarily and in itself harms the security or other equally essential interests of the Member State concerned. Thus, the offence of forming a criminal organisation can give rise to a prosecution as an exception to the principle ne bis in idem only in the case of organisations whose actions may, due to the elements that distinguish them, be regarded as constituting such harm.

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43 See Article 55(1)(b) of the CISA.

44 The Court of Justice refers to Article 55(1)(b) of the CISA.

45 See Article 50 and Article 52(1) of the Charter.

46 See Article 54 of the CISA.

47 See Article 55(1)(b) of the CISA.

48 See Article 55(1)(b) of the CISA.

In that context, as regards the relevance to be attached to the fact that a criminal organisation engages exclusively in financial crime, the Court states that, in order to characterise the actions of such an organisation as harming the security or other equally essential interests of the Member State concerned, it is necessary to take into account the seriousness of the damage which its activities have caused to that Member State. Moreover, those actions must, irrespective of the actual intention of that organisation and over and above the breaches of public order which every offence entails, affect the Member State itself.

V. COMPETITION

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

Judgment of the Court of Justice (Second Chamber), 16 March 2023, Towercast, C-449/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Control of concentrations between undertakings – Regulation (EC) No 139/2004 – Article 21(1) – Exclusive application of that regulation to operations covered by the concept of 'concentration' – Scope – Concentration operation which has no Community dimension, is below the thresholds for mandatory ex ante control laid down in the law of a Member State and has not been referred to the European Commission – Control of such an operation by the competition authorities of that Member State in the light of Article 102 TFEU – Whether permissible

The French digital terrestrial television (DTT) broadcasting sector has been open to competition since its launch in 2005 and has become increasingly concentrated since then. As a result, by 2014, the only broadcasters remaining were Itas, Towercast and Télédiffusion de France (TDF). [49] Moreover, TDF held the majority of the market shares on both the upstream and downstream wholesale markets for DTT broadcasting, taken as markets with a national dimension.

In October 2016, TDF announced that it had taken control of its competitor Itas. The operation of acquiring Itas, which was below the relevant thresholds defined in Article 1 of the Merger Regulation [50] and the French Code de commerce (Commercial Code), was not notified or examined under the prior control of concentrations by the European Commission or by the Autorité de la concurrence (Competition Authority, France). Moreover, that operation did not give rise to a procedure for referral to the Commission under Article 22 of the Merger Regulation.

In those circumstances, Towercast lodged a complaint with the Competition Authority in which it alleged that the acquiring of control of Itas by TDF constituted an abuse of a dominant position, inasmuch as that acquisition of control hindered competition on the upstream and downstream wholesale markets for DTT broadcasting by significantly strengthening the dominant position of TDF on those markets.

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49 In France, terrestrial audiovisual broadcasting has historically been the subject of a State monopoly enjoyed, most recently, by TDF. That monopoly ended with the opening up of the sector to competition at the beginning of 2004.

50 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1; 'the Merger Regulation').

By decision of 16 January 2020, the Competition Authority rejected that complaint. That authority performed a different analysis to that conducted by its investigating departments, taking the view, in essence, that the Merger Regulation applied exclusively to concentrations as defined in Article 3 of that regulation. According to the Competition Authority, where the undertaking concerned has not engaged in abuse which can be separated from such a concentration, that concentration is no longer covered by the prohibition of abuse of a dominant position laid down in Article 102 TFEU.

On 9 March 2020, Towercast brought proceedings before the cour d'appel de Paris (Court of Appeal, Paris, France) challenging that decision. That court asks the Court of Justice, in essence, whether it is possible for a national competition authority to carry out, in view of Article 102 TFEU, an ex post control of a concentration operation performed by an undertaking in a dominant position, where that concentration remains below the thresholds for prior control laid down by the Merger Regulation and by the national law on concentrations, such that it has not been subject to an ex ante control in that regard.

In its judgment, delivered today, the Court answers that question in the affirmative.

Findings of the Court

Under Article 21(1) of the Merger Regulation, that regulation 'alone [is to] apply to concentrations as defined in Article 3' thereof, to which Regulation No 1/2003 [51] is not, in principle, applicable.

In order to provide the referring court with an interpretation of that provision, as is sought by that court, the Court examines, first, the wording and legislative history of the provision and, second, the objectives and general scheme of the Merger Regulation.

Having regard to the wording of Article 21(1) of the Merger Regulation, the Court points out, first, that that provision is intended to govern the scope of that regulation with regard to the examination of concentration operations in relation to the scope of other pieces of secondary EU legislation concerning competition. By contrast, the examination of the wording of that provision does not answer the question of whether the provisions of primary law, and, in particular, Article 102 TFEU, remain applicable to a concentration of undertakings in a situation such as that in the main proceedings, where no ex ante control under the law on concentrations has been carried out.

Next, as regards the legislative history of Article 21(1) of the Merger Regulation, the Court notes that, in so far as it reproduces, in essence, the substance of Article 22 of Regulation No 4064/89 [52] that was previously applicable, that provision reflects the intention of the EU legislature to specify that the other regulations implementing competition law cease, in principle, to be applicable to all concentrations, including those constituting an abuse of a dominant position.

That being so, the Court observes, lastly, in its subsequent examination of the objectives and general scheme of the Merger Regulation, that, by Article 21(1) thereof, the EU legislature intended to make clear that that regulation is the only procedural instrument applicable to the prior and centralised examination of concentrations, and is intended to permit effective control of all concentrations in terms of their effect on the structure of competition. Therefore, far from depriving the competent authorities of the Member States of the possibility of applying the Treaty provisions on competition to concentrations as defined in Article 3 of the Merger Regulation, that regulation forms part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is not distorted in the internal market of the European Union.

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51 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1).

52 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

It follows from the scheme of the Merger Regulation that, although that regulation introduces an ex ante control for concentration operations with a Community dimension, it does not preclude an ex post control of concentration operations that do not meet that threshold.

In that regard, the Court observes that the interpretation put forward by the Competition Authority ultimately amounts to ruling out the direct applicability of a provision of primary law by reason of the adoption of a piece of secondary legislation covering certain types of conduct of undertakings on the market. However, Article 102 TFEU is a provision having direct effect and its application is not conditional on the prior adoption of a procedural regulation, it being specified, moreover, that no exemption may be granted in respect of the prohibition of abuse of a dominant position laid down by that provision and that the list of abusive practices contained therein is not exhaustive.

In those circumstances, the Merger Regulation cannot preclude a concentration operation with a non-Community dimension, such as the operation at issue in the main proceedings, from being subject to a control by the national competition authorities and by the national courts, on the basis of the direct effect of Article 102 TFEU, having recourse to their own procedural rules.

It follows that a concentration operation which does not meet the respective thresholds for prior control laid down by the Merger Regulation and by the applicable national law may be subject to Article 102 TFEU where the conditions laid down in that article for establishing the existence of an abuse of a dominant position are satisfied. In particular, it is for the authority in question to verify that a purchaser who is in a dominant position on a given market and who has acquired control of another undertaking on that market has, by that conduct, substantially impeded competition on that market. In that regard, the mere finding that an undertaking's position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market.

2. STATE AID

Judgment of the General Court (Tenth Chamber, Extended Composition), 29 March 2023, Wizz Air Hungary v Commission (Blue Air; COVID-19 and rescue aid), T-142/21

Link to the judgment as published in extract form

State aid – Romanian air transport market – Aid granted by Romania to Blue Air in the context of the COVID-19 pandemic – Blue Air rescue aid – Loan guaranteed by the Romanian State – Decision not to raise any objections – Action for annulment – Aid intended to make good the damage caused by an exceptional occurrence – Article 107(2)(b) TFEU – Assessment of the damage – Causal link – Beneficiary's pre-existing difficulties – Taking avoidable costs into account – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Article 107(3)(c) TFEU – Contribution of the aid to an objective of common interest – 'One time, last time' condition for rescue aid – Principle of non-discrimination – Freedom to provide services – Freedom of establishment – Obligation to state reasons

On 18 August 2020, Romania notified the European Commission of an aid measure in favour of the airline Blue Air Aviation S.A. ('Blue Air') in the form of a State-guaranteed loan in the amount of approximately EUR 62 130 000 with subsidised interest rates.

The notified measure included two separate aid measures granted on two different legal bases, each covering a defined aid amount. The first aid measure consisted of a loan in the amount of EUR 28 290 000 to make good the damage suffered directly by Blue Air due to the cancellation or rescheduling of its flights following the imposition of travel restrictions linked to the COVID-19 pandemic in the period from 16 March 2020 to 30 June 2020 ('the compensation measure'). The second aid measure concerned a loan in the amount of EUR 33 840 000 to partially cover Blue Air's

urgent liquidity needs resulting from operating losses recorded as a result of the pandemic ('the rescue aid').

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission found, by decision of 20 August 2020, [53] that the notified measure constituted State aid, both aspects of which were compatible with the internal market. Accordingly, the Commission declared the compensation measure compatible with the internal market within the meaning of Article 107(2)(b) TFEU. [54] The rescue aid was, in turn, declared compatible under Article 107(3)(c) TFEU, [55] read in conjunction with the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ('the Guidelines'). [56]

The airline Wizz Air Hungary Zrt. brought an action for annulment against that decision, which is dismissed by the General Court (Tenth Chamber, Extended Composition). In its judgment, the Court confirms the Commission's analysis that the notified measure is compatible with the internal market.

Findings of the Court

The Court rejects, first, the plea for annulment alleging incorrect application of Article 107(2)(b) TFEU. In that regard, the applicant complained, inter alia, that the Commission had erred in its assessment of the damage suffered by Blue Air as a result of the travel restrictions imposed in the context of the COVID-19 pandemic.

On that point, the Court recalls that only economic disadvantages directly caused by natural disasters or exceptional occurrences may be compensated under Article 107(2)(b) TFEU. It follows that aid likely to exceed the losses incurred by its beneficiaries does not fall within the scope of Article 107(2)(b) TFEU. Moreover, the Court also points out that the occurrence giving rise to the damage, as defined in the contested decision, must be the determining cause of the damage which the aid is intended to remedy and must be directly responsible for causing it.

In order to be able to declare the compensation measure compatible with the internal market under Article 107(2)(b) TFEU, it was therefore incumbent on the Commission to consider with particular care whether the travel restrictions imposed amid the COVID-19 pandemic actually represented the decisive cause of the damage that that measure was intended to compensate for or whether, on the contrary, part of that damage was due to Blue Air's pre-existing difficulties.

In the light of those clarifications, the Court rejects, in particular, the applicant's argument that, by not excluding Blue Air's losses resulting from pre-existing difficulties, the Commission overestimated the damage suffered as a result of the COVID-19 pandemic. In that regard, the Court notes that the Commission compared Blue Air's actual financial situation with a counterfactual scenario that would have occurred in the absence of the travel restrictions, based on the projected revenues and costs provided for in the 2020 budget for the period from 16 March to 30 June 2020. For the purposes of that counterfactual scenario, the Commission had taken into account Blue Air's pre-existing difficulties prior to the COVID-19 pandemic. As these difficulties were also reflected in Blue Air's actual results and were therefore included in both scenarios that the Commission compared, the Court finds that their impact was neutralised in the calculation of the damages suffered by Blue Air as a result of the travel restrictions imposed in the context of the COVID-19 pandemic.

