COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
May 2023

I. FUNDAMENTAL RIGHTS: PRINCIPLES AND FUNDAMENTAL RIGHTS ENSHRINED IN THE CHARTER

Judgment of the Court of Justice (First Chamber), 4 May 2023, Agenția Națională de Integritate, C-40/21

Link to the full text of the judgment

Reference for a preliminary ruling – Decision 2006/928/EC – Mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption – Charter of Fundamental Rights of the European Union – Article 15(1) – Article 47 – Article 49(3) – Elective public office – Conflict of interests – National legislation prohibiting the holding of elective public office for a predetermined period – Penalty additional to the termination of the term of office – Principle of proportionality

In 2016, the applicant in the main proceedings was elected mayor of the municipality of MN (Romania). In a report drawn up in 2019, the Agenția Națională de Integritate (ANI) (National Integrity Agency, Romania) found that he had not complied with the rules governing conflicts of interest in administrative matters. In the event that that report became final, the term of office of the applicant in the main proceedings would terminate automatically and an additional prohibition on holding elective public office for a period of three years would be imposed on him.

The applicant in the main proceedings brought an action seeking the annulment of that report, claiming that EU law precluded national legislation under which a penalty is imposed, automatically and without the possibility of modulation according to the seriousness of the infringement committed, on a person deemed to have acted in a conflict of interest situation. [1] Ruling on that action, the referring court decided to ask the Court about the compatibility of that prohibition with the principle of proportionality of penalties, [2] the right to engage in work [3] and the right to an effective remedy and of access to an independent tribunal, [4] guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter').

Findings of the Court

In the first place, the Court holds that Article 49(3) of the Charter does not apply to national legislation which provides, following an administrative procedure, for a measure prohibiting the holding of any elective public office for a predetermined period of three years against a person who has been found to have a conflict of interest in the holding of such an office, in the event that that measure is not criminal in nature.

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1 Article 25 of legea nr. 176/2010 privind integritatea în exercitarea funcțiilor și demnităților publice, pentru modificarea și completarea legii nr. 144/2007 privind înființarea, organizarea și funcționarea Agenției Naționale de Integritate, precum și pentru modificarea și completarea altor acte normative (Law No 176/2010 on integrity in the performance of public duties and the holding of public office, amending and supplementing Law No 144/2007 on the establishment, organisation and operation of the National Integrity Agency, and amending and supplementing other normative acts) of 1 September 2010. That law implements the second benchmark set out in the annex to Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56).

2 Article 49(3) of the Charter.

3 Article 15(1) of the Charter.

4 Article 47 of the Charter.

In that regard, three criteria are relevant for assessing the criminal nature of a penalty: the legal classification of the offence under national law, the intrinsic nature of the offence and the degree of severity of the penalty.

First of all, as regards the first criterion, neither the automatic termination of the term of office in the event of a finding of a conflict of interest nor the prohibition on the holding of any elective public office is regarded under Romanian law as a criminal penalty. Next, the second criterion involves ascertaining whether the measure at issue has, inter alia, a punitive purpose. The legislation concerned seeks to ensure integrity and transparency in the exercise and holding of public functions and offices and to prevent institutional corruption. Thus, the purpose of that prohibition, like that of the automatic termination of the term of office, is to preserve the proper functioning and transparency of the State, by putting to a lasting end situations of conflict of interest. Therefore, such a measure pursues an essentially preventive – and not punitive – objective. In terms of the third criterion, that prohibition measure does not consist in imposing a sentence of deprivation of liberty or a fine, but in banning the future exercise of specific activities, namely elective public office, targeting individuals belonging to a limited group with a special status. It is of limited duration and does not apply to the right to vote.

To the extent that it is not criminal in nature, that measure cannot be assessed in the light of Article 49(3) of the Charter.

That said, in so far as it implements EU law, the national legislation at issue in the main proceedings must, in any event, observe the principle of proportionality, as a general principle of EU law.

In that respect, the Court finds, in the second place, that that principle does not preclude that legislation provided that, in the light of all the relevant circumstances, its application results in the imposition of a penalty commensurate with the seriousness of the breach which it penalises, having regard to the objective of ensuring integrity and transparency in the exercise and holding of public functions and offices and preventing institutional corruption. That would not be the case where, exceptionally, the unlawful conduct found to have taken place, having regard to that objective, does not have an element of seriousness, whereas the impact of that measure on the personal, professional and economic situation of that person proves particularly serious.

Imposing the penalty at issue automatically thus makes it possible to put to a lasting end the situation of conflict of interest identified while preserving the functioning of the State and of the elective bodies concerned. Moreover, providing for both the automatic termination of the term of office and an automatic prohibition on holding any elective public office for a sufficiently long predetermined period would appear likely to deter persons who exercise an electoral mandate from placing themselves in such a position and to encourage them to comply with their obligations in that regard.

In addition, in terms of the necessity of the penalty at issue, the Romanian legislature set its duration at three years in view of the intrinsic seriousness, both for the functioning of the State and for society, of the facts constituting a conflict of interest situation. Thus, that prohibition is imposed as a result of the infringement committed by a person holding elective public office and which is undoubtedly serious. In that regard, the scale of the conflicts of interest and the level of corruption observed in the national public sector must also be taken into account. Furthermore, the said prohibition is limited in time, applies only to certain categories of persons performing particular duties and applies only to defined activities, namely elective public functions, and does not prevent the pursuit of any other professional activity.

So far as concerns, last, the proportionality of the measure at issue, in the light of the seriousness of the harm to the public interest resulting from acts of corruption and conflicts of interest, even the least significant, on the part of elected representatives in a national context involving a high risk of corruption, that measure does not appear, in principle, to be disproportionate to the offence which it seeks to penalise. That said, the fact that the duration of that prohibition is not coupled with any possibility of modulation does not rule out the possibility that, in certain exceptional cases, that penalty may prove disproportionate.

In the third place, the Court makes it clear that the right to exercise an elective mandate obtained following a democratic electoral process, such as that of mayor, is not covered by Article 15(1) of the Charter.

Although that provision is worded broadly, it does not include the right to exercise, for a fixed period, such a mandate. Article 15 of the Charter appears in Title II thereof, entitled 'Freedoms', whereas specific provisions concerning the right to stand as a candidate at elections appear in a separate title, namely Title V, entitled 'Citizens' rights'. [5] The case-law of the European Court of Human Rights supports that interpretation. [6]

In the fourth and last place, the Court finds that Article 47 of the Charter does not preclude the national legislation concerned, provided that the person concerned has had an effective opportunity to challenge the legality of the report that made the finding of a conflict of interest and the penalty imposed on the basis of it, including its proportionality.

The right to an effective remedy includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it. In the present case, that right presupposes that the referring court is able to review the legality of the assessment report calling into question the applicant in the main proceedings and, if necessary, annul that report and the penalties imposed on the basis of it.

II. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (First Chamber), 4 May 2023, Österreichische Datenschutzbehörde and CRIF, C-487/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Data subject's right of access to his or her data undergoing processing – Article 15(3) – Provision of a copy of the data – Concept of 'copy' – Concept of 'information'

CRIF is a business consulting agency that provides, at the request of its clients, information on the creditworthiness of third parties. It was for that purpose that it processed the personal data of the applicant in the main proceedings, an individual. The latter applied to CRIF, on the basis of the General Data Protection Regulation, [7] for access to personal data concerning him. In addition, he asked to be provided with a copy of the documents, namely emails and database extracts containing, inter alia, his data, 'in a standard technical format'.

In response to that request, CRIF sent the applicant in the main proceedings, in summary form, the list of his personal data undergoing processing. Being of the view that CRIF should have sent him a copy of all of the documents containing his data, such as emails and database extracts, the applicant

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5 See Articles 39 and 40 of the Charter on the right to vote and to stand as a candidate at elections to the European Parliament and at municipal elections respectively.

6 See ECtHR, 8 November 2016, Savisaar v. Estonia, CE:ECHR:2016:1108DEC000836516.

7 Article 15 of 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').

in the main proceedings lodged a complaint with the Österreichische Datenschutzbehörde (Austrian Data Protection Authority). That authority rejected the complaint, taking the view that CRIF had not in any way infringed the right of access of the applicant in the main proceedings to his personal data.

The Bundesverwaltungsgericht (Federal Administrative Court, Austria), hearing the action brought by the applicant in the main proceedings against the rejection decision adopted by that authority, is uncertain as to the scope of the obligation laid down in the first sentence of Article 15(3) of the GDPR to provide the data subject with a 'copy' of his or her personal data undergoing processing. That court is uncertain, in particular, whether that obligation is fulfilled where the controller transmits the personal data in the form of a summary table or whether that obligation also entails the transmission of document extracts or even entire documents, as well as extracts from databases, in which those data are reproduced. The referring court also seeks clarification of what precisely is covered by the concept of 'information' in the third sentence of Article 15(3) of the GDPR. [8]

By its judgment, the Court provides clarification on the content and scope of the data subject's right of access to his or her personal data undergoing processing. In that regard, it considers that the right to obtain from the controller a 'copy' of the personal data undergoing processing pursuant to the first sentence of Article 15(3) of the GDPR means that the data subject must be given a faithful and intelligible reproduction of all those data. That right entails the right to obtain copies of extracts from documents or even entire documents or extracts from databases which contain, inter alia, those data, if the provision of such a copy is essential in order to enable the data subject to exercise effectively the rights conferred on him or her by the GDPR, bearing in mind that account must be taken, in that regard, of the rights and freedoms of others. Furthermore, the Court states that the concept of 'information' referred to in the third sentence of Article 15(3) of the GDPR relates exclusively to personal data of which the controller must provide a copy pursuant to the first sentence of that paragraph.

Findings of the Court

In the first place, the Court gives a literal, systematic and teleological interpretation of the first sentence of Article 15(3) of the GDPR, which provides for the right of the data subject to obtain a copy of his or her personal data undergoing processing.

As regards the wording of the first sentence of Article 15(3) of the GDPR, the Court notes that, although that provision does not contain a definition of the term 'copy', account must be taken of the usual meaning of that term, which refers to the faithful reproduction or transcription of an original, with the result that a purely general description of the data undergoing processing or a reference to categories of personal data does not correspond to that definition. Furthermore, it is apparent from the wording of that provision that the disclosure obligation relates to the personal data undergoing the processing in question. After conducting a literal analysis of that provision, the Court holds that it confers on the data subject the right to obtain a faithful reproduction of his or her personal data, understood in a broad sense, that are subject to operations that can be classified as processing carried out by the controller.

Regarding the context of which the first sentence of Article 15(3) of the GDPR forms part, the Court notes that Article 15 of the GDPR defines, in paragraph 1 thereof, the subject matter and scope of the data subject's right of access. Article 15(3) of the GDPR sets out the practical arrangements for the fulfilment of the controller's obligation, specifying, inter alia, in its first sentence, the form in which that controller must provide the personal data undergoing processing, namely in the form of a 'copy'. As a result, the first sentence of Article 15(3) of the GDPR cannot be interpreted as establishing a separate right from that provided for in Article 15(1) of the GDPR. Moreover, the Court notes that the term 'copy' does not relate to a document as such, but to the personal data which it contains and

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8 Pursuant to the third sentence of Article 15(3) of the GDPR, where the data subject makes the request by electronic means, and unless otherwise requested by the data subject, the information shall be provided in a commonly used electronic form.

which must be complete. The copy must therefore contain all the personal data undergoing processing.

With regard to the objectives pursued by Article 15 of the GDPR, the Court notes that the right of access provided for in that article must enable the data subject to ensure that the personal data relating to him or her are correct and that they are processed in a lawful manner.

In addition, according to the Court, it is apparent from the GDPR [9] that the controller is obliged to take appropriate measures to provide the data subject with all the information referred to, in a concise, transparent, intelligible and easily accessible form, using plain and clear language, and that the information must be provided in writing or by other means, including, where appropriate, by electronic means, unless the data subject requests that it be provided orally. It follows that the copy of the personal data undergoing processing, which the controller must provide, must have all the characteristics necessary for the data subject to exercise his or her rights under that regulation effectively and must, consequently, reproduce those data fully and faithfully.

Accordingly, in order to ensure that the information thus provided is easy to understand, the reproduction of extracts from documents or even entire documents or extracts from databases which contain, inter alia, the personal data undergoing processing may prove essential. In particular, where personal data are generated from other data or where such data result from empty fields, that is to say where there is an absence of information which provides information about the data subject, the context in which the data are processed is an essential element in enabling the data subject to have transparent access and an intelligible presentation of those data.