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53 Commission Decision C(2020) 5830 final of 20 August 2020 on State aid SA.57026 (2020/N) Aid to Blue Air.

54 In accordance with that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is to be compatible with the internal market.

55 Under that provision, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the internal market.

56 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1).

Second, the Court rejected the plea for annulment alleging misapplication of Article 107(3)(c) TFEU, read in the light of the Guidelines. In that context, the applicant argued, in particular, that the Commission had erred in stating that the rescue aid pursued an objective of common interest within the meaning of point 43 of the Guidelines.

The Court notes in that context that it is clear from point 43 of the Guidelines that, in order to be declared compatible with the internal market on the basis of the Guidelines, the notified aid must pursue an objective of common interest, in that its purpose is to avoid social hardship or to address a market failure. This is confirmed by point 44 of the Guidelines, according to which Member States must demonstrate that the failure of the beneficiary would be likely to lead to serious social hardship or severe market failure, in particular by proving that there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for a competitor to take the place of the beneficiary.

With regard to the importance of the service provided by Blue Air, it is apparent from the Commission's decision that the airline ensured the connectivity of Romania by serving domestic and international air routes, while targeting two specific categories of passengers whose travel depended heavily on low-cost air routes, namely small local entrepreneurs and the Romanian community established outside the country. In the Commission's view, Blue Air's air services were, moreover, complicated to replicate, as other low-cost airlines had little or no presence on the majority of Blue Air's routes and Blue Air therefore occupied a niche that was not exploited by other low-cost airlines in the Romanian market.

Since none of the arguments put forward by the applicant is capable of calling those findings into question, the Court concludes that the Commission was right to find that, in the event of Blue Air's exit from the market, there would have been a specific risk of disruption to certain passenger air transport services, which were considered to be important and complicated to replicate in the particular circumstances of the case, so that the notified aid pursued an objective of common interest.

As the other pleas raised by the applicant also proved to be unfounded, the Court dismisses the action in its entirety.

VI. APPROXIMATION OF LAWS

1. MOTOR VEHICLES

Judgment of the Court of Justice (Grand Chamber), 21 March 2023, Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices), C-100/21

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Approval of motor vehicles – Directive 2007/46/EC – Article 18(1) – Article 26(1) – Article 46 – Regulation (EC) No 715/2007 – Article 5(2) – Motor vehicles – Diesel engine – Pollutant emissions – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Defeat device – Protection of the interests of an individual purchaser of a vehicle equipped with an unlawful defeat device – Right to compensation from the vehicle manufacturer on the basis of tortious liability – Method of calculating compensation – Principle of effectiveness – Article 267 TFEU – Admissibility – Reference to the Court from a single judge

In 2014, QB purchased a used Mercedes-Benz motor vehicle – model C 220 CDI, equipped with a Euro 5 generation diesel engine – from a dealer. That vehicle, placed on the market by the car manufacturer Mercedes-Benz Group AG (formerly Daimler AG), was first registered in 2013. The vehicle was equipped with engine programming software that reduced the exhaust gas recirculation rate when outside temperatures were below a certain threshold, which resulted in an increase in nitrogen oxide (NOx) emissions. Accordingly, that recirculation was fully effective only if the outside temperature did not fall below that threshold.

QB brought an action before the Landgericht Ravensburg (Regional Court, Ravensburg, Germany), the referring court, seeking compensation for the damage allegedly caused to him by Mercedes-Benz Group by equipping the vehicle in question with defeat devices, prohibited under the regulation on type approval of motor vehicles. [57]

The objective pursued by that regulation is to ensure a high level of environmental protection and, more specifically, to considerably reduce the NOx emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution. [58] That provision defines a 'defeat device' as being 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'. [59] In addition, the directive establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, as applicable to the dispute in the main proceedings, [60] contains the administrative provisions and general technical requirements

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57 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1), and more specifically under Article 5(2) of that regulation.

58 Recitals 1 and 6 of the regulation on type approval of motor vehicles.

59 Article 3(10) of the regulation on type approval of motor vehicles.

60 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 385/2009 of 7 May 2009 (OJ 2009 L 118, p. 13) ('the Framework Directive').

for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the European Union. [61]

Under German law, the exercise, by the individual purchaser of a motor vehicle which does not comply with EU law, of the right to compensation presupposes the infringement of a law intended to protect others. [62] The referring court therefore decided to ask the Court whether the relevant provisions, in the present case, of the Framework Directive [63] and the regulation on type approval of motor vehicles, [64] protect, in addition to public interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a defeat device prohibited by that regulation. Furthermore, it raised the question whether, in the context of compensation for damage caused to the purchaser of a vehicle equipped with a prohibited defeat device, EU law precludes the offsetting of the benefit derived from the actual use of that vehicle against the reimbursement of the purchase price of that vehicle and, if that is not the case, the calculation of that benefit on the basis of the total purchase price of that vehicle.

Sitting as the Grand Chamber, the Court provides significant clarification on the question of the right to compensation of purchasers of vehicles the engines of which have been equipped with an unlawful defeat device intended to reduce the effectiveness of the NOx emissions control systems.

Findings of the Court

As a preliminary point, the Court points out that it is for the referring court to decide, where appropriate, whether, in the light of the Court's case-law, the software with which the vehicle purchased by QB is equipped constitutes a 'defeat device' within the meaning of the regulation on type approval of motor vehicles.

Next, it notes that there are three exceptions to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems. The only one of those exceptions which is relevant in the present case concerns the situation where 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'. [65] In order to be justified, that defeat device must strictly meet the need to avoid immediate risks of damage to the engine of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, a defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle, would clearly run counter to the objective of environmental protection pursued by that regulation and cannot therefore be justified. Here also it is for the referring court to carry out the factual assessments necessary for the purposes of applying those conditions.

Primarily, in the first place, the Court rules that the relevant provisions of the Framework Directive and the regulation on type approval of motor vehicles, considered together, protect, in addition to public interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a defeat device prohibited under that regulation.

The Court notes that the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems pursues a general objective of ensuring a high level of environmental protection and that the obligation on manufacturers to ensure that customers and users are supplied

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61 Article 1 of the Framework Directive.

62 Paragraph 823(2) of the Bürgerliches Gesetzbuch (Civil Code).

63 Namely Article 18(1), Article 26(1) and Article 46 of the Framework Directive.

64 Namely Article 5(2)(a) of the regulation on type approval of motor vehicles.

65 Exception laid down in Article 5(2)(a) of the regulation on type approval of motor vehicles.

with objective and precise information as to the extent to which vehicles are polluting when making their purchasing decisions forms part of that general objective. In addition, vehicles falling within the scope of the Framework Directive must be type approved and such type-approval may be granted only if the type of vehicle in question satisfies the provisions of the regulation on type approval of vehicles, in particular those relating to emissions.

The Court adds that, in accordance with the Framework Directive, in addition to those requirements relating to EC type-approval, manufacturers are also required to issue a certificate of conformity to the individual purchaser of a vehicle. Under that Framework Directive, that certificate is required for the purposes of registration and sale or entry into service of a vehicle. Furthermore, the penalties provided for in the Framework Directive must ensure that the purchaser of a vehicle has a certificate of conformity enabling him to register that vehicle in any Member State without having to provide additional technical documents. That purchaser can therefore reasonably expect that the regulation on type approval of motor vehicles has been complied with. The Court concludes that the Framework Directive, considered in conjunction with the regulation on type approval of motor vehicles, establishes a direct link between the motor vehicle manufacturer and the individual purchaser of a motor vehicle intended to guarantee to the latter that the vehicle complies with the relevant EU legislation.

In that regard, the Court states that it cannot be ruled out that a vehicle type covered by an EC type-approval allowing that vehicle to be driven on the road may, initially, be approved by the approval authority without the presence of the software, such as that at issue in the main proceedings, having been disclosed to it. The Framework Directive envisages the situation in which the unlawfulness of an element of design of a vehicle, for example in the light of the requirements of the regulation on type approval of vehicles, is discovered only after that approval has been granted. Consequently, the unlawfulness of a defeat device equipped in a motor vehicle, discovered after the grant of EC type-approval for that vehicle, is capable of calling into question the validity of that type-approval and, by extension, the validity of the certificate of conformity intended to certify that that vehicle, belonging to the series of the type approved, complied with all regulatory acts at the time of its production. That unlawfulness is thus liable, inter alia, to create uncertainty as to the possibility of registering or selling that vehicle or entering it into service and, ultimately, to harm the purchaser of a vehicle equipped with an unlawful defeat device.

In the second place, in answer to the question, in essence, whether EU law must be interpreted as precluding – in the context of compensation for damage caused to the purchaser of a vehicle equipped with a prohibited defeat device – the offsetting of the benefit derived from the actual use of that vehicle against the reimbursement of the purchase price of that vehicle and, if that is not the case, the calculation of that benefit on the basis of the total purchase price of that vehicle, the Court holds that, in the absence of provisions of EU law governing the matter, it is for the law of the Member State concerned to determine the rules concerning compensation for damage actually caused to the purchaser of a vehicle equipped with a prohibited defeat device, provided that that compensation is adequate with respect to the damage suffered.

First, the Court notes the conclusion it reached, according to which the Framework Directive protects the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a prohibited defeat device, with the result that the purchaser has the right that that vehicle not be fitted with a prohibited defeat device. Secondly, it points out that the Framework Directive and the regulation on type approval of motor vehicles provide that it is for the Member States to establish penalties, which must be effective, proportionate and dissuasive, applicable in the event of infringements of the provisions of that legislation. Consequently, the Member States are required to provide that the purchaser of a vehicle equipped with a prohibited defeat device has a right to compensation from the manufacturer of that vehicle. It is indeed for each Member State to lay down the detailed rules for obtaining such compensation. Nevertheless, the Court states that national legislation which makes it, in practice, impossible or excessively difficult for the purchaser of a motor vehicle to obtain adequate compensation for the damage caused to him or her by the infringement, by the manufacturer of that vehicle, of the prohibition on the use of defeat devices would not be compatible with the principle of effectiveness. Subject to that reservation, the Court notes that national courts are entitled to ensure that the protection of rights guaranteed by the legal order of the European Union does not result in unjust

enrichment. Thus, it is for the referring court to determine whether the offsetting of the benefit derived from the actual use of the vehicle in question ensures adequate compensation for the purchaser concerned, if it is established that that purchaser suffered damage connected with the installation in that vehicle of a prohibited defeat device.

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

Judgment of the General Court (First Chamber, Extended Composition), 22 March 2023, Satabank v ECB, T-72/20

Link to the full text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Regulation (EU) No 1024/2013 – Regulation (EU) No 468/2014 – Supervised entity – Composite administrative procedure – Denial of access to the file – Directive 2004/258/EC – Access to ECB documents

At the time its action was brought, the applicant, Satabank plc, was a credit institution under Maltese law, which had been classified as a less significant institution for the purposes of Regulation No 1024/2013, [66] and was directly supervised by the Malta Financial Services Authority (MFSA).

On 16 November 2019, the applicant requested access to the file concerning it from the European Central Bank (ECB). By decision of 26 November 2019, the ECB refused the request for access, stating that the applicant was not the subject of proceedings within the meaning of Article 22 of the SSM Regulation [67] and that, as a consequence, no access to any file could be granted to it pursuant to Article 32(1) of Regulation (EU) No 468/2014 [68] . [69]

On 5 February 2020, the applicant brought an action before the General Court seeking annulment of that decision of the ECB. It submitted, inter alia, that the ECB refused access to its file based on an unduly narrow interpretation of Article 32(1) of the SSM Framework Regulation and that it was required to process its request for access on the basis of the general principles relating to access to documents.

On 12 February 2020, the MFSA submitted to the ECB a draft decision proposing the withdrawal of the applicant's authorisation. [70] On 16 March 2020, the ECB notified the applicant of a draft decision

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66 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation').

67 It follows from Article 22(2) of the SSM Regulation that the rights of defence of the persons concerned are fully respected in the proceedings and that those persons are entitled to have access to the ECB's file.

68 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (OJ 2014 L 141, p. 1; 'the SSM Framework Regulation').

69 The first and second sentences of Article 32(1) of the SSM Framework Regulation provide that 'the rights of defence of the parties concerned shall be fully respected in ECB supervisory procedures' and that, 'for this purpose, and after the opening of the ECB supervisory procedure, the parties shall be entitled to have access to the ECB's file …'.

70 Pursuant to Article 14(5) of the SSM Regulation and Article 80 of the SSM Framework Regulation.

withdrawing its authorisation. On 30 June 2020, the ECB adopted a decision withdrawing the applicant's authorisation as a credit institution, which the applicant subsequently sought annulment of before finally withdrawing its appeal.

By its judgment delivered in extended composition, the Court annulled the decision of the ECB rejecting the applicant's request for access to the file concerning it. This case gives the Court the opportunity to interpret, for the first time, Article 32 of the SSM Framework Regulation, read in conjunction with Article 22 of the SSM Regulation, and to rule on the applicability of the general rules on access to documents in the context of those provisions.

Findings of the Court

First, the Court examines the plea alleging, in essence, that the contested decision is based on an incorrect interpretation of Article 32(1) of the SSM Framework Regulation. According to the applicant, this provision must be interpreted as giving each bank a right of access to its file simply based on the ongoing supervisory relationship with the ECB. It adds that it is not necessary that the ECB is currently considering a specific step for access to the file to be granted. The applicant further argues that there is an ongoing supervisory procedure from the point in time at which a licence is granted until it is revoked.

In that connection, the Court recalls that a request for access to a file is based on the exercise of the rights of the defence. Such a request has no purpose in the absence of an administrative procedure affecting the legal interests of the applicant for access and, consequently, in the absence of a file concerning that person. Accordingly, Article 32(1) of the SSM Framework Regulation expressly uses the expression 'supervisory procedure' and not 'prudential supervision'. The SSM Framework Regulation [71] defines the 'ECB supervisory procedure' as 'any ECB activity directed towards preparing the issue of an ECB supervisory decision …'. Consequently, prudential supervision with regard to the ECB's tasks cannot be equated with a supervisory procedure, aimed at performing a specific supervisory task and taking a decision thereon. According to the Court, if the scope of prudential supervision were identical to that of the supervisory procedure, there would never be a supervisory procedure, as it would necessarily always be pending in the context of ongoing prudential supervision. The mere persistence of prudential supervision, without a specific pending supervisory procedure, cannot be regarded as justifying access to the file under Article 32 of the SSM Framework Regulation.

Furthermore, it cannot be assumed that the authorisation withdrawal procedure is already pending after the authorisation has been granted. In the present case, there is nothing to suggest that, on the date on which the applicant lodged its request for access, namely on 16 November 2019, a supervisory procedure before the ECB was pending in respect of the applicant. At that stage, the Court notes that the ECB had not taken any supervisory measure concerning the applicant and that the draft decision proposing the withdrawal of the applicant's authorisation was submitted to the ECB by the MFSA on 12 February 2020. The applicant was informed by the ECB of its intention to take a decision withdrawing that authorisation on 16 March 2020. It follows that the applicant has not established that the ECB made an error of assessment in finding, in the contested decision, that no supervisory procedure had been initiated on the date the contested decision was adopted, namely 26 November 2019.

Second, the Court addresses the plea alleging, in essence, that the ECB was required to process the applicant's request for access on the basis of the general principles relating to access to documents. Thus, the applicant submits that the existence of a supervisory procedure is not relevant because access in any case needed to be granted on grounds of public access to documents, irrespective of the existence of any supervisory procedure. According to the ECB, the applicant based its request for access on Article 32 of the SSM Framework Regulation in so far as it used the terms 'access to the file'.

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71 Under Article 2(24) of the SSM Framework Regulation.

Accordingly, it claims that the applicant's request therefore cannot be examined in terms of the general regime for access to documents.

In that connection, the Court notes that Decision 2004/258 [72] gives any citizen of the European Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to ECB documents, subject to the conditions and limits defined in that decision. A person requesting access is not required to justify that request and therefore does not have to demonstrate any interest in having access to the documents requested. [73] It follows that a request for access which falls within the scope of Decision 2004/258 and which is made by a person who relies on certain specific circumstances which distinguish him or her from any other EU citizen must nevertheless be examined in the same way as an application from any other person.

In the present case, the Court observes that, by its request for access, the applicant requested access to the 'file' concerning it without making reference to any legal basis for its request. It is common ground that no provision of Decision 2004/258 requires the applicant for access to specify the legal basis of that request. Consequently, even though the applicant did use the term 'file' in its request, the ECB could not conclude that the request for access was based solely on Article 32 of the SSM Framework Regulation.

Moreover, it is clear from the case-law that the fact that the request for access concerned a 'file' of the ECB relating to a credit institution, that is to say, a field governed by the SSM Regulation and the SSM Framework Regulation, does not preclude that request from being based, at the outset, on the general provisions on access to documents, since it is common ground that the latter may serve as the legal basis for a request for access to documents relating to an administrative procedure governed by another EU act.

In the present case, since no supervisory procedure was pending in respect of the applicant at the time of its request for access, and therefore no 'file' within the meaning of Article 32 of the SSM Framework Regulation exists, that request should be examined as a request for access to documents concerning it on the basis of the general provisions, in particular Decision 2004/258. Therefore, the Court holds that the ECB erred in law in failing to examine the applicant's request on the basis of the provisions on access to documents laid down in Decision 2004/258. The Court therefore upholds the action and annuls the contested decisions.

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72 Article 2(1) of Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ 2004 L 80, p. 42), as amended by Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 (OJ 2015 L 84, p. 64) (as amended, 'Decision 2004/258').

73 Under Article 6(1) of Directive 2004/258.

VIII. SOCIAL POLICY: COORDINATION OF SOCIAL SECURITY SYSTEMS

Judgment of the Court of Justice (Second Chamber), 2 March 2023, DRV Intertrans and Verbraeken J. en Zonen, C-410/21 and C-661/21

Link to the full text of the judgment

Reference for a preliminary ruling – Migrant workers – Social security – Legislation applicable – Regulation (EC) No 987/2009 – Article 5 – A1 certificate – Provisional withdrawal – Binding effect – Certificate fraudulently obtained or relied on – Regulation (EC) No 883/2004 – Article 13(1)(b)(i) – Persons normally pursuing an activity as an employed person in two or more Member States – Applicability of the legislation of the Member State in which the registered office is situated – Concept of 'registered office' – Undertaking which has obtained a Community licence for transport under Regulation (EC) No 1071/2009 and Regulation (EC) No 1072/2009 – Effect – Licence fraudulently obtained or relied on

FU is the managing director of DRV Intertrans BV, a company established in Belgium. He also set up the company Md Intercargo s. r. o., established in Slovakia. The Slovak competent authority issued A1 certificates [74] attesting that several employees of Md Intercargo were affiliated to the Slovak social security system.

The checks carried out by the Sociale Inspectie (the Social Security Inspectorate, Belgium) ('the Belgian Social Security Inspectorate') brought to light that Md Intercargo had been set up in order to assign a cheap labour force to DRV Intertrans by posting workers. Although it held a Community licence for road transport issued by the Slovak authorities, Md Intercargo had no relevant economic activity in Slovakia. During the criminal proceedings brought against FU and DRV Intertrans for fraud relating to social security contributions, the Belgian Social Security Inspectorate requested the Slovak issuing institution to withdraw retroactively the A1 certificates in question. That institution responded that it was provisionally suspending the binding effects of those certificates until it ruled definitively on that request, after the criminal proceedings were closed.

PN is the managing director of Verbraeken J. en Zonen BV ('Verbraeken') a company established in Belgium. It is also a co-owner of UAB Van Daele F., a company established in Lithuania which holds a Community licence for road transport issued by the Lithuanian authorities.

According to an investigation carried out by the Belgian Social Security Inspectorate, PN and Verbraeken used UAB Van Daele F. to employ Lithuanian drivers in Belgium. Criminal proceedings were brought against PN and Verbraeken for fraud related to social security contributions.

By decisions delivered in February 2021 and September 2019, FU and DRV Intertrans, as well as PN and Verbraeken, were found guilty of that fraud.

The referring court, hearing appeals on a point of law in the context of those two sets of proceedings, wonders whether, where a declaration is made by the institution that issued an A1 certificate that its binding effects are provisionally suspended, that certificate continues to be binding on the institutions and courts of the Member States. In addition, it seeks, first, clarification from the Court of Justice as to the possibility of disregarding an A1 certificate in the course of a criminal procedure brought in a Member State in which the work is carried out. Second, it asks the Court as to the evidential value, in

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74 The A1 certificate is issued pursuant to Article 19(2) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), as amended by Regulation No 465/2012, by the institution designated by the competent authority in the Member State whose legislation on social security applies, in order to attest that workers are subject to the legislation of that Member State.

order to establish the place of the registered office of a company for the purposes of determining the national social security legislation applicable, of a Community licence for road transport held by it.

The Court replies in the affirmative to the first question and provides clarifications on the two other issues raised by the referring court.

Findings of the Court

In the first place, the Court held that, pursuant to EU law, [75] an A1 certificate issued by the competent institution of a Member State is binding on the institutions and courts of the Member State in which the work is carried out, including where, following a request for a review and withdrawal sent by the competent institution of the latter Member State to the issuing institution, it has declared that it has provisionally suspended the binding effects of that certificate pending its definitive decision on that request. However, in those circumstances, a court of a Member State in which the work is carried out, seised in the context of criminal proceedings against persons suspected of having fraudulently obtained or used the same A1 certificate, may find that there has been fraud and consequently disregard that certificate as necessary for those criminal proceedings. first, a reasonable period of time must have elapsed without the issuing institution having reconsidered the grounds for issuing that certificate and having adopted a decision on the specific evidence submitted by the competent institution in the host Member State, which gave rise to the view that that certificate had been obtained or relied on fraudulently, as the case may be, by cancelling or withdrawing the certificate in question; and, second, the guarantees inherent in the right to a fair trial which must be afforded to those persons must have been respected.

In that regard, the Court states, first of all, that since only the withdrawal and declaration of invalidity of A1 certificates remove the binding effects of those certificates vis-à-vis the institutions and courts of the Member States, [76] the decision of the issuing institution to provisionally suspend them does not result in the loss of those effects.