In the event of conflict between, on the one hand, exercising the right of full and complete access to personal data and, on the other hand, the rights or freedoms of others, the Court takes the view that a balance will have to be struck between the rights and freedoms in question. Wherever possible, means of communicating personal data that do not infringe the rights or freedoms of others should be chosen, bearing in mind that the result of those considerations should not be a refusal to provide all information to the data subject.

In the second place, the Court examines what is covered by the concept of 'information' referred to in the third sentence of Article 15(3) of the GDPR. Although that provision does not specify what is to be understood by the term 'information', it follows from its context that the 'information' to which it refers necessarily corresponds to the personal data of which the controller must provide a copy in accordance with the first sentence of that paragraph.

9 More specifically, recitals 58 and 60 and Article 12(1) of that regulation.

III. COMPETITION

1. CONCENTRATIONS

Judgment of the General Court (Fourth Chamber, Extended Composition), 17 May 2023, EVH v Commission, T-312/20

Competition – Concentrations – German electricity market – Decision declaring the concentration compatible with the internal market – Action for annulment – Locus standi – Admissibility – Obligation to state reasons – Concept of 'single concentration' – Right to effective judicial protection – Right to be heard – Definition of the market – Period of analysis – Analysis of market power – Decisive influence – Manifest errors of assessment – Duty of diligence

In March 2018, the companies RWE AG and E.ON, both governed by German law, announced that they wanted to engage in a complex asset swap by means of three concentrations operations ('the overall transaction').

By the first concentration operation, RWE, which is active across the whole supply chain of energy provision in several European countries, wished to acquire sole or joint control over certain generation assets of E.ON, an electricity provider which operates in several European countries. The second concentration operation consisted in the acquisition by E.ON of the sole control over the distribution and retail energy business, as well as some production assets of Innogy SE, a subsidiary of RWE. As for the third concentration operation, it concerned the acquisition of 16.67% of E.ON's shares by RWE.

The first and second concentration operations were reviewed by the European Commission, while the third concentration operation was reviewed by the Bundeskartellamt (Federal Competition Authority, Germany).

In April 2018, the German undertaking EVH GmbH, which generates electricity on the German territory, from both conventional and renewable sources, notified to the Commission its wish to participate in the procedure relating to the first and second concentration operations and, consequently, to receive the documents relating thereto.

The first concentration operation was notified to the Commission on 22 January 2019. By decision of 26 February 2019 [10] ('the decision at issue'), the Commission decided not to oppose the notified operation and declared that it was compatible with the internal market pursuant to Regulation No 139/2004. [11]

EVH [12] brought an action before the Court seeking the annulment of the decision at issue. In dismissing that action, the Court clarifies, first of all, the concept of 'single concentration' as far as concerns asset swaps. Next, it rules for the first time on the Commission's obligation to publish

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10 Commission Decision C(2019) 1711 final of 26 February 2019, declaring that a concentration is compatible with the internal market and with the EEA agreement (case M.8871 – RWE/E.ON Assets).

11 Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1). Under Article 6(1)(b) of that regulation, if the Commission finds that the concentration notified does not raise serious doubts as to its compatibility with the common market, it must decide not to oppose it and must declare that it is compatible with the common market.

12 Notably, ten other companies also sought the annulment of this decision. All of these actions were dismissed either as inadmissible, or on the merits. See related series of cases: judgments of 17 May 2023, Stadtwerke Leipzig v Commission, T-313/20, Stadtwerke Hameln Weserbergland v Commission, T-314/20, TEAG v Commission, T-315/20, Naturstrom v Commission, T-316/20, EnergieVerbund Dresden v Commission, T-317/20, eins energie in sachsen v Commission, T-318/20, GGEW v Commission, T-319/20, Mainova v Commission, T-320/20, and Stadtwerke Frankfurt am Main v Commission, T-322/20.

decisions adopted under Article 6(1)(b) of Regulation No 139/2004. Lastly, it clarifies the extent of the period which the Commission must analyse in order to assess the compatibility of the concentration at issue with the internal market and examines the concept of 'common shareholding'.

Findings of the General Court

First of all, the Court rejects the plea of inadmissibility raised by RWE, based on EVH's lack of standing to bring proceedings.

In that context, the Court recalls that, under the fourth paragraph of Article 263 TFEU, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him or her.

As regards direct concern, the Court notes that the decision at issue, by allowing the first concentration operation to be put into effect immediately, is capable of bringing about an immediate change in the state of the relevant markets. It follows that EVH, active on that market, is therefore directly concerned by the decision at issue.

As regards whether EVH is individually concerned by a decision finding that a concentration operation is compatible with the internal market, the Court notes that the individual concern of an undertaking which is a third party to the concentration depends, on the one hand, on the effect on its market position and, on the other, on its participation in the administrative procedure. In the present case, in the light of the significant involvement of EVH in the administrative procedure, its status as competitor of the merging parties and the potential impact on the value of certain investments specifically identified by EVH following the concentration, it must be regarded as being individually concerned by the decision at issue.

Secondly, on the substance, the Court rejects, first of all, the plea seeking to criticise the Commission for having failed to review, on the one hand, the third concentration operation and, on the other hand, to consider the three concentration operations as components of a single concentration.

So far as concerns the third concentration operation, the Court finds that EVH is not justified in maintaining that it is a concentration for the purposes of Article 3 of Regulation No 139/2004. [13]

In that regard, the Court notes, in the first place, that the action concerns formally only the Commission decision declaring the first concentration operation compatible with the internal market. That decision does not explicitly determine the classification to be given to the third operation, in the light of the concept of 'concentration' and, consequently, whether the Commission has competence to assess its compatibility with the internal market. Therefore, EVH cannot ask the Court to rule on a question of competence which has not been considered by the Commission in the decision which is the subject of the action. Moreover, if EVH was of the opinion that the third concentration operation may have a Union dimension, it was for EVH to complain to the Commission in order to ask it to determine the case, since, in such a case, the Commission is required to decide on the principle of its competence as supervising authority.

In the second place, and in any event, the acquisition of a minority shareholding may give rise to control only where specific rights are attached to that minority shareholding, bringing about de jure sole control, or where a minority shareholder obtains, due to extraordinary circumstances, sole control on a de facto basis. [14] In this case, EVH has not claimed that specific rights were attached to the minority shareholding acquired by RWE, or shown that RWE had acquired de facto sole control over E.ON.

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13 That provision, entitled 'Definition of concentration', provides the criteria that an operation must fulfil in order to be considered a concentration within the meaning of EU law.

14 See, to that effect, paragraphs 57 and 59 of the Codified Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1).

As for the question whether the three concentration operations may be regarded as the components of a single concentration, the Court observes that, for that purpose, two conditions must be met. [15] First, the operations must be interdependent in such a way that none of them would be carried out without the others. Second, the result of those operations must consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings. In the light of those conditions, the concept of 'single concentration' cannot apply when interdependent undertakings gain control of different targets, as is the case in an asset swap.

In this case, it follows from the Court's examination that the overall transaction meets the condition relating to interdependence but not that relating to result. There is no functional link between the three concentration operations, since the overall transaction in question is not a concentration by means of which several intermediate transactions are carried out in order for control over one or several undertakings to be gained by the same undertaking or undertakings. In those circumstances, since one of the conditions is not met, the Commission validly took the view that the three concentration operations were not components of a single concentration.

That being said, there is nothing contentious in the Commission analysing separately the first and second concentration operations while taking into account, in the decision at issue, the effects which they have on each other respectively.

In that regard, the Court states as a preliminary point that, even if it were to confirm the existence of the rule of priority in the terms set out by the Commission, namely that a concentration must be examined in the light of all transactions previously notified, it would not apply in the present case. The first concentration operation was formally notified before the second concentration operation. The Court adds that, having regard to the interdependence in law and in fact of the concentration operations at issue, the mechanical application of that rule could have arbitrary effects on the scope of the Commission's analysis. Thus, to the extent that those concentration operations have a link allowing the Commission to gain an understanding of the probable effects on the market of each concentration, it is for the Commission to take it into account in the overall assessment of all the relevant evidence that it carries out in respect of each of those operations. Those constitute, in the light of the other operations, an element which the Commission must take into account in its overall analysis of the effects of the operation on the internal market.

Next, the Court rejects the plea alleging infringement of the right to effective judicial protection in that the publication of the decision at issue took place after a considerable amount of time had elapsed, observing that the late publication of an act of the Union has no bearing on the validity of that act.

In its analysis, the Court notes that although Regulation No 139/2004 does not require the publication in the Official Journal of the European Union of Commission decisions adopted under Article 6(1)(b) of that regulation, the Commission, in practice, has a self-imposed obligation to publish such decisions and to do so while ensuring that the confidentiality of information bound by professional secrecy or other public policy exemptions is preserved. [16] The Court considers that such an approach is consistent with the Commission's obligation to guarantee, by means of appropriate publicity, the right of third parties, directly and individually concerned by such decisions, to effective judicial protection.

Lastly, the Court rejects the plea alleging manifest errors by the Commission in its assessment of the compatibility of the concentration at issue with the internal market, due to, inter alia, the choice of a period of analysis which is allegedly too short and, second, to an examination of the influence that RWE is liable to have over E.ON which is claimed to be insufficient, in particular in the light of their common shareholding.

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15 See, to that effect, recital 20 and Article 3(1)(b) of Regulation No 139/2004.

16 See paragraphs 2 and 5 of 'Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation'.

So far as concerns the period of analysis, the Court recalls that, in merger control, the Commission must assess whether a concentration is such as to significantly impede effective competition in the internal market or in a substantial part of it. A prospective analysis consisting in an examination of how a concentration might alter the factors determining the state of competition on a given market makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely. It follows that the Commission must carry out an assessment of the effects of the concentration over a period the maximum duration of which cannot exceed – with a sufficient degree of certainty – the time frame within which certain events may occur. From that point of view, the Commission cannot be required to carry out a prospective analysis on the basis of elements of which it is not able to envisage, within a reasonable margin of error, the long-term effects.

As for the collective influence exerted by RWE and a third company over E.ON, the Court does not rule out that the existence of a common shareholding, namely the possession by the same institutional investors of shares in competing undertakings and its non-coordinated competitive effects, may reduce competitive pressures on other competitors. For that reason, the effect of that reduction alone is not, in principle, on its own, sufficient to demonstrate a significant impediment to effective competition, in the context of a theory of harm based on non-coordinated effects. In the present case, the Court notes that EVH has not been able to identify indicative factors capable of establishing that the presence of the third company in question in the capital of RWE and E.ON amounts to evidence that there is already a tendency to collective dominance. It follows that the Commission cannot be found to have made a manifest error of assessment by failing to mention such evidence.

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

Judgment of the General Court (Fourth Chamber, Extended Composition), 17 May 2023, enercity v Commission, T-321/20

Competition – Concentrations – German electricity market – Decision declaring the concentration compatible with the internal market – Action for annulment – No locus standi – No active participation – Inadmissibility

In March 2018, the companies RWE AG and E.ON, both governed by German law, announced that they wanted to engage in a complex asset swap by means of three concentration operations.

By the first operation, RWE, which is active across the whole supply chain of energy provision in several European countries, wished to acquire sole or joint control over certain generation assets of E.ON, an electricity provider which operates in several European countries. The second concentration operation consisted in the acquisition by E.ON of the sole control over the distribution and retail energy business, as well as some production assets of Innogy SE, a subsidiary of RWE. As for the third concentration operation, it concerned the acquisition of 16.67% of E.ON's shares by RWE.

On 24 July 2018, the German municipal authority enercity AG, which generates and provides energy in Germany notified the European Commission of its wish to participate in the procedure relating to the first and second concentration operations and, consequently, to receive the documents relating thereto.

Since the first concentration operation had been notified to the Commission on 22 January 2019, the latter conducted, inter alia, a market test by sending a questionnaire to certain undertakings. By

decision of 26 February 2019 [17] ('the decision at issue'), the Commission declared that concentration compatible with the internal market.

Enercity [18] brought an action for annulment of that decision which was dismissed as inadmissible by the Fourth Chamber of the General Court (extended composition), since the municipal authority was not individually concerned by the decision at issue. To reach that conclusion, the Court examines in particular the novel question of the burden of proof so far as concerns the sending of the questionnaire by the Commission in the context of conducting its market test.

Findings of the General Court

As a preliminary point, the Court recalls that, under the fourth paragraph of Article 263 TFEU, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him or her.

In that regard, the Court confirms that enercity is directly concerned by the decision at issue since, by allowing the first concentration operation to be put into effect immediately, that decision was capable of bringing about an immediate change in the state of the relevant markets.

As regards whether enercity is individually concerned by a decision finding that a concentration is compatible with the internal market, the General Court notes that the individual concern of a undertaking which is a third party to that concentration depends, on the one hand, on the effect on its market position and, on the other, on its participation in the administrative procedure. On that latter point, it follows from the case-law that while the active participation by the third party in the administrative procedure is a factor regularly taken into account to establish, in conjunction with other specific circumstances, the admissibility of its action for annulment, mere participation in the procedure is not sufficient to establish that the decision is of individual concern to that third party.

In the present case, the Court notes from the outset that the participation of enercity in the administrative procedure relating to the first concentration is not being challenged. That being said, the Court finds on the basis of a detailed examination of the evidence submitted in this respect that that evidence is not sufficient to establish the 'active' nature of that participation. The Court holds, more specifically, that the observations made by enercity in that context, although they bear some relevance and have been dealt with by the Commission, were not conclusive in order to assess the effects of the concentration in question on the relevant market.

That finding is not invalidated by enercity's line of argument alleging, in substance, lack of care and attention of the Commission's services in its respect, both in relation to the sending of the questionnaire for the purposes of the conduct of a market test and to the action taken in response to its request that it be recognised as an interested third party.

In so far as enercity claims that it had not received that questionnaire, the Court states, first of all, that it is for the Commission to submit evidence that it had been sent. In that regard, the Court notes that the Commission, in compliance with a measure of organisation of procedure, submitted several items of evidence to demonstrate that the document at issue had been sent to enercity.

Next, in response to enercity's argument that the questionnaire was addressed to the wrong recipient, namely its press officer, the Court observes that it can reasonably be expected of such a person, in receipt not only of an email but also of a fax from an European institution, that it would let that institution know as soon as possible of the error in the recipient. Moreover, it was also possible

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[17] Commission Decision C(2019) 1711 final of 26 February 2019, declaring that a concentration is compatible with the internal market and with the EEA agreement (case M.8871 – RWE/E.ON Assets).

[18] Notably, ten other companies also sought the annulment of this decision. All of these actions were dismissed either as inadmissible, or on the merits. See related series of cases: judgments of 17 May 2023, EVH v Commission, T-312/20, Stadtwerke Leipzig v Commission, T-313/20, Stadtwerke Hameln v Commission, T-314/20, TEAG v Commission, T-315/20, Naturstrom v Commission, T-316/20, EnergieVerbund Dresden v Commission, T-317/20, eins energie in sachsen v Commission, T-318/20, GGEW v Commission, T-319/20, Mainova v Commission, T-320/20, and Stadtwerke Frankfurt am Main v Commission, T-322/20.

for that person to contact the legal or commercial department of its undertaking to inform them of the receipt of those documents.

In any event, even if enercity had sent back the completed questionnaire, that mere correspondence was not sufficient for its participation in the administrative procedure to be classified as active and to distinguish enercity individually for the purposes of the fourth paragraph of Article 263 TFEU.

Lastly, even if enercity's request to the hearing officer to be recognised as an interested third party is evidence of its will to participate in the procedure relating to the concentration at issue, the Court also does not accept that such a request may establish the 'active' nature of its participation, since such a classification requires the existence of acts of the undertaking concerned which may have influenced the procedure at issue to be established.

In those circumstances, from which it is apparent that enercity did not actively participate in the first concentration operation and, moreover, having regard to the absence of specific circumstances relating to effects on its market position, the General Court considers that it is not individually concerned by the decision at issue. Accordingly, the Court concludes that energycity has not demonstrated that it has standing to bring proceedings and, consequently, dismisses its action as inadmissible.

2. STATE AID

Judgment of the General Court (Tenth Chamber, Extended Composition), 10 May 2023, Ryanair and Condor Flugdienst v Commission (Lufthansa; COVID-19), T-34/21 and T-87/21

Link to the full text of the judgment

State aid – German air transport market – Aid granted by Germany to an airline in the context of the COVID-19 pandemic – Recapitalisation of Deutsche Lufthansa – Decision not to raise any objections – Temporary Framework for State aid measures – Actions for annulment – Locus standi – Substantial effect on competitive position – Admissibility – Significant market power – Additional measures to preserve effective competition on the market – Obligation to state reasons

On 12 June 2020, the Federal Republic of Germany notified the European Commission of individual aid in the form of a recapitalisation of EUR 6 billion ('the measure at issue') granted to Deutsche Lufthansa AG ('DLH'). The recapitalisation, part of a wider series of support measures for the Lufthansa Group, [19] was intended to restore the balance sheet position and liquidity of the undertakings in that group in the exceptional situation caused by the COVID-19 pandemic.

The measure at issue consisted of three different elements, namely an equity participation of approximately EUR 300 million, a silent participation that is not convertible into shares of approximately EUR 4.7 billion ('Silent Participation I') and a silent participation of EUR 1 billion with the features of a convertible debt instrument ('Silent Participation II').

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission classified the measure at issue as State aid that was compatible with the internal

[19] DLH is the parent company of the Lufthansa Group, which, inter alia, comprises Lufthansa Passenger Airlines, Brussels Airlines SA/NV, Austrian Airlines AG, Swiss International Air Lines Ltd and Edelweiss Air AG.

market [20] under Article 107(3)(b) TFEU [21] and the Communication from the Commission on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. [22]

The airlines Ryanair DAC and Condor Flugdienst GmbH ('Condor') brought two actions for annulment of that decision, which are upheld by the Tenth Chamber (Extended Composition) of the General Court on the ground that the Commission, by adopting the contested decision, infringed several conditions and requirements laid down in the Temporary Framework.

Findings of the General Court

The admissibility of the actions for annulment

As regards the standing of the applicants to bring proceedings to challenge the merits of the contested decision, the Court observes that, in accordance with the fourth paragraph of Article 263 TFEU, there are two alternative situations in which any natural or legal person may institute proceedings against an act which is not addressed to them, namely, first, if the act at issue is of direct and individual concern to them and, second, if it is a regulatory act that is of direct concern to them and does not entail implementing measures.

Since the contested decision, which is addressed to the Federal Republic of Germany, does not constitute a regulatory act, the Court determines whether the applicants are directly and individually concerned by that decision.

As regards, first, the question of individual concern, it is apparent from the case-law that that condition may be satisfied if the applicants adduce evidence to show that the measure concerned is liable to have a substantial adverse effect on their position on the market at issue. Accordingly, Ryanair and Condor showed their status as direct competitors to the Lufthansa Group on a multitude of routes, which would all constitute relevant markets. Ryanair also highlighted its status as a direct competitor of the Lufthansa Group on the German, Belgian and Austrian markets.

After observing that, at the stage of examining the admissibility of an action, it is sufficient to find that the definition of the market at issue put forward by the applicants is plausible, that being without prejudice to the substantive examination of that issue, the Court confirms that the measure at issue was liable to have a substantial effect on the competitive position of the applicants on the markets for the transport of passengers by air.

It is apparent from examining the relevant and credible data provided by the applicants, read in combination with the contested decision, that the measure at issue was not only likely to allow the Lufthansa Group to cope with the risk of an exit from the markets on which it was in direct competition with the applicants, but also to strengthen its competitive position. Accordingly, the grant of the measure at issue was prima facie capable of causing the loss of an opportunity to make a profit or a less favourable development than would have been the case for the applicants without such a measure.

As regards, second, the question of whether the applicants are directly concerned, the Court observes that a competitor of a beneficiary of aid is directly concerned by a Commission decision authorising a Member State to pay the aid when there is no doubt as to that State's intention to do so, which was the case in this instance.

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20 Commission Decision C(2020) 4372 final of 25 June 2020 concerning State Aid SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa ('the contested decision'). On 14 December 2021, the Commission adopted Decision C(2021) 9606 final, correcting the contested decision.

21 Under Article 107(3)(b) TFEU, aid to remedy a serious disturbance in the economy of a Member State may, under certain conditions, be considered to be compatible with the internal market.

22 Communication from the Commission of 19 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID19 outbreak (OJ 2020 C 91 I, p. 1 ; 'the Temporary Framework'), which was amended, for the first time, on 3 April 2020 (OJ 2020 C 112 I, p. 1) and, for a second time, on 8 May 2020 (OJ 2020 C 164, p. 3).

Having regard to all those factors, the Court confirms that the applicants are entitled to challenge the contested decision on the merits by means of their actions for annulment.

The merits of the actions for annulment

Before examining the merits of the various pleas for annulment raised by the applicants, the Court observes that the Commission is bound by the guidelines and notices that it issues in the specific area of State aid, to the extent that they do not depart from the rules in the Treaty. It is therefore for the Courts of the European Union to determine whether the Commission has observed the rules which it has adopted in that area.

The Court states, furthermore, that in the context of the review that it conducts on complex economic assessments carried out by the Commission in the field of State aid, it is true that it is not for the Court to substitute its own economic assessment for that of the Commission. However, the Court must establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In addition, the review carried out by the Courts of the European Union is comprehensive as regards the evaluations made by the Commission which do not involve complex economic assessments or as regards questions of a strictly legal nature.

A. The eligibility of DLH for the notified aid

Having made those observations, the Court examines, first of all, the various complaints contesting the eligibility of DLH for the notified aid. In that regard, the applicants in particular alleged an infringement of point 49(c) of the Temporary Framework, which states that, in order to be eligible for a recapitalisation measure, the beneficiary must be unable to obtain financing on the markets at affordable terms.

According to the contested decision, that condition was satisfied since DLH would not have had sufficient collateral to obtain financing on the markets for the entire amount of the aid.

On that point, the Court observes, however, that there is nothing in the contested decision to indicate that the Commission assessed the possible availability of collateral, such as DLH's unencumbered aircraft, their value and the terms for any loans that it may have been possible to obtain on the financial markets against such collateral. Furthermore, the assertion that the 'collateral' – not specified in the contested decision – would not be sufficient to cover the entire amount of the funds necessary is based on a false premiss, that the financing that can be obtained on the markets must necessarily cover all of the beneficiary's needs. Neither the wording, purpose nor context of point 49(c) of the Temporary Framework provides support for the view that the beneficiary must be incapable of finding financing on the markets for the entirety of its needs.

Since the Commission did not assess whether DLH could have raised a non-negligible part of the necessary financing on the markets, the Court finds that the Commission failed to take account of all the relevant evidence that must be taken into consideration in order to assess the compliance of the measure at issue with point 49(c) of the Temporary Framework. Consequently, the Court upholds the complaint made by Ryanair based on an infringement of that point, and, a fortiori, that of Condor alleging the existence of serious doubts in that regard.

B. The remuneration and exit of the State

The Court then addresses the complaints alleging an infringement of the conditions laid down in the Temporary Framework as regards the remuneration and exit of the State.

In that regard, Ryanair in particular criticised the Commission for not providing a step-up mechanism for increasing the remuneration of the German State as regards, first, the equity participation in DLH and, second, Silent Participation II after its possible conversion into equity.

In the first place, as regards the remuneration for equity instruments, such as the equity participation, point 61 of the Temporary Framework states that any recapitalisation measure is to include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. Point 62 of the framework provides that the Commission may accept alternative mechanisms, provided that they lead overall to a similar outcome with regard to the

incentive effects on the exit of the State and have a similar impact overall on the State's remuneration.

While the participation of the German State in the equity of DLH was not accompanied by any step-up mechanism within the meaning of point 61 of the Temporary Framework, the Commission found that the overall structure of the notified aid constituted an alternative step-up mechanism, within the meaning of point 62, in that it included sufficiently strong incentives for the exit of the State from DLH's capital. In support of that finding the Commission referred inter alia to the significant discount at which Germany had acquired the shares in DLH, which would provide the State with higher remuneration than that which would have resulted from the application of a step-up mechanism.

That line of argument is, however, rejected by the Court, which observes that the price at which the State acquires shares on entry into the capital of the beneficiary is governed by point 60 of the Temporary Framework, according to which a capital injection by the State is to be conducted at a price that does not exceed the average share price over the 15 days preceding the request for the capital injection. The subject matter and objective of that rule are different from those underlying the step-up mechanism. While the latter mechanism is intended to be an incentive to the beneficiary concerned to buy back the State's shareholding as quickly as possible, the rule concerning the purchase price of the shares is intended, in essence, to ensure that the price at which the State acquires its shares does not exceed their market price. Since the price of the shares may rise as well as fall, the purchase price is not necessarily intended to increase the incentive, over time, for the beneficiary concerned to buy back the State's shareholding.

It follows that, contrary to what was argued by the Commission, the price of the shares at the time of the entry of the German State into the capital of DLH did not constitute an alternative step-up mechanism for increasing the remuneration of that State.