Next, the decision of the issuing institution to withdraw an A1 certificate must be taken in the context of the procedure of dialogue and reconciliation between institutions, [77] where, following a reconsideration of the grounds for the issue of that certificate, that institution considers that its social security system is not applicable to the worker concerned. To accept that the issuing institution may, even temporarily, remove the binding effects of an A1 certificate without having first reconsidered the grounds for its issue or determined which social security system is applicable to the worker concerned would be tantamount to disregarding both the detailed rules for the application of the procedure of dialogue and reconciliation and the purpose of that procedure, and infringe the principle of sincere cooperation on which that procedure is based.

In addition, in such circumstances, the lack of binding effects of the A1 certificate in question would enable the institutions of other Member States to subject the worker concerned to their own social security systems, which would be likely to increase the risk of duplication of those systems, thereby undermining the principle that employed persons are affiliated to a single social security system and the foreseeability of which system is applicable and, therefore, the principle of legal certainty. Furthermore, the potential duplication of those systems could compromise the objective of facilitating the free movement of workers and the freedom to provide services.

Finally, the Court states that, in the present case, although the procedure of dialogue and reconciliation was indeed initiated, the institution that issued the A1 certificates however decided to

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75 The Court refers to Article 5 of Regulation No 987/2009.

76 In particular, Article 5(1) of Regulation No 987/2009.

77 That procedure is provided for in Article 76(6) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p.4). The Court based its decision on Article 13(1)(b)(i)

defer the reconsideration of their validity and the determination of the applicable social security system pending the outcome of the criminal proceedings before the courts of the Member States in which the work is carried out. That institution accordingly did not undertake a reconsideration of the certificates the fraudulent acquisition and use of which was at issue in these criminal proceedings and adopt a position, within a reasonable period, on the evidence in that respect submitted by the competent institution of the host Member State. Consequently, it must be possible for those matters to be relied on in the context of such proceedings, in order to require the court to disregard the certificates at issue.

In the second place, the Court states that, under EU law, [78] the fact that a company holds a Community licence for road transport issued by the competent authorities of a Member State does not constitute irrefutable proof that the registered office of that company is in that Member State for the purposes of determining the national social security legislation applicable.

On that subject, the Court stated that since the issuing of a Community licence for road transport was subject to a requirement of an 'effective and stable establishment', [79] the criteria for determining the place of establishment of a transport company for the purposes of obtaining such a licence are different from those used to determine its 'registered office or place of business'. [80] Whereas the element of connection of the 'registered office or place of business' is determined by the place from which an undertaking is in fact managed and organised, the concept of 'effective and stable establishment' refers essentially to the place where the undertaking's core business documents are held and where its equipment, as well as its technical and administrative facilities, are located.

78 The Court based its decision on Article 13(1)(b)(i) of Regulation (EC) No 883/2004, Article 3(1)(a) of Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ 2009 L 300, p.51) and Article (4)(1)(a) of Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p.72).

79 Within the meaning of Article 3(1)(a) of Regulation No 1071/2009.

80 Within the meaning of Article 13(1)(b)(i) of Regulation No 883/2004.

IX. ENVIRONMENT: GREENHOUSE GASES

Judgment of the General Court (First Chamber, Extended Composition), 22 March 2023, Tazzetti v Commission, T-825/19 and T-826/19

Link to the judgment as published in extract form

Environment - Regulation (EU) No 517/2014 - Fluorinated greenhouse gases - Electronic registry for quotas for placing hydrofluorocarbons on the market – Undertakings with the same beneficial owner – Single producer or importer – Act having an adverse effect – Interest in bringing proceedings – Admissibility – Request to modify the application – Inadmissibility – Plea of illegality – Interpretation of an implementing regulation consistent with the basic regulation – Implementing power of the Commission

In the context of the campaign against greenhouse gas emissions, the European Parliament and the Council of the European Union adopted Regulation No 517/2014 on fluorinated greenhouse gases, [81] which aims to limit the quantities of hydrofluorocarbons (HFCs) placed on the EU market. In accordance with that regulation, the European Commission is responsible for determining a maximum quantity of HFCs that can be placed on the market each year and for allocating quotas to producers and importers according to an allocation mechanism that is based, inter alia, on the establishment of reference values. In that connection, the regulation states that the reference values are initially attributed to producers and importers who reported having placed HFCs on the market between 2009 and 2012. From 2017 and every three years thereafter, the Commission is to recalculate the reference values on the basis of the annual average of the quantities of HFCs lawfully placed on the market from 1 January 2015.

According to the provisions of Regulation No 517/2014, the Commission is also to set up an electronic registry for quotas for placing HFCs on the market ('the HFC registry'). In order to ensure the smooth functioning of that registry, the Commission adopted Implementing Regulation 2019/661. [82]

In order to prevent any circumvention or abuse of the requirements for allocations of HFC quotas, Article 7(1) of Implementing Regulation 2019/661 provides, inter alia, that all undertakings with the same beneficial owner(s) are to be considered as one single importer or producer for the purpose of recalculating the reference values in accordance with Regulation No 517/2014.

In 2008, Tazzetti SpA, a company incorporated under Italian law that places HFCs on the EU market, acquired a company incorporated under Spanish law that also places HFCs on the market. The Commission informed that company and Tazzetti SpA, by letters of 27 and 30 September 2019 and of 20 November 2019 (together, 'the contested decisions'), that, because those two undertakings had the same beneficial owner, only Tazzetti SpA could now receive HFC quotas under Article 7(1) of Implementing Regulation 2019/661.

Tazzetti SpA and the acquired company took the view that the Commission had acted ultra vires by adopting Article 7(1) of Implementing Regulation 2019/661 and brought two actions for annulment of the contested decisions before the General Court. In support of those actions, the applicants claim that, while the Commission's implementing power is limited to the smooth functioning of the HFC registry, Article 7(1), referred to above, altered the very functioning of the HFC quota mechanism established by Regulation No 517/2014.

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81 Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases and repealing Regulation (EC) No 842/2006 (OJ 2014 L 150, p. 195).

82 Commission Implementing Regulation (EU) 2019/661 of 25 April 2019 ensuring the smooth functioning of the electronic registry for quotas for placing hydrofluorocarbons on the market (OJ 2019 L 112, p. 11).

The First Chamber (Extended Composition) of the General Court upholds those actions and clarifies the scope of the Commission's implementing power as regards the system for the allocation of HFC quotas established by Regulation No 517/2014.

Findings of the Court

The Court begins by finding that, contrary to the applicants' arguments, it is clear and unambiguous from the wording of Article 7(1) of Implementing Regulation 2019/661 that that provision applies to all producers and importers subject to the procedure for recalculating the reference values and that no derogation is provided for in favour of incumbent undertakings, namely those that, like the applicants, reported having placed HFCs on the market between 2009 to 2012.

Having made that clarification, the General Court examines whether, by adopting Article 7(1) of Implementing Regulation 2019/661, the Commission exceeded the implementing power conferred on it by Regulation No 517/2014 and Article 291 TFEU. [83] In that connection, the General Court examines the applicants' arguments that the Commission supplemented or amended Regulation No 517/2014 with regard to, first, the rights of undertakings to receive an allocation of HFC quotas and, secondly, the rights of undertakings to transfer HFC quotas.

First of all, the Court points out, first, that it follows from Article 17(2) of Regulation No 517/2014 that the Commission's implementing power is limited to the smooth functioning of the HFC registry, which is an instrument for managing quotas, placing HFCs on the market and reporting, including reporting on equipment placed on the market. Secondly, when an implementing power is conferred on the Commission on the basis of Article 291(2) TFEU, the provisions of the implementing act adopted by the Commission must comply with the essential general aims pursued by the legislative act and be necessary or appropriate for the implementation of that act without supplementing or amending it, even as to its non-essential elements.

Concerning the rights of undertakings to receive an allocation of HFC quotas, the Court subsequently observes that, under Article 16(3) of Regulation No 517/2014, any undertaking, understood as a natural or legal person taken individually, which lawfully placed HFCs on the market from 1 January 2015 and made the declaration provided for in that regulation is entitled to a reference value upon the triennial recalculation of the reference values. However, by providing that several undertakings having the same beneficial owner are, under certain conditions, to be considered as one single undertaking for the purposes of Regulation No 517/2014, Article 7(1) of Implementing Regulation 2019/661 amended that system established by its basic regulation by adding conditions that are not provided for in the basic regulation for determining the right of undertakings to receive reference values.

In doing so, the Commission has also amended the system for the allocation of HFC quotas established by Regulation No 517/2014, [84] as a single producer or importer within the meaning of Article 7(1) of Implementing Regulation 2019/661 is allocated, as part of its sole reference value, not only the HFC quotas corresponding to the quantities of HFCs that it previously placed on the market, but also the quotas corresponding to the quantities of HFCs placed on the market by the other undertakings with the same beneficial owner, while those undertakings lose the right to their own reference value and to the quotas in respect of such a value.

Consequently, those same undertakings have finally also lost the right to transfer HFC quotas since Article 7(1) of the Implementing Regulation 2019/661 entered into force, because, under Regulation

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83 Under Article 291(2) TFEU, 'where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission …'.

84 Annex III.2(1) to Regulation No 517/2014.

No 517/2014, [85] that right is reserved for undertakings which have received a quota allocation on the basis of a reference value.

Therefore, by adopting Article 7(1) of Implementing Regulation 2019/661, the Commission modified the rights which the undertakings concerned derived from Regulation No 517/2014 with regard to receiving a reference value, the possibility of being allocated their own HFC quotas and the ability to transfer those quotas, thereby reforming the very functioning of the HFC quota system.

In the light of all the foregoing, the Court concludes that the Commission was not competent to adopt Article 7(1) of Implementing Regulation 2019/661 and, consequently, annuls the contested decisions taken on that basis.

X. ENERGY

Judgment of the Court of Justice (Fifth Chamber), 9 March 2023, ACER v Aquind, C-46/21 P

Link to the full text of the judgment

Appeal – Energy – Regulation (EC) No 714/2009 – Article 17 – Request for exemption relating to an electrical interconnector – Refusal decision from the European Union Agency for the Cooperation of Energy Regulators (ACER) – Regulation (EC) No 713/2009 – Article 19 – Board of Appeal of ACER – Intensity of the review

Aquind Ltd is the project promoter for a proposed electricity interconnector connecting the electricity transmission systems in the United Kingdom and France. For the purposes of that project, Aquind Ltd submitted to the French and United Kingdom regulatory authorities a request for exemption relating to new electrical interconnectors under Article 17 of Regulation No 714/2009 on conditions for access to the network for cross-border exchanges in electricity. [86]

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 [87] 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 [88] ('the Board of Appeal'). Thus, Aquind Ltd brought an action before the General Court for annulment of the decision of the Board of Appeal, which action was upheld by judgment of 18 November 2020, Aquind

85 Article 18(1) of Regulation 517/2014.

86 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).

87 ACER Decision No 05/2018 of 19 June 2018.

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

v ACER. [89] In that judgment, the General Court found, inter alia, that the Board of Appeal had erred in law by limiting its review of the ACER decision to that of a manifest error of assessment.

On appeal lodged by ACER, the Court of Justice upholds the judgment of the General Court, while clarifying the intensity of the review which the Board of Appeal is required to carry out of ACER's decisions on requests for exemptions.