In the second place, as regards Silent Participation II, which is a hybrid capital instrument, point 68 of the Temporary Framework requires that, after its conversion into equity, a step-up mechanism must be included to increase the remuneration of the State and to incentivise the beneficiaries concerned to buy back the State capital injections. According to the Court, it is common ground that Silent Participation II, at the time of its conversion into equity, is likewise not accompanied by a step-up or similar mechanism.

Consequently, the Court finds that the Commission infringed the Temporary Framework in that it failed to require the inclusion of a step-up mechanism to increase the remuneration of the State or a similar mechanism in the remuneration for the equity participation and for Silent Participation II, at the time of the latter's conversion into equity.

C. The existence of significant market power on the part of the Lufthansa Group on the markets at issue and the structural commitments

Lastly, the Court examines the complaints alleging an infringement of point 72 of the Temporary Framework, which states that if the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power ('SMP') on at least one of the relevant markets on which it operates, Member States must propose additional measures to preserve effective competition on those markets.

In that regard, the applicants essentially raised three sets of complaints relating to (a) the definition of the markets at issue; (b) whether the Lufthansa Group holds SMP on those markets; and (c) the effectiveness and sufficiency of the structural commitments accepted by the Commission.

a. The definition of the relevant markets

In the first place, as regards the definition of the relevant markets, the Commission held in the contested decision that the markets on which the Lufthansa Group operated were the markets for the provision of passenger air transport services to and from the airports served by that group. It thus identified the relevant markets according to the 'airport-by-airport' approach. That approach is contested by the applicants, which state that the Commission should have defined the markets for the provision of passenger air transport services as pairs of cities between a point of origin and a point of destination ('the O&D markets').

Since point 72 of the Temporary Framework does not specify the method that should be used for defining the relevant markets, the Court observes that the recapitalisation measures falling under the Temporary Framework are intended to remedy a serious disturbance in the economy of a Member State by supporting, in particular, the viability of the undertakings affected by the COVID-19 pandemic so as to restore their capital structure to the level existing before the pandemic. Those aid measures thus target the overall financial situation of the beneficiary and, more generally, that of the economic sector concerned.

In that context, the measure at issue sought to ensure, in essence, that the companies of the Lufthansa Group have sufficient liquidity and that the disruptions caused by the COVID-19 pandemic do not undermine their viability, and not to support the presence of that group on a particular route. Consequently, the Commission was right to state that the measure at issue was aimed at preserving the overall ability of the Lufthansa Group to operate air transport services and that, as a result, it was not appropriate to analyse the impact of the measure at issue on each O&D market taken in isolation.

The arguments put forward by the applicants based on the approach followed in the area of merger control, in which the relevant markets are defined according to the O&D approach, likewise fail to convince, since that analogy does not take sufficient account of the specific features of the Temporary Framework and the measure at issue, which does not have a direct link with particular O&D markets rather than others.

Consequently, for the purpose of applying point 72 of the Temporary Framework, the Commission was entitled, without making a manifest error of assessment, to define the markets at issue according to the 'airport-by-airport' approach.

In addition, the Court rejects the complaints made by Ryanair, in the alternative, that the Commission erred in its application of the 'airport-by-airport' approach by limiting its examination solely to the airports in the European Union where the Lufthansa Group had a base. On that point, the Court observes that inasmuch as Ryanair has not demonstrated to the requisite legal standard that the Lufthansa Group was likely to have SMP at the airports at which it had no base, the Commission was entitled to exclude those airports from its analysis. Furthermore, in questions of State aid, the Commission has no jurisdiction to examine whether the Lufthansa Group holds SMP at an airport located outside the European Union.

b. Whether the Lufthansa Group holds SMP at the relevant airports

With all of the applicants' arguments concerning the definition of the relevant markets having been rejected as unfounded, the Court analyses, in the second place, the complaints related to whether the Lufthansa Group holds SMP at the airports examined by the Commission.

Since the concept of SMP is not defined in the Temporary Framework, nor more generally in the field of State aid, the Court begins by observing that that concept must be regarded, in essence, as equivalent to that of a dominant position under competition law. According to settled case-law, such a dominant position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

In the contested decision, as corrected, the Commission based its analysis of whether the Lufthansa Group held SMP at the 10 airports examined [23] on the slot holdings possessed by that group at those airports, the level of congestion there, and the number of slots held by competitors; it also took into account the number of aircraft based by that group and its competitors at some of the airports.

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23 Namely Berlin Tegel, Brussels, Düsseldorf, Frankfurt, Hamburg, Munich, Palma de Mallorca, Stuttgart, Vienna and Hannover airports.

In that regard, the Court finds that those criteria, which relate in essence to airport capacity and concern access by airlines to airport infrastructure, do not provide direct information about the market shares of the Lufthansa Group on the market for the provision of passenger air transport services at the airports examined. However, given that the relationship between the market shares of the latter undertaking and of its competitors is relevant evidence of the existence of SMP, the Commission could not ignore factors providing information on that issue, such as the number of flights and seats offered to and from the airports concerned. It follows that, by failing to take into consideration all the factors that were relevant for assessing the market power of the Lufthansa Group at the airports concerned, the Commission made a manifest error of assessment.

Furthermore, and in any event, the Commission also made a manifest error of assessment by finding, on the basis solely of the criteria that it examined, that the Lufthansa Group enjoyed SMP at Frankfurt and Munich airports during the 2019 summer and the 2019/2020 winter seasons, but that such was not the case as regards the other relevant airports. In that regard, the Court observes that an overall assessment of the criteria analysed by the Commission for Düsseldorf and Vienna airports during the 2019 summer season demonstrates the existence of a very high slot holding on the part of the Lufthansa Group at Düsseldorf Airport and a high slot holding at Vienna Airport, including during peak hours; a very high congestion rate at those two airports, characterised by almost complete congestion during peak hours; and the weak position of the group's competitors. Consequently, on the basis of those criteria alone, the Commission could not properly find that the Lufthansa Group did not hold SMP at Düsseldorf and Vienna airports, at least during the 2019 summer season. Furthermore, and in any event, the data which led the Commission to find that the Lufthansa Group held SMP at Frankfurt and Munich airports were not materially different from those concerning Düsseldorf and Vienna airports, at least as regards the 2019 summer season. On that basis, the Court upholds the complaints put forward by the applicants.

c. The structural commitments

In the third and final place, the Court examines the complaints contesting several aspects of the structural commitments accepted by the Commission under point 72 of the Temporary Framework, in order to preserve effective competition at Frankfurt and Munich airports.

Under point 72, the Member States may, in proposing such measures, offer structural or behavioural commitments foreseen in the Notice on remedies. [24] In accordance with that notice, the commitments proposed have to eliminate the competition concerns entirely, be comprehensive and effective from all points of view and, furthermore, must be capable of being implemented effectively within a short period of time. In that context, the Commission must in particular consider all relevant factors relating to the proposed remedy itself, including the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market.[1] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p. 1).It is necessary also to take account of the specific features of the law on State aid and, more particularly, the Temporary Framework, of which the requirement related to additional measures is part. Given that the objective of the aid granted in accordance with that framework is to ensure the operational continuity of viable undertakings during the COVID-19 pandemic, the commitments set out in point 72 thereof must be designed so as to ensure that, after the aid has been granted, the beneficiary will not become more powerful on the market than it was before the COVID-19 outbreak and that effective competition on the markets concerned will be maintained. In the present case, the contested decision envisaged, as measures proposed by Germany under point 72 of the Temporary Framework, in particular, the divestiture by DLH of 24 slots a day at each of Frankfurt and Munich airports as well as additional assets, as required by the Slot Coordinator to allow for the transfer of slots.In that regard, the applicants

contested, inter alia, the procedure for the divestiture of the slots approved in the contested decision, which was intended to take place in two stages. In the first stage, the slots were to be offered 'to new entrants' only. If, after a specific period exceeding several seasons, the slots were not divested to a new entrant, they would, in a second stage, be made available to carriers which already have a base at those two airports.Referring to the Commission's duty to consider all the relevant factors relating to the proposed commitments, judged by reference to the structure and particular characteristics of the market at issue, including the position of the parties and other players on the market, the Court finds that the Commission failed to examine whether it was appropriate to exclude the competitors already based at Frankfurt and Munich airports from the first stage of the procedure. In the contested decision, the Commission did not put forward any reason capable of demonstrating that that exclusion was likely to maintain effective competition on the relevant markets and that it was necessary for that purpose.In the present case, such an examination was all the more necessary since the structure of the market at Frankfurt and Munich airports was characterised, according to the contested decision itself, by the much greater weight of the Lufthansa Group in comparison with that of its closest competitors, which already had a base at those airports, such that their exclusion from the first stage of the procedure risked having the effect of further fragmenting competition at those airports. Furthermore, the fact that the closest competitors of the Lufthansa Group, which, owing to their presence at Frankfurt and Munich airports could be better placed to acquire the slot portfolio at issue and increase the competitive pressure, may become eligible during the second stage of the procedure does not call that finding into question, since their eligibility depends on the failure of the first stage. In the light of the foregoing, the Court finds that by excluding the competitors that already have a base at Frankfurt and Munich airports from the first stage of the slot divestiture procedure, the Commission failed to examine all the relevant factors relating to the proposed commitment, and therefore made a manifest error of assessment. As regards the divestiture of DLH's slots at Frankfurt and Munich airports, Condor, in addition, alleged that the Commission infringed its obligation to state reasons in that it did not explain how the requirement to pay for the divestiture of the slots at issue, as set out in the contested decision, rather than requiring their transfer free of charge is, first, in compliance with the applicable rules and, second, makes the commitments sufficiently attractive to a potential purchaser.On that point, the Court observes that the requirement that the divestiture of slots should be remunerated was of decisive importance in the scheme of the contested decision, with the result that the Commission was obliged to state the reasons why it considered that that requirement complied with the applicable rules. Given the absence of any indication as to the reasons which led the Commission to find that the slot divestiture at issue should be carried out in return for remuneration and not carried out free of charge, and that that requirement would not have the effect of reducing the attractiveness of those slots and, therefore, the effectiveness of the related commitments, the Court finds that the Commission failed to fulfil its obligation to state reasons for the contested decision. In the light of all of the foregoing, the Court finds that the contested decision, as corrected, is vitiated by several errors and irregularities and, in consequence, it annuls that decision.

Judgment of the General Court (Tenth Chamber), 24 May 2023, Ryanair v Commission (Italy; aid scheme; COVID-19), T-268/21

Link to the judgment as published in extract form

State aid – Italian air transport market – Compensation scheme for airlines with an Italian operating licence – Decision not to raise any objections – Aid intended to make good the damage caused by an exceptional occurrence – Obligation to state reasons

In October 2020, the Italian Republic notified the European Commission of an aid measure consisting in subsidies paid out of a EUR 130 million compensation fund to certain airlines holding an Italian licence ('the measure at issue'). That measure was intended to make good the damage suffered by eligible airlines as a result of travel restrictions and other containment measures taken to limit the spread of the COVID-19 pandemic.

Under one of the conditions of eligibility provided for by the measure at issue, in order to benefit from it, airlines had to apply to their employees whose home base was in Italy and to employees of third-party undertakings taking part in their activities remuneration equal to or higher than the minimum remuneration established by the national collective agreement applicable to the air transport sector, concluded by the employers' organisations and trade unions considered to be the most representative at national level ('the minimum remuneration requirement').

Without opening the formal investigation procedure provided for Article 108(2) TFEU, the Commission decided not to raise objections to the measure at issue, on the ground that it was compatible with the internal market. [25]

An action for annulment was brought by the airline Ryanair before the General Court, who annuls that decision on grounds of failure to provide a statement of reasons, as provided for in Article 296 TFEU.

Findings of the General Court

According to settled case-law, a decision not to initiate the formal investigation procedure in respect of notified aid must set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the internal market. Although a succinct statement of reasons is sufficient for that purpose, it must disclose in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with such difficulties.

The Court finds that that has not been done here, however.

First of all, it observes that, in the contested decision, the Commission affirmed both that the minimum remuneration requirement was indissolubly linked to the measure at issue and that that requirement was not inherent in the objective of that measure without, however, setting out in a clear and unequivocal manner the reasoning which led it to make those two statements.

The Court further finds that the conclusion in the contested decision, to the effect that the minimum remuneration requirement was not contrary to 'other provisions of Union law' than Articles 107 and 108 TFEU, was also vitiated by a failure to state reasons.