Findings of the Court

As a preliminary point, the Court recalls that, when interpreting a provision of EU law, it is necessary to consider in particular its wording and the objectives pursued by the rules of which it is part.

In the first place, as regards the wording of the regulation establishing ACER, the Court notes that it is not expressly apparent from its provisions relating to the composition, organisation and powers of the Board of Appeal [90] that the latter's review of ACER's decisions involving assessments of complex economic and technical matters is necessarily limited to a review of a manifest error of assessment.

In the second place, as regards the objectives pursued by the establishment of the Board of Appeal, it should be noted that that creation forms part of an overall approach, adopted by the EU legislature, to provide the EU agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned. Although those different review bodies display certain differences in their structure, their functioning and their powers, they nevertheless share certain common characteristics.

First, such review bodies, which are administrative revision bodies that are internal to the agencies, have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts, which enables them to dispose of appeals against decisions that often have a strong technical component. Secondly, the right of appeal to these bodies is enjoyed by the addressees of decisions adopted by the agencies, in addition to the natural and legal persons to whom those decisions are of direct and individual concern. Third, they are a quick, accessible, specialised and inexpensive mechanism for protecting the rights of the addressees and persons concerned by those decisions.

As regards the Board of Appeal, the Court notes that, according to the procedure applicable before that Board, any natural or legal person, including national regulatory authorities, may appeal against an ACER decision addressed to that person or which is of direct or individual concern to that person, without that appeal being subject to other conditions of eligibility. As regards its composition, the Board of Appeal includes members who must have prior experience in the energy sector, and thus it has the necessary expertise to allow it to conduct a full review of the complex technical and economic assessments contained in ACER's decisions.

In that regard, the existence of differences between the Board of Appeal and other Boards of Appeal, such as that of the European Chemicals Agency (ECHA), in terms of objectives, procedure, time limits and staff rules, cannot affect the intensity of the review which that board is required to conduct.

In that context, the Court endorses the General Court's conclusion that the case-law relating to the limited nature of the review conducted by the EU judicature of complex technical, scientific and economic assessments cannot be transposed to the appeal bodies of the EU agencies. Indeed, a limited review by the Board of Appeal of technical and economic assessments would lead the EU judicature to conduct a limited review of a decision which would itself be the result of a limited review. However, a system of 'limited review of a limited review' fails to offer the guarantees of

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

90 Articles 18 and 19 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1).

effective judicial protection which must be afforded to undertakings that have been refused a request for exemption.

In the light of all those considerations, the Court of Justice concludes that the General Court was right to find that the Board of Appeal had erred in law in holding that, as regards assessments of a technical or complex nature, it could confine itself to determining whether ACER had committed a manifest error of assessment.

Judgment of the Court of Justice (Fifth Chamber), 30 March 2023, Green Network (Order for repayment of costs), C-5/22

Link to the full text of the judgment

Reference for a preliminary ruling – Internal market in electricity – Directive 2009/72/EC – Article 37 – Annex I – Duties and powers of the national regulatory authority – Consumer protection – Administrative management costs – Power of the national regulatory authority to order the repayment of sums paid by final customers pursuant to contractual terms that have been penalised by that authority

In 2019, the Autorità di Regolazione per Energia Reti e Ambiente (Regulatory Authority for Energy, Networks and the Environment, Italy) imposed on Green Network, an Italian electricity and natural gas distribution undertaking, an administrative fine of EUR 655 655,000 for having breached obligations relating to tariff transparency. That authority also ordered that undertaking to repay its final customers the sum of EUR 13 987 13,987,495.22, invoiced to them in respect of administrative management costs pursuant to a contractual term considered to be unlawful by that authority.

After unsuccessfully challenging that decision before an administrative court, Green Network brought an appeal before the Consiglio di Stato (Council of State, Italy), before which it claimed that the power of the national regulatory authority to require the repayment of sums invoiced to customers, provided for under Italian law, was contrary to Directive 2009/72. [91]

In that context, the Council of State referred two questions to the Court of Justice for a preliminary ruling concerning Article 37(1) and (4) of Directive 2009/72, relating to the powers of regulatory authorities, and Annex I thereto, which sets out the measures to be taken by Member States to protect consumers.

In its judgment, the Court states that Article 37(1)(i) and (n) [92] and Article 37(4)(d) [93] of Directive 2009/72 and Annex I thereto do not preclude a Member State from conferring on a national regulatory authority the power to order electricity undertakings to reimburse their final customers for the sums paid by those customers to cover 'administrative management costs' pursuant to a contractual term considered to be unlawful by that authority. The same is true in cases where that order for repayment is based not on considerations of the quality of the relevant service provided by those undertakings, but on the breach of obligations relating to tariff transparency.

Findings of the Court

91 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

92 Those provisions concern, respectively, the duties of regulatory authorities with regard to ensuring compliance with transparency obligations and consumer protection.

93 That provision provides that regulatory authorities have the power to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under Directive 2009/72 or any relevant legally binding decisions of the regulatory authority, or to propose that a competent court impose such penalties.

The Court holds, first of all, that, in order to pursue the objectives of Directive 2009/72, that directive requires Member States to confer wide powers on their national regulatory authorities to regulate and monitor the market in electricity, in particular with a view to ensuring consumer protection.

Next, it notes that Article 37 of Directive 2009/72, concerning the duties and powers of the regulatory authority, does not mention the power to require electricity undertakings to repay any sums received as consideration under a contractual term considered to be unlawful. However, the use, in Article 37(4) of Directive 2009/72, of the words 'the regulatory authority shall have at least the following powers' indicates that powers other than those expressly mentioned in Article 37(4) may be conferred on such an authority in order to enable it to carry out the tasks referred to in Article 37(1), (3)

and (6) of that directive. Furthermore, ensuring compliance with the transparency obligations incumbent on electricity undertakings and protecting consumers fall within the scope of the duties of national regulatory authorities referred to in Article 37(1), (3) and (6)

of that directive. The Court therefore finds that a Member State may grant such an authority the power to require those operators to repay sums received by them in breach of consumer protection requirements, in particular those concerning the obligation of transparency and the accuracy of invoicing.

Such an interpretation is not called into question by the fact that Article 36 of Directive 2009/72 provides, in essence, that the national regulatory authority is to take the necessary measures 'in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies', or that Article 37(1)(n) of that directive contains the words 'together with other relevant authorities'.

It is not apparent from those provisions that, in a case such as that in the main proceedings, only one of those other national authorities may order the repayment of sums unduly received from final customers by electricity undertakings. On the contrary, the use of the words 'as appropriate' implies that such consultation is only necessary where the measure whose adoption is envisaged is likely to have implications for other relevant authorities.

Last, the Court states that, in so far as consumer protection and compliance with transparency obligations fall within the scope of the duties referred to in Article 37 of Directive 2009/72, the exact reason why, in order to accomplish one of those duties, an electricity undertaking is ordered to reimburse its customers is irrelevant.

XI. COMMON COMMERCIAL POLICY

1. ANTI-DUMPING

Judgment of the General Court (First Chamber, Extended Composition), 1 March 2023, Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission, T-301/20

Link to the full text of the judgment

Dumping – Imports of certain woven or stitched glass fibre fabrics originating in China and Egypt – Implementing Regulation (EU) 2020/492 – Definitive anti-dumping duty – Calculation of the normal value – Article 2(5) of Regulation (EU) 2016/1036 – Manifest error of assessment – Injury – Calculation of the undercutting margin

Following a complaint, the European Commission adopted Implementing Regulation 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics ('GFF') originating in China and Egypt. [94]

Hengshi Egypt Fiberglass Fabrics SAE ('Hengshi') and Jushi Egypt for Fiberglass Industry SAE ('Jushi'), two companies owned by Chinese entities established in the China-Egypt Suez Economic and Trade Cooperation Zone, produce and export GFF to the European Union. Jushi produces and exports, in addition, glass fibre rovings ('GFR') to the European Union, which are the main raw material used for the production of GFF.

Taking the view that they had been adversely affected by the anti-dumping duties imposed by the Commission, Hengshi and Jushi brought an action before the General Court for annulment of Implementing Regulation 2020/492. In dismissing that action, the Court provides, first, clarification as to the taking into account, for the purposes of determining the normal value of products subject to an anti-dumping duty, of records of the party subject to the anti-dumping investigation. Secondly, the Court clarifies the extent of the Commission's duty of diligence, in particular as regards the use, in an anti-dumping investigation, of evidence obtained in the context of a parallel anti-subsidy investigation.

Findings of the Court

In support of their action, the applicants raise, in their first plea, two complaints alleging infringement of the first subparagraph of Article 2(5) of Regulation 2016/1036. [95] That provision provides that, for the purposes of the determination of the normal value of the products subject to the anti-dumping duty, the costs connected with the production and sale of the products must be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned (first condition) and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration (second condition). In that regard, the applicants put forward a number of arguments disputing, in essence, the method used by the Commission to construct the normal value of GFF sold by Hengshi.

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94 Commission Implementing Regulation (EU) 2020/492 of 1 April 2020 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ 2020 L 108, p. 1).

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

In the first place, the Court rejects the complaint alleging an error of law and a manifest error of assessment by the Commission, in that it did not set out the cost of GFR included in Hengshi's records in order to calculate the cost of production of GFF, on the ground that the purchase price of that raw material had not been set at arm's length.

In that regard, the Court notes, first, that the first subparagraph of Article 2(5) of the basic regulation does not preclude the Commission from disregarding the costs reported in the records of the party under investigation where the price of the raw material used for the manufacture of the product under consideration is not at arm's length. However, when the Commission considers that it must disregard those costs and replace them with another price deemed reasonable, the Commission is required to rely on direct evidence, or at least on circumstantial evidence pointing to the existence of the factor for which the adjustment was made.

In the present case, the Commission found that the prices at which Hengshi purchased GFR from Jushi were consistently and substantially below the prices at which Jushi sold the same product to independent customers operating on the Egyptian market. Given the significant difference between those prices, the Commission rightly concluded that the prices paid by Hengshi to Jushi could not be considered at arm's length and that therefore it was appropriate that the prices should be adjusted.

In addition, the fact that Jushi had achieved a profit margin on its sales of GFR to Hengshi does not lead to an automatic conclusion that a transaction was made at arm's length.

Next, the Court rejects the applicants' line of argument that the second condition set out in the first subparagraph of Article 2(5) of the basic regulation does not concern the reasonableness of the costs, but rather the 'reliability' of the records of the party under investigation. Such an interpretation would ultimately prevent recourse to the constructed normal value, in particular where the production costs are affected by a particular market situation.

Lastly, the finding that Article 2(5) of the basic regulation does not contain an express provision concerning the reasonableness of the costs incurred between related parties is not sufficient to demonstrate that it was the intention of the EU legislature to exclude that circumstance when applying that provision.

In the second place, the Court rejects the complaint alleging a manifest error of assessment by the Commission in the comparison of the sales prices of GFR charged by Jushi to Hengshi and independent domestic customers respectively. On that point, the applicants complained that the Commission had failed to take into account all the relevant factors relating to the sales at issue such as, in particular, the customs duties paid by Jushi in respect of sales of GFR to independent domestic customers. In the absence of evidence of payment in the anti-dumping investigation, according to the applicants, it was for the Commission to use on its own initiative evidence of payment of those customs duties which it had in its parallel anti-subsidy investigation on GFR [96] or, at the very least, to ask them to produce that evidence in the anti-dumping investigation.