On that point, it observes that the only EU law provision, other than Articles 107 and 108 TFEU, in the light of which the Commission examined that requirement was Article 8 of the Rome I Regulation, [26] which lays down special conflict-of-law rules relating to individual contracts of employment. However, the Commission still failed to set out, in the contested decision, the reasons substantiating its view that that article was the only relevant provision, other than Articles 107 and 108 TFEU, in the light of which it had to examine the compatibility of the minimum remuneration requirement with EU law. Accordingly, the Commission failed to set out in a clear and transparent manner the reasons why it had found that that requirement did not constitute an infringement of 'other provisions of Union law'.

That failure to state reasons is illustrated by the fact that, when examining the minimum remuneration requirement, the Commission took account of a complaint filed by the Italian Low Fares Airline Association contesting the compatibility of Italian rules providing for a minimum remuneration requirement similar to that included in the measure at issue with the freedom to provide services under Article 56 TFEU. In view of that context, the Commission was a fortiori in a situation in which it had to rule on the relevance of Article 56 TFEU for the purposes of its examination of the compatibility of the measure at issue with the internal market.

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25 Commission Decision C(2020) 9625 final of 22 December 2020 on State aid SA.59029 (2020/N) Compensation scheme for airlines with an Italian operating licence.

26 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

In the light of the foregoing, the Court concludes that the Commission infringed the obligation to state reasons imposed on it by Article 296 TFEU and, consequently, annuls the contested decision.

3. RULES APPLYING TO UNDERTAKINGS

Judgment of the General Court (Fifth Chamber, Extended Composition), 24 May 2023, Meta Platforms Ireland v Commission, T-451/20

Link to the full text of the judgment

Competition – Data market – Administrative procedure – Article 18(3) and Article 24(1)(d) of Regulation (EC) No 1/2003 – Request for information – Virtual data room – Obligation to state reasons – Legal certainty – Rights of the defence – Necessity of the information requested – Misuse of powers – Right to privacy – Proportionality – Principle of good administration – Professional secrecy

On the basis of suspicions of anticompetitive behaviour by the Facebook group in its use of data and in the management of its social network platform, the European Commission, by decision of 4 May 2020, 27 sent a request for information to Meta Platforms Ireland Ltd, formerly Facebook Ireland Ltd. That decision, adopted pursuant to Article 18(3) of Regulation No 1/2003, 28 required Meta Platforms Ireland to provide the Commission with all documents prepared or received by three of its executives within the period concerned which contained one or more of the search terms defined in the annexes. That decision provided for a potential penalty payment of EUR 8 million per day in the event of failure to provide the information requested. 29

The decision of 4 May 2020 replaced an earlier similar decision, which laid down broader search criteria. That new decision, taken after exchanges between the Commission and Meta Platforms Ireland, reduced the number of documents requested by refining search terms and limiting the number of officials concerned.

On 15 July 2020, Meta Platforms Ireland brought, first, an action for annulment of the decision of 4 May 2020 and, second, an application for interim measures.

By interim order of 29 October 2020, 30 the President of the General Court ordered that the operation of the decision of 4 May 2020 be suspended until a specific procedure had been put in place for the production of the requested documents which were not linked to Meta Platforms Ireland's business activities and which also contained sensitive personal data. Subsequent to that order, the Commission adopted an amending decision 31 stating that those documents could be placed on the investigation file only after having been examined in a virtual data room in the manner specified in the interim order.

Meta Platforms Ireland modified its application for annulment to take account of that amending decision. The Fifth Chamber, Extended Composition, of the General Court dismisses the action in its entirety. In that context, the General Court examines, for the first time, the lawfulness under

27 Commission Decision (C(2020) 3011 final of 4 May 2020 relating to a proceeding pursuant to Article 18(3) and to Article 24(1)(d) of Regulation (EC) No 1/2003 (Case AT.40628 – Facebook Data-related practices).

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

29 On the same date, the Commission adopted a request for information under Article 18(3) of Regulation (EC) No 1/2003 in respect of Meta Platforms Ireland Ltd in the context of its parallel investigation into certain practices relating to the Marketplace product. The action for annulment brought by Meta Platforms Ireland Ltd against that decision is dismissed by the Court in its judgment of the same date in Case T-452/20, Meta Platforms Ireland v Commission.

30 Order of 29 October 2020, Facebook Ireland v Commission (T-451/20 R, not published, EU:T:2020:515).

31 Commission Decision C(2020) 9231 final of 11 December 2020.

Regulation No 1/2003 of a request for information using search terms, as well as the lawfulness of a virtual data room procedure for the processing of documents containing sensitive personal data.

Findings of the Court

In support of its action for annulment, Meta Platforms Ireland argued, inter alia, that applying the search terms specified in the request for information would inevitably lead to the capture of a significant number of documents with no relevance to the investigation carried out by the Commission, which would be contrary to the principle of necessity set out in Article 18 of Regulation No 1/2003.

On that point, the Court recalled that, under Article 18(1) of Regulation No 1/2003, the Commission may, by simple request or by decision, require undertakings to provide 'all necessary information' in order to monitor compliance with the EU competition rules. It follows that the Commission is entitled to require the disclosure only of information which may enable it to investigate presumed infringements which justify the conduct of its investigation. Having regard to the broad powers of investigation conferred on the Commission by Regulation No 1/2003, that necessity requirement is satisfied if the Commission could reasonably suppose, at the time of the request, that the information may help it to determine whether an infringement of the competition rules has taken place.

In support of its complaints challenging whether the principle of necessity had been complied with, Meta Platforms Ireland had disputed certain search terms in the request for information, while arguing that those specific criticisms ought to be understood as non-exhaustive examples intended to illustrate its more general line of argument. In its view, it would have been unreasonable, if not impossible, to focus on each search term separately.

However, the Court rejects that approach and considers that an overall assessment of compliance with the principle of necessity set out in Article 18 of Regulation No 1/2003 is not appropriate in the present case, even if it were possible. The fact that certain search terms may, as Meta Platforms Ireland submits, be too vague has no bearing on the fact that other search terms may be sufficiently precise or targeted to enable the finding – that they may help the Commission to determine whether an infringement of the competition rules has taken place – to be established.

Having regard to the presumption that acts of the EU institutions are valid, the Court accordingly concludes that only the search terms specifically challenged by Meta Platforms Ireland may be reviewed as to whether the principle of necessity has been observed. The other search terms must, by contrast, be regarded as having been defined in accordance with that principle.

In addition, after noting that the arguments concerning the search terms referred to for the first time at the stage of the reply are inadmissible, the Court examines only the search terms referred to in the application. Taking the view that Meta Platforms Ireland has not successfully established that those terms were contrary to the principle of necessity, the Court rejects the various arguments put forward in that regard as being unfounded.

In its action for annulment, Meta Platforms Ireland also submitted that, by requiring the production of numerous irrelevant documents of a private nature, the decision of 4 May 2020, as amended ('the contested decision'), infringed the fundamental right to privacy enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

In that regard, the Court recalls that, in accordance with Article 7 of the Charter, which contains rights which correspond to those guaranteed by Article 8(1) ECHR, everyone has the right to respect for his or her private and family life, home and communications.

As regards impediments to that right, Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In addition, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the light of those clarifications, the Court examines whether the impediment to Article 7 of the Charter created by the contested decision satisfies the conditions set out in Article 52(1) thereof.

After observing that Regulation No 1/2003 confers on the Commission the power to adopt the contested decision, such that the interference with privacy which it causes is provided for by law, that that decision meets objectives of general interest of the European Union and that Meta Platforms Ireland had not maintained that the contested decision compromises the essence of the right to privacy, the Court examines whether the contested decision disproportionately impedes that right.

On that point, the Court confirms, in the first place, that a request for information under Article 18(3) of Regulation No 1/2003 constitutes an appropriate measure for attaining the objectives of general interest pursued by the Commission, namely the maintenance of the system of competition intended by the Treaties.

As regards, in the second place, the question whether the contested decision goes beyond what is necessary in order to achieve those objectives of general interest, the Court notes that, following the delivery of the interim order of 29 October 2020, the Commission adopted a separate procedure for the treatment of documents to be produced by Meta Platforms Ireland but which, prima facie, were not linked with its business activities and which contained sensitive personal data ('the Protected Documents').

Under that procedure, the Protected Documents were to be transmitted to the Commission on a separate electronic medium and placed in a virtual data room accessible to a limited number of members of the team responsible for the investigation, in the presence of Meta Platforms Ireland's lawyers, with a view to selecting the documents to be placed on the file. In the event of continuing disagreement regarding the classification of a document, the amending decision also lays down a system for resolving disputes. In accordance with that decision, the Protected Documents may, moreover, be transmitted to the Commission in a redacted form by removing the names of the individuals concerned and any information allowing to identify them. Upon request by the Commission motivated by the needs of the investigation, those documents must nevertheless be provided to it in a full version.

The Court observes, furthermore, that it is not disputed that certain documents requested by the Commission contained sensitive personal data capable of falling within the data referred to in Article 9 of Regulation 2016/679 32 and Article 10 of Regulation 2018/1725, 33 in relation to which the ability to undertake processing is subject to the following three conditions:

- the processing must pursue a significant public interest, with its basis in EU law;
- the processing must be necessary to fulfil that public interest;
- EU law must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

Since those conditions are also relevant for assessing whether, in accordance with Article 52(1) of the Charter, the contested decision does not go beyond what is necessary to achieve the objectives of general interest which it pursues, the Court recalls, first, that a request for information such as the contested decision constitutes an appropriate measure for achieving the objectives of general interest pursued by the Commission (first condition) and, second, that the processing of personal data entailed by the contested decision is necessary to fulfil the significant public interest pursued (second condition).

32 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, and corrigendum OJ 2018 L 127, p. 2).

33 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

Referring to the arrangements for the transmission, consultation, evaluation and anonymisation of the Protected Documents, the Court considers that the third condition referred to above is also satisfied in the present case.

Having thereby established that the contested decision, in so far as it lays down the virtual data room procedure, does not go beyond what is necessary to achieve the objectives of general interest pursued, the Court finds, in the third place, that the disadvantages involved in that procedure were also not disproportionate to the aims pursued.

In the light of all the foregoing, the Court concludes that the impediment to the right to privacy caused by the contested decision satisfies the conditions set out in Article 52(1) of the Charter and therefore rejects the complaints alleging infringement of Article 7 of the Charter.

Since the other pleas in law raised by Meta Platforms Ireland have also proved to be unfounded, the Court dismisses the action in its entirety.

IV. APPROXIMATION OF LAWS

1. COPYRIGHT

Judgment of the Court of Justice (First Chamber), 25 May 2023, AKM (Provision of satellite packages in Austria), C-290/21

Link to the full text of the judgment

Reference for a preliminary ruling – Intellectual property – Copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission – Directive 93/83/EEC – Article 1(2) – Communication to the public by satellite – Concept – Satellite package provider – Broadcasting of programmes in another Member State – Place of the act of exploitation by which that provider participates in such communication

The applicant in the main proceedings, Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger Reg. Gen. mbH (AKM) is an Austrian copyright collecting society. It holds a licence to exploit musical works, entitling it to exercise broadcasting rights in Austria on a fiduciary basis. The company Canal+ Luxembourg Sàrl ('Canal+') is a television operator established in Luxembourg, which offers by satellite, in Austria, packages of encrypted programmes (satellite packages) of various broadcasting organisations located in other Member States, both in high definition and in standard definition.

The introduction of each of the programme-carrying satellite signals into the chain of communication (uplinking) is carried out for the most part by those broadcasting organisations themselves, sometimes by Canal+, in those other Member States. A stream is broadcast containing the entire programme in high-definition quality and additional information, such as audio data and subtitle data. After being 're-sent' by the satellite, that stream is received by satellite-receiving equipment within the coverage area. That stream is then split up and the user may access each of the programmes on a terminal by means of a decoder. The satellite packages supplied by Canal+ contain pay-TV and free-to-air programmes. Unlike pay-TV programmes, the latter are not encrypted and may always be received in standard quality by everyone in Austria.

Since it was of the view that Canal+ infringed the rights which it manages, AKM brought an action before the Austrian courts seeking, in essence, an injunction prohibiting the broadcasting by Canal+ of satellite signals in Austria and payment of compensation, claiming that, in the Member States in

which the act of broadcasting or communication to the public by satellite took place, no authorisation had been obtained for such exploitation and that it had not authorised that broadcasting in Austria.