In that regard, the Court notes that while it is true that the Commission must conduct the anti-dumping investigation diligently and take into consideration all the relevant circumstances in determining the normal value, the fact remains that it is reliant on the voluntary cooperation of the parties under investigation to provide it with the necessary information. In the present case, it was therefore for the applicants to submit the evidence which they considered relevant for the purposes of the investigation. Since they did not submit, in the anti-dumping investigation, the slightest evidence in relation to the customs duties paid by Jushi in respect of sales of GFR, they cannot benefit from their own negligence by criticising the Commission for failing to take that factor into account.

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96 That investigation culminated in Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt (OJ 2020 L 201, p. 10).

Furthermore, it follows from the first subparagraph of Article 29(6) of Regulation 2016/1037 [97] that the Commission cannot, on its own initiative, rely, in an anti-dumping investigation, on evidence produced in a parallel anti-subsidy investigation. Therefore, it was for the applicants to waive the guarantee provided for by that article and to request that such evidence be admitted also in the anti-dumping investigation.

In the light of those considerations, the Court concludes that the Commission did not infringe the first subparagraph of Article 2(5) of the basic regulation and rejects the two complaints of the first plea raised by the applicants. The Court also rejects the other complaints of the first plea and the second plea relied on by the applicants in that action and, consequently, the action in its entirety.

2. ANTI-SUBSIDIES

Judgment of the General Court (First Chamber, Extended Composition), 1 March 2023, Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission, T-480/20

Link to the judgment as published in extract form

Subsidies – Imports of certain woven or stitched glass fibre fabrics originating in China and Egypt – Implementing Regulation (EU) 2020/776 – Definitive countervailing duty – Calculation of the subsidy amount – Attributability of the subsidy – Rights of the defence – Manifest error of assessment – Import duty drawback scheme – Tax treatment of foreign exchange losses – Calculation of the undercutting margin

Judgment of the General Court (First Chamber, Extended Composition), 1 March 2023, Jushi Egypt for Fiberglass Industry v Commission, T-540/20

Link to the judgment as published in extract form

Subsidies – Imports of continuous filament glass fibre products originating in Egypt – Implementing Regulation (EU) 2020/870 – Definitive countervailing duty and definitive collection of the provisional countervailing duty – Rights of the defence – Attributability of the subsidy – Manifest error of assessment – Import duty drawback scheme – Tax treatment of foreign exchange losses – Calculation of the undercutting margin

Following a complaint lodged on 1 April 2019, the European Commission adopted Implementing Regulation 2020/776 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics ('GFF') originating in China and Egypt. [98]

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97 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55).

98 Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ 2020 L 189, p. 1).

Following a second complaint lodged on 24 April 2019, the Commission moreover adopted Implementing Regulation 2020/870 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products ('GFR') originating in Egypt, and levying the definitive countervailing duty on the registered imports of that GFR. [99] GFR constitutes the main raw material used to produce GFF. GFR constitutes the main raw material used to produce GFF.

Hengshi Egypt Fiberglass Fabrics SAE ('Hengshi') and Jushi Egypt for Fiberglass Industry SAE ('Jushi'), two companies formed in accordance with Egyptian laws whose shareholders are Chinese entities, produce GFF and export it to the European Union. Jushi also produces GFR and exports it to the European Union. Those two companies are established in Egypt in the China-Egypt Suez Economic and Trade Cooperation Zone ('the SETC-Zone'), which was created jointly by Egypt and China in accordance with their respective national strategies, namely the Suez Canal Corridor Development Plan for Egypt and the 'Belt and Road' Initiative for China. The latter initiative enables the government authorities of China to grant certain benefits, in particular financial support, to Chinese undertakings established in the SETC-Zone.

Taking the view that they had been harmed by the countervailing duties imposed by the Commission, Hengshi and Jushi brought an action before the Court for annulment of Implementing Regulation 2020/776. In a separate action, Jushi moreover sought the annulment of Implementing Regulation 2020/870.

In dismissing those actions, the Court clarified the conditions under which the Commission may attribute to the government of the country of origin or export of a product subsidies granted by the government of another country for the purpose of imposing, under the basic anti-subsidy regulation, [100] a countervailing duty on imports of the product concerned into the European Union.

Findings of the Court

In support of their actions, the applicants put forward, inter alia, a plea alleging infringement of Article 3(1)(a) of the basic anti-subsidy regulation, according to which a subsidy is deemed to exist if there is a financial contribution by a government in the country of origin or export. In that regard, the applicants dispute in particular the line of argument followed by the Commission in the implementing regulations, consisting in attributing to the Government of Egypt financial contributions granted by Chinese public bodies to undertakings established in the SETC-Zone.

First of all, the Court rejects the applicants' complaint alleging that the Commission erred in law in its interpretation of the concept of 'government' of the country of origin or export within the meaning of Article 3(1)(a) of the basic anti-subsidy regulation.

As regards that concept of 'government', the Court notes that Article 2(b) of the basic anti-subsidy regulation is limited to defining that concept as including the government or public bodies of the country of origin or export. However, it is not apparent from that provision that a financial contribution may not be attributed to the government of the country of origin or export of the product concerned on the basis of the specific evidence available. Moreover, the fact that that regulation requires that a financial contribution be granted by the government 'within the territory of a country' [101] does not imply that that contribution must come directly from the government of the country of origin or export.

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99 Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt (OJ 2020 L 201, p. 10).

100 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55).

101 Recital 5 of the basic anti-subsidy regulation.

Thus, the basic anti-subsidy regulation does not preclude the possibility that a financial contribution granted to companies established in Egypt by Chinese public bodies, and not directly by the Government of Egypt, may be attributed to the latter as government of the country of origin or export.

This conclusion is all the more relevant in the specific context of the SETC-Zone, which enables the government authorities of China to confer directly all the facilities inherent in the 'Belt and Road' initiative on the Chinese undertakings established in that zone. In those circumstances, it cannot be accepted that an economic and legal construct of such a scale as that of the SETC-Zone is not covered by the basic anti-subsidy regulation.

Next, the Court rejects the applicants' line of argument that the Commission's interpretation of Article 3(1)(a) of the basic anti-subsidy regulation is contrary to Article 10(7) and Article 13(1) of that regulation.

In that regard, the Court notes, first, that Article 10(7) of the basic anti-subsidy regulation, which requires the Commission, upon receipt of a complaint, to invite the country of origin or export concerned for consultations with the aim of clarifying the situation, does not preclude the government of that country from being consulted on the financial contributions attributable to them. In the present case, it is apparent from the file that the Commission did indeed invite the Government of Egypt for consultations on issues such as the preferential loans granted by Chinese entities.

As regards, second, Article 13(1) of the basic anti-subsidy regulation, which allows, inter alia, the country of origin or export to eliminate or limit the subsidy or take other measures concerning its effects, such a possibility remains valid where the financial contribution may be attributed to the government of that country. Thus, it was open to the Government of Egypt to stop the close cooperation with the Government of China in relation to the financial contributions or to propose measures to limit the effects of the subsidies at issue.

It follows that neither Article 3(1)(a) of the basic anti-subsidy regulation nor the general scheme of that regulation precludes a financial contribution granted by the Government of China from being attributed to the Government of Egypt, as country of origin or export, in a case such as that at issue in the present case.

Lastly, contrary to what the applicants submit, that conclusion is supported inter alia by the provisions of Article 1 of the Agreement on Subsidies and Countervailing Measures, [102] in the light of which the basic anti-subsidy regulation must be interpreted.

Article 1.1(a)(1) of that agreement, which Article 3 of the basic anti-subsidy regulation seeks to implement, defines a subsidy as a financial contribution by a government or any public body within the territory of 'a' Member of the WTO. That wording does not therefore preclude the possibility that a financial contribution granted by a third country may be attributed to the government of the country of origin or export, since it is sufficient that the financial contribution of the government or any public body is within the territory of 'a' Member of the WTO.

In the light of those considerations, the Court finds that the Commission correctly interpreted Article 3(1)(a) of the basic anti-subsidy regulation and rejects the plea raised by the applicants. The Court also rejects the other pleas put forward by the applicants in both actions and, consequently, those actions in their entirety.

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[102] Agreement on Subsidies and Countervailing Measures (OJ 1994 L 336, p. 156), in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3), signed in Marrakesh on 15 April 1994.

XII. JUDGMENTS PREVIOUSLY DELIVERED

1. FREEDOM OF MOVEMENT: FREE MOVEMENT OF WORKERS

Judgment of the Court of Justice (First Chamber), 16 June 2022, Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists), C-577/20

Reference for a preliminary ruling – Recognition of professional qualifications – Directive 2005/36/EC – Article 2 – Scope – Article 13(2) – Regulated professions – Right to take up the profession of psychotherapist in a Member State based on a diploma in psychotherapy awarded by a university established in another Member State – Articles 45 and 49 TFEU – Freedom of movement and establishment – Assessment of the equivalence of training – Article 4(3) TEU – Principle of sincere cooperation among Member States – Doubts of the host Member State as to the level of knowledge and qualifications that can be presumed from a diploma awarded in another Member State – Conditions

A, a Finnish national, took a course in psychology organised in Finland and in Finnish by a UK university in association with a Finnish company. In November 2017, at the end of the course, the university awarded her a postgraduate diploma. She subsequently applied to the Sosiaali- ja terveysalan lupa- ja valvontavisasto (Department for the authorisation and supervision of public health and social welfare, Finland; 'Valvira') for the right to use the professional title of psychotherapist, which is protected under Finnish law. Earlier in the year, Valvira had been contacted by former students on the course who had raised concerns about the potential inadequacy of the course content.

In 2018, Valvira rejected A's application on the grounds that it was not satisfied that the course met the requirements for psychotherapist training in Finland. In April 2019, the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) dismissed A's appeal against that decision, upholding Valvira's interpretation.

A appealed the judgment before the referring court, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland). The referring court notes that the profession of psychotherapist is not regulated in the United Kingdom, and that the interested party – who has not pursued the profession of psychotherapist in another Member State which does not regulate that profession, as required under Article 13(2) of Directive 2005/36 [103] – cannot assert the right to access that profession in Finland under the directive. However, the referring court is uncertain whether A's situation should also be examined in the light of the principles of free movement of workers [104] and freedom of establishment, [105] and, if so, whether the competent authority of the host Member State, when determining whether the knowledge and qualifications are equivalent, may rely on information other than that provided by the university awarding the diploma concerned.

The Court of Justice answered the first of those questions in the affirmative, taking the view that an application for access to a regulated profession submitted in those circumstances must be examined in the light of Articles 45 or 49 TFEU. It also held that the competent authority of the host Member State that had received such an application must consider a diploma awarded by the authority of another Member State as valid. Only where that authority has serious doubts, based on concrete evidence defined by the Court of Justice, may it request the issuing authority to review the grounds

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[103] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

[104] The principle of freedom of movement for workers is provided for by Article 45 TFEU.

[105] The principle of freedom of establishment is governed by Article 49 TFEU.

for awarding the diploma and, where appropriate, to withdraw it. If the diploma is not withdrawn, it is only in exceptional cases, where it is clear from the circumstances that the diploma is not credible, that the authority of the host Member State may challenge the grounds for awarding the diploma.