The Oberster Gerichtshof (Supreme Court, Austria), before which an appeal on a point of law (*Revision*) had been brought against a judgment of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), which had held, inter alia, that the satellite packages at issue reached a new public, that is to say, a public different from that targeted by free-to-air transmissions by broadcasting operators, decided to refer a question to the Court of Justice for a preliminary ruling on the interpretation of Directive 93/83 [34] and, in particular, of Article 1(2)(b) thereof. Under that provision, communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

Findings of the Court

The Court ruled that, where a satellite package provider is required to obtain, for the act of communication to the public by satellite in which it participates, the authorisation of the holders of the copyright and related rights concerned, that authorisation must be obtained, such as that granted to the broadcasting organisation concerned, only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite.

The Court recalls, first of all, that, in order for the rule laid down in Article 1(2)(b) of Directive 93/83 to apply, there must be a 'communication to the public by satellite', within the meaning of Article 1(2)(a) and (c), those provisions laying down cumulative conditions to that effect. Thus, a transmission constitutes a single 'communication to the public by satellite' if (i) it is triggered by an 'act of introducing' of programme-carrying signals carried out 'under the control and responsibility of the broadcasting organisation', (ii) those signals are introduced 'into an uninterrupted chain of communication leading to the satellite and down towards the earth', (iii) those signals are 'intended for reception by the public', and (iv) in the case that those signals are encrypted, their decoding device is 'provided to the public by the broadcasting organisation or with its consent'.

Next, both the indirect and direct transmission of television programmes that fulfil all of those cumulative conditions, must each be regarded as constituting a single communication to the public by satellite and thus as indivisible. In contrast, the indivisibility of such a communication does not however signify that the intervention of the satellite package provider in that communication can occur without the authorisation of the right holders concerned.

Lastly, such authorisation must be obtained, in particular by a person who triggers that communication or who intervenes when it is carried out, so that, by means of that communication, he or she makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the protected works within the framework of an authorisation given to another person. A communication to the public by satellite, such as that at issue in the main proceedings, is triggered by the broadcasting organisation under whose control and responsibility the programme-carrying signals are introduced into the chain of communication leading to the satellite. Furthermore, it is common ground that, as a general rule, that organisation thereby renders the protected works accessible to a new public. Consequently, that organisation is required to obtain the authorisation provided for in Article 2 of Directive 93/8.

The Court also notes that, in so far as such a communication to the public by satellite is deemed to take place only in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite, the broadcasting organisation is required to obtain that authorisation only in that Member State. However, it states that, in order to determine the appropriate remuneration of the copyright holders for such communication of their works, all aspects

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[34] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

of the broadcast concerned must be taken into account, such as its actual audience and its potential audience. It infers from this that, where part of that actual or potential audience is located in Member States other than that in which the programme-carrying signals are introduced into the chain of communication leading to the satellite, it is, where appropriate, for the various collecting societies concerned to find adequate solutions in order to ensure equitable remuneration of those right holders.

That said, the Court recalls that it cannot be ruled out that other operators may intervene in the course of a communication to the public by satellite, with the result that they render the protected works or subject matter accessible to a public wider than that targeted by the broadcasting organisation concerned. In such a situation, the intervention of those operators is not covered by the authorisation granted to that organisation. That may in particular be the case where an operator expands the circle of persons having access to that communication and thereby renders the protected works or subject matter accessible to a new public.

Moreover, the Court finds that it follows from recitals 5, 14 and 15 of Directive 93/83 that Article 1(2)(b) seeks to ensure that any 'communication to the public by satellite' is subject exclusively to the legislation on copyright and related rights in force in the Member State in which the programme-carrying signals are introduced into the chain of communication leading to the satellite. Accordingly, it would be contrary to that objective if a satellite package provider were also required to obtain authorisation from the holders of the copyright and related rights concerned in other Member States.

2. EU TRADE MARK

Judgment of the General Court (Tenth Chamber), 24 May 2023, Emmentaler Switzerland v EUIPO (EMMENTALER), T-2/21

Link to the full text of the judgment

EU trade mark – International registration designating the European Union – Word mark EMMENTALER – Absolute ground for refusal – Descriptive character – Article 7(1)(c) of Regulation (EU) 2017/1001 – Collective mark – Article 74(2) of Regulation 2017/1001 – Obligation to state reasons – Article 94 of Regulation 2017/1001

Emmentaler Switzerland obtained, from the International Bureau of the World Intellectual Property Organisation, the international registration of the word sign EMMENTALER for goods corresponding to the description 'Cheeses with the protected designation of origin "emmentaler"'. [35]

That international registration was notified to the European Union Intellectual Property Office (EUIPO), but the examiner rejected the application for registration. [36] Emmentaler Switzerland therefore lodged an appeal, which was subsequently dismissed by the Second Board of Appeal of EUIPO, on the ground that the mark applied for was descriptive. [37]

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35 Goods in Class 29 within the meaning of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

36 On the basis of Article 7(1)(b) and (c) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), read in conjunction with Article 7(2) of that regulation.

37 Within the meaning of Article 7(1)(c) of Regulation 2017/1001.

By its judgment, the General Court rejects the action brought by the applicant against the Board of Appeal's decision. In this case, it examines whether the Board of Appeal infringed Article 7(1)(c) of Regulation 2017/1001 by finding that the mark applied for is descriptive. In addition, it clarifies the link between Article 74(2) of that regulation, concerning descriptive signs or indications which may constitute collective marks, and Article 7(1)(c) of that regulation, concerning descriptive marks.

Findings of the Court

First, as regards the descriptive nature of the mark applied for, the Court considers that, in the light of the evidence taken into account by the Board of Appeal, the relevant German public immediately understands the sign EMMENTALER as designating a type of cheese. Given that, in order for the registration of a sign to be refused, it is sufficient that the sign have a descriptive character in part of the European Union, which may be a single Member State, the Court holds that the Board of Appeal was entitled to conclude that the mark applied for is descriptive, without it being necessary to examine the elements which do not concern the perception of the relevant German public.

Secondly, as regards the protection of the mark applied for as a collective mark, the Court notes that Article 74(2) of Regulation 2017/1001 provides that, by way of derogation from Article 7(1)(c) of that regulation, signs or indications which may serve, in trade, to designate the geographical origin of the goods or services in question may constitute collective marks. That derogation must however be interpreted strictly. Accordingly, the scope of that derogation cannot cover signs which are regarded as an indication of the kind, quality, quantity, intended purpose, value, time of production or other characteristic of the goods in question, but only signs which will be regarded as an indication of the geographical origin of those goods. Since the mark applied for is descriptive of a type of cheese for the relevant German public and is not perceived as an indication of the geographical origin of that cheese, the Court concludes that it does not enjoy protection as a collective mark.

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

Judgment of the Court of Justice (First Chamber), 4 May 2023, ECB v Crédit lyonnais, C-389/21 P

Link to the full text of the judgment

Appeal – Economic and monetary policy – Prudential supervision of credit institutions – Regulation (EU) No 575/2013 – Calculation of the leverage ratio – Exposure measure – Article 429(14) – Exclusion of exposures meeting certain conditions – Partial refusal of authorisation – Discretion of the European Central Bank (ECB) – Action for annulment – Manifest error of assessment – Judicial review

Crédit Lyonnais is a public limited company incorporated under French law and authorised as a credit institution. That credit institution is a subsidiary of Crédit agricole SA, and is, as such, subject to the direct prudential supervision of the European Central Bank (ECB).

On 5 May 2015, Crédit agricole, on its own behalf and on behalf of the entities forming part of the Crédit agricole group, including Crédit lyonnais, applied to the ECB for authorisation [38] to exclude for the purposes of the calculation of the leverage ratio the exposures to the Caisse des dépôts et consignations (CDC), a French public institution, resulting from deposits made on various savings passbooks, which must, under the applicable French legislation, be transferred to the CDC ('the regulated savings').

The decision of 24 August 2016, by which the ECB refused to grant Crédit agricole the authorisation that it had sought, was annulled by a judgment of the General Court. [39] Following that judgment, Crédit agricole resubmitted its application for authorisation to exclude the exposures to the CDC to the ECB. By decision of 3 May 2019, [40] the ECB authorised Crédit agricole and the entities forming part of the Crédit agricole group, with the exception of Crédit lyonnais, to exclude from the calculation of the leverage ratio all their exposures to the CDC. By contrast, Crédit lyonnais was authorised to exclude only 66% of those exposures. In the decision at issue, the ECB, taking the view that it had a discretion in the present case, applied a methodology that took into account three factors, namely the creditworthiness of the French central government, the risk of fire sales of assets and the level of concentration of exposures to the CDC.

Crédit lyonnais's action, for annulment of the decision at issue in so far as it refused to authorise it to exclude from the calculation of its leverage ratio all of its exposures to the CDC, was upheld by the General Court. [41] Specifically, the Court found that the ground of the decision at issue relating to the level of risk of fire sales of assets was vitiated by 'illegality'. Consequently, it concluded that the other two elements of the methodology applied by the ECB could not have led the ECB to refuse, in the decision at issue, to grant Crédit lyonnais the benefit of the exclusion for the entirety of that institution's exposures to the CDC.

On hearing the appeal brought by the ECB, the Court set aside the judgment under appeal; and, giving final judgment in the case, dismissed the action brought by Crédit lyonnais. By its judgment, the Court clarifies the level of review by the Courts of the European Union when assessing the lawfulness of administrative decisions adopted by the ECB, where the latter enjoys a broad discretion.

Findings of the Court

The Court notes that, in so far as the ECB has a broad discretion in deciding whether or not to authorise the exclusion for the purposes of calculating the leverage ratio of exposures meeting certain conditions, the judicial review which the Courts of the European Union must carry out of the merits of the grounds of the ECB's decision must not lead it to substitute its own assessment for that of the ECB. That review seeks to ascertain that such a decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers. In that regard, the Courts of the European Union must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Where an institution enjoys broad discretion, observance of procedural guarantees is of fundamental importance, including the obligation for that institution to examine carefully and impartially all the relevant aspects of the situation in question.

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38 Under Article 429(14) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1), as amended by Commission Delegated Regulation (EU) 2015/62 of 10 October 2014 (OJ 2015 L 11, p. 37).

39 Judgment of 13 July 2018, Crédit agricole v ECB (T-758/16, EU:T:2018:472).

40 Decision ECB SSM-2019-FRCAG-39 ('the decision at issue').

41 Judgment of 14 April 2021, Crédit lyonnais v ECB (T-504/19, EU:T:2021:185; 'the judgment under appeal').

The Court observes that, in carrying out its own assessment of the characteristics of the regulated savings and their cumulative effect, the General Court considered that the level of risk of fire sales of assets was not sufficiently high to justify the ECB's refusal to exclude from the calculation of the leverage ratio all Crédit lyonnais's exposures to the CDC.

However, in so doing, the General Court, in the first place, did not call into question the ECB's findings concerning the characteristics of regulated savings which led the ECB to conclude that those characteristics did not make it possible to rule out completely any risk that Crédit lyonnais might be compelled to make fire sales of assets. That applies in particular to the ECB's findings concerning the high liquidity of the regulated savings in the absence of statutory rules limiting withdrawals of those savings and the obligation of Crédit lyonnais to reimburse depositors even during the deferred adjustment period between the positions of Crédit lyonnais and those of the CDC. Consequently, the reasoning of the General Court neither calls into question the material accuracy, reliability and consistency of the factors taken into account in the decision at issue, nor establishes that those factors do not constitute all the relevant information which had to be taken into consideration by the ECB.

In the second place, the General Court's finding that the information taken into account by the ECB was not capable of substantiating the conclusions drawn from it in the decision at issue follows from its own assessment of the level of risk of fire sales of assets. That assessment, which is based on the same factors as those taken into account by the ECB, departs from the assessment made by that institution without establishing that that assessment was manifestly incorrect.

By reasoning in that way, the General Court did not review the manifest error of assessment as was incumbent on it, but substituted its own assessment for that of the ECB in a situation in which, moreover, that institution enjoys a broad discretion.

Furthermore, concerning the General Court's assessment of the ECB's reasoning based on the experience of recent banking crises, the General Court did not establish how the considerations that regulated savings deposits cannot be invested, unlike sight deposits, in risky or illiquid assets are such as to demonstrate that the ECB's assessment of the possible risk of massive withdrawals, which had to be used to analyse the risk of fire sales of assets to which Crédit lyonnais was exposed, was manifestly incorrect. The same is true of the considerations based on the difference between the dual guarantee of the French Republic enjoyed by regulated savings passbooks and the guarantee mechanism under Directive 2014/49. [42]

The Court concluded from this that the General Court annulled the decision at issue, substituting its own assessment of the risk of fire sales of assets to which Crédit lyonnais was exposed, without establishing how the ECB's assessment set out in that decision was, in that regard, vitiated by a manifest error of assessment. In so doing, it exceeded the scope of its judicial review. In addition, it was also wrong to find that the ECB had failed to fulfil its obligation to examine carefully and impartially all the relevant aspects of the situation in question.