Findings of the Court

First, the Court of Justice clarifies that the situation at issue falls within the scope of Directive 2005/36, since the formal qualification concerned was issued in a Member State other than the host Member State. However, the interested party does not appear to meet the requirement laid down in Article 13(2) of Directive 2005/36 of having pursued the profession of psychotherapist during the minimum period referred to in that provision. As a result, she cannot rely on any system for the recognition of professional qualifications established by that directive.

Examining A's situation in the light of Articles 45 and 49 TFEU, the Court notes that the free movement of persons means that Member States may not deny the benefit of the freedoms recognised by those two provisions to their nationals who have obtained professional qualifications in another Member State. Further, the authorities of a Member State to whom an application has been made for authorisation to practise a regulated profession must take into consideration all the diplomas, certificates and other formal qualifications of the person concerned and his or her relevant experience, by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by the national rules. Since this principle is inherent in the fundamental freedoms enshrined in the TFEU, the adoption of directives on the mutual recognition of diplomas – including Directive 2005/36 – should not have the effect of making it harder to recognise diplomas, certificates and other formal qualifications in situations those directives do not cover. Thus, in a situation in which none of the systems for the recognition of professional qualifications established by Directive 2005/36 apply, it is in the light of Articles 45 and 49 TFEU that the host Member State must fulfil its obligations with regard to the recognition of professional qualifications.

Second, the Court of Justice states that the comparative examination procedure for the abovementioned different qualifications and experience must enable the authorities of the host Member State to verify, on an objective basis, whether the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those attested by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications that its holder can be assumed, by virtue of that diploma, to possess, having regard to the nature and duration of the studies and practical training to which the diploma relates. Since that comparison presupposes mutual trust among Member States in the qualifications issued, the authority of the host Member State is obliged in principle to consider a diploma issued by the authority of another Member State as credible. Only where that authority has serious doubts, based on concrete elements forming a consistent body of evidence suggesting that the diploma relied on by the applicant does not reflect the level of knowledge and qualifications that the applicant can be presumed to have acquired, may that authority request the issuing authority to review, in the light of that evidence, the grounds for awarding that diploma and, where appropriate, to withdraw it. Such concrete evidence may include information provided by persons other than the course organisers. Where the issuing authority has reviewed the grounds for awarding the diploma in the light of that evidence, but has not withdrawn it, it is only in exceptional cases, where it is clear from the circumstances that the diploma is not credible, that the authority of the host Member State may challenge the grounds for awarding the diploma.

2. COMPETITION: STATE AID

Judgment of the General Court (Seventh Chamber, Extended Composition), 16 November 2022, Netherlands v Commission, T-469/20

State aid – Netherlands law prohibiting the use of coal for the production of electricity – Early closure of a coal-fired power plant – Award of compensation – Decision not to raise any objections – Decision declaring the compensation compatible with the internal market – No express classification as 'State aid' – Action for annulment – Challengeable act – Admissibility – Article 4(3) of Regulation (EU) 2015/1589 – Legal certainty

On 11 December 2019, the Kingdom of the Netherlands adopted a law prohibiting the use of coal for the production of electricity from 1 January 2030 at the latest.

After that law came into force, four of the five coal-fired power plants operating in the Netherlands benefited from a transitional period of 5 to 10 years enabling them to recoup the investments made, adapt to another raw material or prepare for closure. However, the Hemweg 8 power plant, which did not burn biomass, produced no renewable energy, and whose efficiency was lower than that of the other four coal-fired power plants, was forced to close at the end of 2019.

In that context, the Netherlands Government decided to grant compensation of EUR 52.5 million to the company operating the Hemweg 8 power plant for the damage incurred due to early closure ('the measure at issue'), in accordance with the provision of the law of 11 December 2019 to that effect.

By decision of 12 May 2020, [106] the European Commission declared the measure at issue compatible with the internal market, pursuant to Article 107(3)(c) TFEU, without, however, examining whether that measure conferred an advantage on the company operating the Hemweg 8 power plant and therefore constituted State aid.

The Kingdom of the Netherlands brought an action for the annulment of that decision, which is upheld by the Seventh Chamber (Extended Composition) of the General Court. In that context, the Court states that the Commission cannot rule on the compatibility of a national measure with the internal market without first establishing whether that measure constitutes State aid within the meaning of Article 107(1).

TFEU. Findings of the Court

As a preliminary point, the Court dismisses the objection of inadmissibility raised by the Commission, alleging that no binding legal effect followed from the contested decision for the Kingdom of the Netherlands.

Indeed, according to settled case-law, a decision based on Article 107(1) and (3) TFEU, which, while classifying a measure as State aid, declares it compatible with the internal market, must be regarded as a challengeable act under Article 263 TFEU.

Yet, even if the contested decision did not rule on the question whether the national measure at issue constituted State aid, it had the effect of authorising it. Thus, by adopting that decision, the Commission decided to bring to an end the preliminary examination procedure which it initiated, and implicitly refused to open the formal examination procedure under Article 108(2) TFEU. It therefore

[106] Commission Decision C(2020) 2998 final of 12 May 2020 on State aid SA. 54537 (2020/NN) – Netherlands, Prohibition of coal for the production of electricity in the Netherlands ('the contested decision').

adopted a definitive position on the compatibility of the measure at issue with the internal market which has binding legal effects.

The Court accordingly declares the action admissible, without it being necessary to examine whether the binding legal effects produced by the contested decision were capable of affecting the interests of the Kingdom of the Netherlands.

The Court then examines the claims of the Kingdom of the Netherlands alleging that, by declaring the measure at issue compatible with the internal market without ruling on its classification as State aid, the Commission exceeded its powers and infringed the principle of legal certainty.

In that regard, the Court recalls, first of all, that the Commission adopted the contested decision on the basis of Article 4(3) of Regulation 2015/1589, [107] by finding, in its operative part, that the measure at issue was compatible with the internal market in terms of Article 107(3)(c) TFEU.

According to the latter provision, 'aid' intended to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The use of the term 'aid' implies that the compatibility of a national measure with the internal market can only be examined after that measure has been classified as aid.

In addition, it is settled case-law that, if the Commission is unable to conclude, following the preliminary examination procedure, that a State measure either is not 'aid' within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the Treaty, or where that procedure does not enable the Commission to overcome all the difficulties involved in determining whether the aid is compatible with the internal market, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU, without having any discretion in that regard.

It follows that, according to the Court, the Commission may only consider a measure to be compatible with the internal market if that measure comes within the scope of Article 107(1) TFEU, in other words, if that measure constitutes State aid.

That conclusion is further supported by the relevant provisions of Regulation 2015/1589, Article 4 of which provides for a stage at which the aid measures undergo a preliminary examination, intended to enable the Commission to form an initial view of the measure under examination. On completion of that stage, the Commission is to make a finding either that the State measure at issue does not constitute aid within the meaning of Article 107(1) TFEU or that it falls within the scope of that provision. In the latter case, it may be that that measure does not raise doubts as to its compatibility with the internal market; on the other hand, it is also possible that the measure may raise such doubts. If, following the preliminary examination, the Commission finds that, notwithstanding the fact that the measure notified falls within the scope of Article 107(1) TFEU, it does not raise any doubts as to its compatibility with the internal market, the Commission is to adopt a decision not to raise objections under Article 4(3) of Regulation 2015/1589.

Accordingly, Article 4 of Regulation 2015/1589 sets out an exhaustive list of the decisions that the Commission may adopt after the preliminary examination of the national measure at issue, which does not include the possibility of adopting a decision declaring a national measure compatible with the internal market without the Commission having first ruled on the classification of that measure as State aid.

Consequently, the Court holds that the Commission exceeded its powers by declaring in the contested decision that the measure at issue was compatible with the internal market, without first

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[107] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9). According to the provision cited, 'where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market … The decision shall specify which exception under the TFEU has been applied'.

ruling on the question whether such a measure constituted aid. Furthermore, to the extent that the contested decision did not enable the Kingdom of the Netherlands to know precisely its rights and obligations, the Commission also infringed the principle of legal certainty.

On those grounds, the Court upholds the action and annuls the contested decision, without ruling on the other pleas raised by the Kingdom of the Netherlands.

3. APPROXIMATION OF LAWS: COMMUNITY DESIGNS

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

Link to the full text of the judgment

Community design – Invalidity proceedings – Registered Community design representing an accessory for wireless remote controls – Ground for invalidity – Features of the appearance of a product solely dictated by its technical function – Article 8(1) and Article 25(1)(b) of Regulation (EC) No 6/2002 – Facts or evidence submitted for the first time before the Board of Appeal – Article 63(2) of Regulation No 6/2002 – Obligation to state reasons – Article 41(1) and (2)(c) of the Charter of Fundamental Rights

ADS L. Kowalik, B. Włodarczyk s.c., the applicant, is the holder of a Community design representing an accessory for wireless remote controls. The company ESSAtech filed an application for a declaration of invalidity with the European Union Intellectual Property Office (EUIPO), maintaining that the features of appearance of the products concerned were dictated solely by their technical function, an application which was rejected by the Cancellation Division. The Board of Appeal of EUIPO annulled that decision and declared that the Community design examined was invalid.

The General Court, before which an action has been brought, annuls the decision of the Board of Appeal ('the contested decision') on the grounds of failure to state reasons. In giving a ruling on the question of the admission of the facts or evidence submitted for the first time before the Board of Appeal, the Court applies for the first time, in the field of designs, the conditions laid down in Article 27(4) of Commission Delegated Regulation 2018/625. [108]

Findings of the Court

First, the Court finds that the written statements submitted by the parties to the Board of Appeal contain facts or evidence submitted for the first time before that board. In that regard, it notes that, under Article 63(2) of Regulation No 6/2002, the Board of Appeal has broad discretion to decide whether or not facts or evidence that have not been submitted in due time should be taken into account. Moreover, since taking into account such facts or evidence is justified where the conditions laid down in Article 27(4) of Delegated Regulation 2018/625 are met, and the latter is applicable in the field of Community designs, [109] those conditions apply mutatis mutandis to Article 63(2) of Regulation No 6/2002. Therefore, the possibility for the Board of Appeal to take into account facts or evidence submitted for the first time before it, under Article 63(2) of Regulation No 6/2002, is governed by Article 27(4) of Delegated Regulation 2018/625.

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[108] Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

[109] In accordance with Article 108 of Regulation No 6/2002.

Next, as regards both analysis of the question of the admission of facts or evidence submitted for the first time before the Board of Appeal and examination of the substance of the issues, the Court makes clear that the contested decision must comply with the requirements of the obligation to state reasons. That obligation is intended to prevent the adoption of arbitrary decisions, obliging the author of a decision to ensure that the reasons for it are relevant, consistent and sufficiently specific. Thus, the Board of Appeal is required, when exercising discretion with regard to the admission of facts or evidence submitted for the first time before it, to give reasons for its decision, stating, in particular, whether, in view of the conditions laid down in Article 27(4) of Delegated Regulation 2018/625, that evidence may be accepted.