Following the partial annulment of the judgment under appeal, the Court ruled definitively on the action at first instance. Analysing the arguments raised by Crédit lyonnais at first instance, it finds that, having regard to the limited judicial review which is for it to carry out in the light of the ECB's wide discretion in the present case, Crédit lyonnais is not able to demonstrate that that institution's assessment, set out in the decision at issue, concerning the risk of fire sales of assets and the creditworthiness of the French government is manifestly incorrect. The Court thus upholds the decision to refuse to exclude for the purposes of the calculation of the leverage ratio of Crédit lyonnais 34% of its exposures to the CDC.

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42 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149).

VI. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS: PUBLIC PROCUREMENT BY THE INSTITUTIONS OF THE EUROPEAN UNION

Judgment of the General Court (Sixth Chamber), 26 April 2023, OHB System v Commission, T-54/21

Public supply contracts – Tendering procedure – Competitive dialogue – Procurement of Galileo transition satellites – Rejection of a tenderer's bid – Exclusion criteria – Serious professional misconduct on the part of a tenderer – Absence of a final judgment or a final administrative decision – Referral to the panel referred to in Article 143 of the Financial Regulation – Equal treatment – Abnormally low offer – Manifest error of assessment

By contract notice of 15 May 2018, [43] the European Space Agency (ESA), acting in the name and on behalf of the Commission, had launched a tendering procedure for the supply of transition satellites in the context of the Galileo programme, the aim of which is the implementation and exploitation of a European satellite navigation and positioning system for civil purposes. That procedure had been launched in the form of a competitive dialogue, since the Commission had already identified and defined its needs but had not yet determined the most appropriate specific means of meeting those needs. ESA was responsible for organising the tendering procedure, while the Commission remained the contracting authority. [44] It had been decided that two successful tenderers could be selected and that the award of the contract was to be based on the most economically advantageous tender.

At the end of the first phase of the competitive dialogue, inviting the submission of a request to participate, ESA selected three tenderers, namely OHB System AG (the applicant), Airbus Defence and Space GmbH (ADS), and Thales Alenia Space Italia (TASI). Following the second phase, which aimed to identify and determine the appropriate means of meeting the needs of the contracting authority, and the third phase, during which ESA invited the tenderers to submit their 'final offer', those final offers (tenders) were evaluated by an evaluation board which presented its results in an evaluation report. On the basis of that report, the Commission took the decision not to accept the applicant's tender and the decision to award the contract to TASI and ADS (together, 'the contested decisions'), which were communicated to the applicant by letter of 19 January 2021.

Prior to the adoption of the contested decisions, the applicant had, by letter of 23 December 2020, informed the Commission and ESA that one of the applicant's former employees (its former Chief Operating Officer), who had had extensive access to project data and had participated in the preparation of its tender, had been hired by ADS in December 2019. The applicant claimed that there were indications that this former employee had obtained sensitive information and that a national criminal investigation had been opened following a complaint filed by the former against the latter. Accordingly, it had asked the Commission to suspend the competitive dialogue at issue, to inquire into the matter and, if necessary, to exclude ADS from that dialogue. By letter of 20 January 2021, the Commission informed the applicant that there were insufficient grounds for such a suspension and

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43 Contract notice published in the Supplement to the *Official Journal of the European Union* of 15 May 2018 (OJ 2018/S 091-206089).

44 Under Article 15(1) of Regulation (EU) No 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council (OJ 2013 L 347, p. 1), the Commission had concluded a delegation agreement with ESA for the deployment phase of the Galileo programme.

that, as the allegations were the subject of an investigation by the national authorities, in the absence of a final judgment or a final administrative decision concerning those allegations, there was no ground for excluding ADS from the competitive dialogue at issue.

Hearing an action for annulment – which it dismisses in its entirety – against the contested decisions, the General Court provides, in particular, explanations as regards (i) the application of the criteria for excluding a tenderer and (ii) referring the matter to a panel pursuant to the Financial Regulation of 2018. [45] It also does so with regard to the obligation to check the composition of a tender deemed to be abnormally low and the autonomy of the award decision in cases where the contracting authority merely endorses the reasoning set out in the evaluation report.

Findings of the General Court

In the first place, the Court rejects the complaint based on an alleged breach of the criteria for excluding a tenderer which are laid down by the Financial Regulation of 2018.

Before doing so, it recalls that a contracting authority is to exclude a tenderer from participating in a tendering procedure when it finds itself in one or more of the situations corresponding to the three exclusion criteria which are laid down by the Financial Regulation of 2018.

In the present case, the Court finds that, in the absence, at the time of the competitive dialogue, of a final judgment or a final administrative decision establishing serious professional misconduct on the part of the tenderer concerned or on the part of a natural or legal person who was a member of the administrative, management or supervisory body of, or had powers of representation, decision or control with regard to, that tenderer, the first two criteria are not applicable. Pursuant to the third exclusion criterion, which is the only criterion capable of being applied in the present case, in the absence of a final judgment or a final administrative decision, the contracting authority may take a decision to exclude a tenderer from a tendering procedure only on the basis of a preliminary classification, [46] and only after having obtained a recommendation from the panel referred to in Article 143 of the Financial Regulation of 2018, under which it is established, in view of the facts and findings, that there has been serious professional misconduct on the part of the tenderer.

To begin with, the Court examines whether, by failing to refer the matter to that panel in the present case, the Commission failed to fulfil its obligations, in breach of the third exclusion criterion.

In this regard, it notes that the underlying purpose of referring a matter to a panel is the protection of the financial interests of the Union, and that the preliminary classification in law, which is only for the panel, necessarily concerns, first, the conduct of the tenderers themselves and, secondly, the facts or findings established, in essence, in the context of audits or investigations conducted by the competent authorities of the European Union or, where appropriate, of the Member States. The Court concludes from this that the contracting authority must refer the matter to the panel only when the established facts available to it constitute evidence, and not mere suspicions, sufficient to support a presumption of guilt on the part of the tenderer. In the present case, however, it finds that, first, the letter of 23 December 2020 was the only evidence available to the Commission concerning an alleged instance of wrongful conduct on the part of ADS. Secondly, the allegations made by the applicant in that letter were not facts and findings established in the context of audits or investigations conducted by the competent authorities of the European Union or by the Member States. Thirdly, that letter was not accompanied by any evidence capable of supporting the allegations mentioned therein. Fourthly, the complaints made did not concern the conduct of ADS but the alleged behaviour of the applicant's former employee.

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45 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), and more specifically Articles 136 and 145 thereof.

46 Within the meaning of Article 136(2) of the Financial Regulation of 2018.

The Court concludes from this that those allegations could not be regarded as facts or findings capable of constituting sufficient evidence to support a presumption of guilt on the part of ADS, justifying referring the matter to the panel.

Having reached that conclusion, the Court ascertains whether the Commission was nevertheless required to inquire into those allegations. In that regard, it observes that the only conduct of which ADS was accused was of having hired, during the tendering procedure at issue, one of the applicant's former employees. In principle, that fact does not, in itself, constitute evidence of behaviour capable of constituting serious professional misconduct.

Likewise, as regards the applicant's complaint that its former employee had breached business secrecy inasmuch as he had unlawfully obtained sensitive information concerning the applicant, which was likely to give ADS an unfair advantage during the competitive dialogue at issue, the Court considers that such a breach would not, in any event, constitute evidence of conduct on the part of ADS itself and would therefore not be capable of establishing a presumption of guilt on the latter's part. In addition, in the absence of concrete arguments and evidence produced by the applicant in its letter of December 2020, the Court finds that the allegation as regards the obtaining of sensitive information which was likely to have given ADS an unfair advantage was vague and hypothetical, with the result that it cannot constitute evidence. Moreover, the Court notes that the former employee had left the applicant shortly after the submission of the latter's revised tender in the context of the second phase of the competitive dialogue, with the result that he was not, in any event, in a position to obtain information regarding either the dialogue which took place between the applicant and ESA during the third phase or the content of the applicant's final tender.

Consequently, since the allegations contained in the letter of December 2020 were not capable of constituting sufficient evidence to establish a presumption of guilt on the part of ADS, justifying referring the matter to the panel, the Commission was not required to conduct an investigation in respect of those allegations.

In the second place, the Court rejects the complaint alleging failure to fulfil obligations relating to the examination of abnormally low tenders. It recalls that, under the provisions of the Financial Regulation of 2018, the assessment by the contracting authority of the existence of abnormally low tenders, a concept which is assessed in relation to the composition of the tender and the supply in question, takes place in two stages. [47] First, the contracting authority must assess whether the tenders submitted contain evidence likely to arouse the suspicion that they could be abnormally low. This is, in particular, the case if it appears uncertain (i) that the tender complies with the legislation in force and (ii) that the price proposed includes all the costs associated with the technical aspects of the tender. The same applies when the price proposed is considerably lower than that of other tenders or the usual market price. Secondly, if such evidence exists, the contracting authority must check the composition of the tender, giving the tenderer concerned the opportunity to justify its price. If, despite the explanations provided, the contracting authority determines that the tender is abnormally low, it must reject that tender.

In this instance, the Court finds that the difference between the price of ADS' final tender and that of the other tenders cannot, in itself, constitute evidence of the abnormally low nature of that tender, in view of the specificities of the contract in question. First, the tendering procedure was launched in the form of a competitive dialogue, since the Commission had not yet determined the specific means of meeting its needs. Thus, the prices of the tenders depended on the different solutions and technical means proposed by each tenderer. Secondly, it follows from the specific characteristics of the satellites in question that they are not goods for which there is a standard price or a market price. Furthermore, beyond the price difference, the applicant has not put forward any concrete argument in support of its allegation that ADS' tender should have appeared to be abnormally low.

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47 Annex I, Chapter 1, Section 2, points 23.1, first paragraph, and point 23.2 of the 2018 Financial Regulation.

The Court concludes that it has not been established that there was evidence such as to arouse the Commission's suspicion that ADS' tender could be abnormally low. Consequently, the Commission was not required to check the composition of ADS' tender in order to ensure that the tender was not abnormally low.

In the third place, the Court rejects the complaint that, by merely confirming the findings set out in the evaluation report, the Commission failed to fulfil its obligation to adopt an independent decision as to the award of the contract.

First, it is true that the Commission has overall responsibility for the Galileo programme and, for the deployment phase of that programme, must conclude a delegation agreement with ESA specifying the latter's tasks, in particular as regards the award of contracts relating to the system. It is precisely within the framework of the delegation agreement which was concluded between the Commission and ESA that the latter, acting in the name and on behalf of the former, was responsible for organising the competitive dialogue at issue, whereas the Commission remained the contracting authority. However, responsibility for the Galileo programme cannot alter or add to the Commission's obligations as contracting authority.

Secondly, in cases where an evaluation committee has been appointed by the contracting authority, under the Financial Regulation of 2018, it is for that committee to evaluate the tenders in its evaluation report. Although the contracting authority is not bound by that report, it is entitled to rely on it to award the contract in question. Accordingly, the fact that the contested decisions were reasoned by reference to the evaluation report, with the Commission endorsing the opinion of the evaluation board responsible for evaluating the tenders submitted, in no way detracts from the fact that those decisions were adopted independently.

2. AGRICULTURE AND FISHERIES

Judgment of the General Court (First Chamber), 8 March 2023, Bulgaria v Commission, T-235/21

EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Bulgaria – Promotional measures – OLAF investigation report – Conformity clearance – Obligation to state reasons

In 2017, the European Commission opened a conformity clearance procedure in respect of certain expenditure incurred by the Republic of Bulgaria under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD). The communication of the findings sent to that Member State indicated that, in accordance with Article 52 of Regulation No 1306/2013 [48] and in the light of the information resulting from an investigation by the European Anti-Fraud Office (OLAF), the Commission was examining the possibility of excluding part of that expenditure from EU financing.

An initial bilateral meeting between the Commission and the Bulgarian authorities took place in July 2017. The Commission then sent OLAF's initial final report to the Republic of Bulgaria and then, in May 2018, invited the Republic of Bulgaria to a second bilateral meeting. The summons referred to Article 54 [49] of Regulation No 1306/2013 and recommended that recovery be sought of the payments

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48 Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1200/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549). Article 52 sets out the procedure for applying corrections in the context of clearance in the event of deficiencies in the management and control systems of the Member States.