Last, in the light of those considerations, the Court considers that, in the present case, facts or evidence submitted for the first time before the Board of Appeal were implicitly taken into account by the latter. However, the statement of reasons for the contested decision does not contain any evidence concerning the reasons why the Board of Appeal admitted that evidence. Hence, the Court is not in a position to examine whether the Board of Appeal applied Article 27(4) of Delegated Regulation 2018/625 and whether the requirements laid down by that provision were met before such admission. It is therefore impossible for it to ascertain the justification for such admission and to assess the merits of the contested decision on that point. Likewise, it is impossible for the parties to ascertain the justification for such admission in order to defend their rights.

Consequently, the Court annuls the contested decision on the ground that it is vitiated by failure to state reasons as regards admission of the facts or evidence submitted for the first time before the Board of Appeal. Within the meaning of Article 25(1)(b), read in conjunction with Article 8(1).

4. COMMON FOREIGN AND SECURITY POLICY

Judgment of the General Court (Grand Chamber), 27 July 2022, RT v Council, T 125/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine – Temporary prohibition on broadcasting and suspension of authorisations for the broadcasting of content by certain media outlets – Inclusion on the list of entities to which restrictive measures apply – Competence of the Council – Rights of the defence – Right to be heard – Freedom of expression and of information – Proportionality – Freedom to conduct a business – Principle of non-discrimination on grounds of nationality

Following the military aggression perpetrated by the Russian Federation ('Russia') against Ukraine on 24 February 2022, the Council of the European Union adopted a number of 'packages' of restrictive measures against Russia. Those measures supplement the previous measures that the Council had adopted from 2014 onwards in view of the actions of that State which had destabilised the situation in Ukraine [110] and in response to the illegal annexation, by Russia, of Crimea and the city of Sevastopol. [111]

[110] Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13).

[111] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 2014 L 78, p. 16).

It was in that context that the Council adopted, on 1 March 2022, Decision 2022/351 [112] and Regulation 2022/350 [113] ('the contested measures') in order temporarily to prohibit the propaganda campaign, undertaken by Russia, targeting civil society in the European Union and in neighbouring countries, in support of its military aggression against Ukraine, carried out through certain media outlets under its control, since that campaign constituted a threat to the EU's public order and security. On that basis, any operator established in the European Union is prohibited from circulating content produced by the legal persons, entities or bodies listed in the annexes to the contested measures. [114]

The applicant, RT France, was included on the list of entities set out in the annexes to the contested measures. This single-shareholder simplified limited company, established in France, publishes specialised television channels. The applicant's entire share capital is held by the association ANO 'TV Novosti', an autonomous not-for-profit association in the Russian Federation, without share capital, having its headquarters in Moscow (Russia). The applicant sought annulment of the contested acts on the ground that its rights of defence, its freedom of expression and information, and its freedom to conduct a business had been infringed. It also alleged infringement of the principle of non-discrimination. Furthermore, it cast doubt on the Council's competence to adopt the acts at issue.

The General Court, sitting as the Grand Chamber, and further to an expedited procedure decided of its own motion, [115] rules for the first time on restrictive measures adopted by the Council seeking to prohibit the broadcasting of audiovisual content. In that connection, the Court recalls the Council's competence to adopt such measures under the Common Foreign and Security Policy of the European Union (CFSP), and rules in particular on the observance of the rights of the defence and the limitations on the exercise of the freedom of expression of an audiovisual media outlet in the light of the conditions laid down in Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

Findings of the Court

As regards, first of all, the Council's competence to adopt the restrictive measures at issue, the Court states that, pursuant to the relevant provisions of the Treaty on European Union, the European Union is to contribute to international 'peace and security' [116] and that, to that end, power is conferred on the Council to adopt 'decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature'. [117] The Court states that the Union's competence in CFSP matters are to cover all areas of foreign policy and all questions relating to the Union's security [118] and that the Union's action on the international scene is to seek to promote democracy, the rule of law, the universality and indivisibility of human rights, respect for human dignity, respect for the principles of the United Nations Charter and international law. [119] Since the concept of 'approach of the Union' lends itself to a broad interpretation, such approaches may take the form of decisions providing for

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112 Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 5).

113 Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 1).

114 Decision 2014/512/CFSP, Article 4g: '1. It shall be prohibited for operators to broadcast, or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies listed in Annex IX, including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.

115 Conducted in accordance with Article 151(2) of the Rules of Procedure of the General Court. The President of the General Court had, by order of 30 March 2022 (RT France v Council, T-125/22 R, not published, EU:T:2022:199), previously dismissed an application for interim measures lodged by the applicant.

116 Article 3(5) TEU.

117 Article 29 TEU.

118 Article 24(1) TEU.

119 Article 21(1) TEU.

measures capable of directly affecting the legal position of individuals, as is confirmed by the wording of the second paragraph of Article 275 TFEU. [120] By adopting the contested decision, the Council therefore exercised the competence attributed to the European Union by the Treaties under the provisions relating to the CFSP.

In that regard, the Court points out that the fact that national administrative authorities, such as the Autorité de régulation de la communication audiovisuel (Authority for the regulation of audiovisual and digital communication; Arcom) in France, are competent to adopt sanctions against the audiovisual entities at issue does not exclude the Council's own competence, since the competence conferred on those authorities is not based on the same values and does not pursue the same objectives. Such authorities cannot guarantee the same results as uniform and immediate intervention by the Council throughout the territory of the European Union, such as that achieved under the CFSP.

As regards the infringements of fundamental rights on which the applicant relies, the Court notes that, in accordance with the provisions of Article 52(1) of the Charter, these are not absolute rights and may be subject to limitations, provided that the limitations concerned are provided for by law, respect the essence of the fundamental right at issue and, subject to the principle of proportionality, are necessary and meet objectives of general interest recognised by the European Union.

Thus, as regards the infringement of the rights of the defence, and in particular of the right to be heard, the Court observes, in the light of the objectives of the CFSP, that the measures at issue form part of an extraordinary context of extreme urgency, characterised by a rapid escalation of the situation which made any form of modulation of the restrictive measures designed to prevent the conflict from spreading difficult. Next, in a strategy of countering so-called 'hybrid' threats, including disinformation, the requirement to adopt restrictive measures against media outlets, such as the applicant, funded by the Russian State budget and directly or indirectly controlled by the leadership of that country, which is the aggressor country, in that they were considered to be at the root of a continuous and concerted activity of disinformation and manipulation of the facts, became, following the launch of the armed conflict, overriding and urgent, in order to preserve the integrity of democratic debate in European society. Having regard to the quite exceptional context in which the contested acts were adopted, namely that of the outbreak of a war at the borders of the European Union, the objective which they pursue and the effectiveness of the restrictive measures which they lay down, it must be concluded that the EU authorities were not required to hear the applicant before initially placing its name on the lists at issue and, consequently, that there was no breach of the applicant's right to be heard.

Next, as regards infringement of the freedom of expression and information, [121] the Court recalls first the principles of case-law laid down by the European Court of Human Rights. [122] Thus, in view of the influence exerted by the media in modern society, the right of journalists to impart information on issues of general interest is subject to the proviso that they are acting in good faith, on an accurate factual basis, and provide 'reliable and precise' information in accordance with the ethics of journalism and the tenets of responsible journalism. In the light of the examination of the proportionality of the restrictive measures at issue, account must be taken of the fact that the audiovisual media have a more immediate and powerful effect than the print media. The Court also points out that, unlike expression on matters of public interest, which is entitled to strong protection,

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120 Article 275 TFEU, second paragraph: '... the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.'

121 Article 11 of the Charter.

122 See, inter alia: ECtHR, 5 April 2022, NIT S.R.L. v. the Republic of Moldova, CE:ECHR:2022:0405JUD 002847012, §§ 178 to 182, and ECtHR, 15 October 2015, Perinçek v. Switzerland, CE:ECHR:2015:1015JUD 002751008, §§ 197, 205, 206 and 230.

expression that promotes or justifies violence, hatred, xenophobia or another form of intolerance cannot normally claim protection, and it is necessary to pay attention to the words used, the manner in which the statements were made and the context in which they were broadcast.

Examining the conditions of Article 52(1) of the Charter, the Court then observes that the restrictive measures at issue were, inter alia, provided for 'by law' in the sense that they were set out in acts which are, in particular, of general application, having clear legal bases in EU law, [123] and that they were foreseeable in the light of the applicant's actions. The condition relating to the pursuit of an objective of general interest recognised by the European Union is also satisfied. By the restrictive measures at issue, the Council pursues the twofold objective of protecting the public order and security of the European Union, threatened by the propaganda campaign at issue, and of exerting pressure on the Russian authorities so that they bring an end to their military aggression against Ukraine

The Court considers, moreover, that the Council was entitled to consider that the various items of evidence referred to above constituted a sufficiently concrete, precise and consistent body of evidence capable of demonstrating that, before the adoption of the contested acts, the applicant actively supported the policy conducted by Russia towards Ukraine, and that the applicant had broadcast information justifying the military aggression at issue, which constituted a significant and direct threat to the Union's public order and security. In that regard, it considers that the evidence put forward by the applicant does not prove a balanced overall treatment, by the latter, of the information relating to the ongoing war.

In the context, lastly, of the weighing-up of the interests at issue, the Court points out that the information processing in question cannot benefit from the enhanced protection afforded to press freedom under Article 11 of the Charter. In that connection, it is appropriate to take into consideration the United Nations International Covenant on Civil and Political Rights, adopted on 16 December 1966, to which not only the Member States but also Russia are parties, and pursuant to which 'any propaganda for war shall be prohibited by law'. [124] Having regard to the extraordinary context of the case, the Court finds that the limitations on the applicant's freedom of expression are proportionate to the aims pursued.

As regards, moreover, the infringement of the freedom to conduct a business, the Court also finds that since the measures in question are temporary and reversible, they do not undermine the essential content of the freedom to conduct a business.

As regards, lastly, infringement of the principle of non-discrimination on grounds of nationality, enshrined in particular in Article 21(2) of the Charter, the Court states that this must apply in accordance with the first paragraph of Article 18 TFEU, [125] which concerns situations falling within the scope of EU law in which a national of one Member State suffers discriminatory treatment compared with nationals of another Member State solely on the basis of his nationality. The General Court notes in that regard that, in the case of alleged discrimination on account of the applicant's Russian shareholding, which was treated for that reason less favourably than other French audiovisual media outlets (which are not under the same type of control by an entity of a third country), a disparity in treatment of that kind does not fall within the scope of that provision.

In view of the foregoing, the Court dismisses the action.

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123 Namely Article 29 TEU, in so far as concerns the contested decision, and Article 215 TFEU, as regards the contested regulation.

124 Article 20(1).

125 Article 18 TFEU, first paragraph: 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

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 General Court (First Chamber), 8 March 2023, Bulgaria v Commission, (T-235/21, EU:T:2023:105)
- Judgment of the General Court (Fourth Chamber, Extended Composition), 8 March 2023, Assaad v Council, (T-426/21, EU:T:2023:114)
- Judgment of the General Court (Third Chamber, Extended Composition), 22 March 2023, B&Bartoni v EUIPO – Hypertherm (Electrode to insert into a torch) (T-617/21, EU:T:2023:152)
- Judgment of the General Court (Fourth Chamber), 29 March 2023, Nouryon Industrial Chemicals and Others v Commission (T-868/19, EU:T:2023:168)