49 This provision concerns the procedure for the recovery of undue payments.

which the report considered as having been irregularly made. In its observations on the summons, the Republic of Bulgaria expressly informed the Commission that it did not intend to proceed with recovery immediately since a decision had not yet been handed down in the preliminary criminal proceedings opened in that connection. In September 2018, the Commission sent OLAF's second final report on irregularities concerning the expenditure in question.

In August 2020, in its final opinion, the Commission stated that it maintained its position of imposing on the Republic of Bulgaria a financial correction based on Article 54(5)(a) and (c) of Regulation No 1306/2013, on account of the fact that the paying agency was negligent by failing to seek recovery of the expenditure at issue from the beneficiaries within the time limits laid down by those provisions.

In February 2021, by Implementing Decision (EU) 2021/261 [50] ('the contested decision'), the Commission excluded an amount of EUR 7 656 848.97 from EU financing.

The Republic of Bulgaria sought annulment of that decision before the General Court. The pleas which it raises concern, inter alia, infringement of its procedural rights, the incorrect determination of the starting point of the period laid down for the recovery of undue payments, and error of assessment concerning the paying agency's duty of diligence with regard to that recovery.

The Court dismisses the action and rules, in that context, on an unprecedented question of interpretation of Article 52 and Article 54(5) (a) and (c) of Regulation No 1306/2013.

Findings of the General Court

First of all, the Court rejects the plea raised by the Republic of Bulgaria that it did not benefit, during the clearance procedure, from the procedural guarantees referred to in Article 52 of Regulation No 1306/2013 and Article 34 of Implementing Regulation No 908/2014. [51]

It is true that the reasons for the financial correction set out in the contested decision correspond only in part to the grounds set out by the Commission in the communication of the findings in order to justify initiating the clearance procedure. However, in the light of the content of the invitation to the second bilateral meeting, in particular the indication of the irregularities capable of justifying a financial correction and the corrective measures to be envisaged, such as the recovery of expenditure, that invitation may be regarded as having, in essence, adapted the communication of the findings.

The Republic of Bulgaria cannot therefore maintain that it was not put in a position to understand that a financial correction could be imposed on it if it failed to initiate a procedure for the recovery of the expenditure at issue, in accordance with Article 54 of Regulation No 1306/2013. Moreover, all matters relating to the application of that provision were discussed later in the subsequent stages of the clearance procedure.

Next, the Court rejects the argument put forward by the Republic of Bulgaria that only the notification of the contested decision, and not of OLAF's final reports, constitutes the time of receipt of a 'control report or similar document' and, consequently, the starting point for the 18-month period for the recovery of the payments concerned. [52]

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50 Commission Implementing Decision (EU) 2021/261 of 17 February 2021 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2021 L 59, p. 10).

51 Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59). Article 34 specifies the different stages of the conformity clearance procedure.

52 Under Article 54(1) of Regulation No 1306/2013, 'for any undue payment following the occurrence of irregularity or negligence, Member States shall require recovery from the beneficiary within 18 months of the approval and, where applicable, reception by the paying agency or body responsible for the recovery of a control report or similar document, stating that an irregularity has taken place'.

In that regard, the Court notes that, if the legislature had intended to set the starting point for that period at the time of the formal completion of the clearance procedure, laid down in Article 52 of Regulation No 1306/2013, it would have expressly referred to implementing acts such as the contested decision. Furthermore, it did not refer to a control report or similar document, since the use of those two concepts suggests that they may be documents of various kinds, whereas only decisions may close the clearance procedure.

Moreover, the purpose of a control report or similar document is to indicate the existence of an irregularity and not to determine the amount of expenditure which should be excluded from EU financing. Therefore, contrary to what is claimed by the Republic of Bulgaria, the fact that OLAF's final reports did not allow the amount of expenditure to be excluded from EU financing to be definitively fixed and could not automatically lead to the initiation of administrative or judicial proceedings at national level, does not prejudge their classification as control reports or similar documents.

Finally, the Court rejects the plea that the Commission made an error of assessment in finding that the paying agency of the Republic of Bulgaria did not act with due diligence and acted negligently in failing to seek recovery of the expenditure at issue from the beneficiaries within the time limits laid down in Article 54 of Regulation No 1306/2013.

According to the case-law, first, it is for the Member States to choose the appropriate means of ensuring the effectiveness of controls and the prompt recovery of unduly paid aid. However, the initiation of criminal proceedings does not necessarily mean that the competent authorities may refrain, moreover, from any measure aimed, if not at recovery, at least at securing a claim resulting from an undue payment. Second, the length of administrative or legal proceedings initiated by the paying agency cannot justify a failure to comply with the duty of diligence, which requires Member States to take all necessary measures to ensure effective protection of the financial interests of the European Union and to recover sums unduly paid.

However, on the date of adoption of the contested decision, the Republic of Bulgaria had not initiated any civil or administrative proceedings for recovery of the expenditure at issue. The only proceedings brought at that time were of a criminal nature and were at the preliminary investigation stage. The time limit for completion thereof was not indicated.

Furthermore, the orders of the paying agency, which the Republic of Bulgaria claims were annulled by its own national courts, sought to suspend payments linked to the programmes concerned by the fraud referred to in OLAF's final reports, and not to recover the expenditure at issue. Accordingly, the Republic of Bulgaria cannot justify the absence of recovery measures by asserting that the measures taken by the paying agency could be annulled and therefore prove to be ineffective and costly. Moreover, there is nothing to support the assertion that, if measures for the recovery of the expenditure at issue had been adopted, they would all have been the subject of an application for annulment before the national courts or could have been annulled by those courts.

In that context, the Court points out that, under the second subparagraph of Article 54(2) of Regulation No 1306/2013, if the Republic of Bulgaria had adopted administrative recovery measures and, at the same time, the Bulgarian national courts had concluded that there had been no irregularity, it could then have declared the financial burden which it had borne in that regard to the fund at issue as expenditure.

3. APPROXIMATION OF LAWS

3.1. COMMUNITY DESIGNS

Judgment of the General Court (Seventh Chamber), 26 April 2023, Activa – Grillküche v EUIPO – Targa (Apparatus for grilling), T-757/21

Link to the judgment as published in extract form

Community design – Invalidity proceedings – Registered Community design representing apparatus for grilling – Disclosure of the earlier design – Article 7(2) of Regulation (EC) No 6/2002

On 5 April 2016, Targa GmbH sought the registration of a Community design representing apparatus for grilling [53] pursuant to Regulation No 6/2002. [54]

On 14 November 2018, Activa – Grillküche GmbH filed an application for a declaration of invalidity, submitting that the design lacked novelty and individual character and relying on, inter alia, an earlier utility model which had been published in China on 24 June 2015 by Guangzhou Hungkay ('the Chinese utility model').

After its publication, the Chinese utility model was the subject of two transfer agreements. By a first agreement concluded on 26 November 2016, Guangzhou Hungkay transferred to Targa GmbH all the intellectual property rights regarding the Chinese utility model with regard to the territory of the European Union, including the United Kingdom, as from 7 October 2014. By a second agreement concluded on 28 November 2016, A, the initial designer of the Chinese utility model and an employee of Guangzhou Hungkay, transferred to the latter all the intellectual property rights relating to that Chinese utility model, also as from 7 October 2014.

That application for a declaration of invalidity was rejected by the Invalidity Division of the European Union Intellectual Property Office (EUIPO). Likewise, the appeal brought by Activa – Grillküche GmbH against that decision was dismissed by the Board of Appeal. Activa – Grillküche GmbH then brought an action before the General Court seeking the annulment of the Board of Appeal's decision.

The Court dismissed that action and examined, for the first time, inter alia, the effects of retroactive transfer agreements in the context of the examination of the applicability of the exception that a

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53 The design was registered in respect of 'Grilling apparatus' in Class 07.02 of the Locarno Agreement Establishing an International Classification for Industrial Designs of 8 October 1968, as amended.

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

disclosure of a design which is provided for in Article 7(2) of Regulation No 6/2002 [55] is not to be taken into consideration.

Findings of the General Court

First of all, the Court pointed out that, for the exception laid down in Article 7(2) of Regulation No 6/2002 to be applicable in the context of invalidity proceedings, the owner of the design that is the subject of the application for a declaration of invalidity must establish that it is either the designer of the design upon which that application is based or the successor in title to that designer. In the present case, the designer of the Chinese utility model transferred his intellectual property rights to Guangzhou Hungkay by means of a transfer agreement with retroactive effect. The latter made the Chinese utility model, which is identical to the contested design, available to the public by means of publication following the registration of that utility model in China. It also transferred to Targa GmbH some of the intellectual property rights in design corresponding to the Chinese utility model.

Next, as regards the question of whether the exception laid down in Article 7(2) of Regulation No 6/2002 applies in the present case, the Court stated that the transfer agreements are governed by the applicable national law and referred, on the one hand, to the role of the principle of contractual freedom in EU law and, on the other hand, to the objectives of Regulation No 6/2002.

The right of parties to conclude contracts transferring property rights is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of EU rules imposing specific restrictions in that regard. It follows that, provided that a contractual clause making such a transfer is not contrary to the objective pursued by the applicable EU rules and does not involve any risk of fraud, such a clause cannot be regarded as unlawful.

In the present case, in the first place, as regards the content of the applicable EU rules, Regulation No 6/2002 does not prohibit contracts which are signed after the date of filing of an application for registration of a design and which retroactively transfer intellectual property rights regarding an earlier design governed by national law from being taken into account in the context of an application for a declaration of invalidity.

In the second place, as regards the objective of the applicable EU rules, the objective of the exception provided for in Article 7 of Regulation No 6/2002 is to offer a creator or his or her successor in title the opportunity to market a design, for a period of 12 months, before having to proceed with the formalities of filing. Accordingly, during that period, the creator or his or her successor in title can ascertain that the design concerned is a commercial success before incurring the costs relating to registration, without fear that the disclosure that takes place at that time may be successfully raised during any invalidity proceedings brought after the possible registration of the design concerned. Consequently, the aim of the exception provided for in Article 7(2) of Regulation No 6/2002 is to protect the interests of the designer and his or her successor in title. In the present case, those interests were protected by the taking into account of the transfer agreements which had been concluded.

In the third place, as regards the risk of fraud, the Court held that there was no indication of fraud or of collusive conduct in the transfer of the property rights by means of the transfer agreements.

It follows that EU law did not, in the present case, preclude the parties from giving retroactive effect to their agreements.

Lastly, the Court held that, since Guangzhou Hungkay had disclosed the Chinese utility model by publishing it in China on 24 June 2015 and Targa GmbH, acting as successor in title to Guangzhou

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[55] According to Article 7(2) of Regulation No 6/2002, a disclosure is not to be taken into consideration for the purpose of applying Articles 5 and 6 of that regulation if a design for which protection is claimed under a registered Community design has been made available to the public: (a) by the designer, his successor in title, or a third person as a result of information provided or action taken by the designer or his successor in title; and (b) during the 12-month period preceding the date of filing of the application or, if a priority is claimed, the date of priority.

Hungkay, has filed an application for registration of an identical design as a Community design on 5 April 2016, that is to say, less than 12 months later, the exception provided for in Article 7(2) of Regulation No 6/2002 was applicable in the present case.

3.2. TELECOMMUNICATIONS

Judgment of the Court of Justice (Fifth Chamber), 20 April 2023, DIGI Communications, C-329/21

Link to the full text of the judgment

Reference for a preliminary ruling – Telecommunications – Electronic communications networks and services – Directive 2002/21/EC (Framework Directive) – Article 4(1) – Directive 2002/20/EC (Authorisation Directive) – Article 7 – Award of rights to use frequencies – Auction procedure – Holding company not registered as a provider of electronic communications services in the Member State concerned – Exclusion from the award procedure – Right of appeal against the award decision

On 18 July 2019, the Nemzeti Média- és Hírközlési Hatóság Hivatala (National Communications and Media Authority, Hungary; 'the NMHH') launched an auction procedure for the award of rights to use radio frequencies for additional wireless broadband services in support of the roll-out of 5G. The detailed rules were set out in a consultation file published on the same date.

DIGI Communications, a company formed in the Netherlands but not registered in Hungary as an electronic communications service provider, applied to take part in that auction procedure. The NMHH took the view that that application was not formally valid because, according to that authority, DIGI Communications had abused its right to take part in that auction procedure, and had engaged in conduct designed to circumvent the procedure, by attempting to mislead the NMHH. Indeed, according to the latter, DIGI Communications had applied in place of its Hungarian subsidiary, a company registered in Hungary and providing electronic communications services there. An application from that subsidiary would have been excluded from the auction procedure by virtue of a ground for exclusion provided for in the consultation file.

The NMHH continued the auction procedure following its decision to exclude DIGI Communications from it. DIGI Communications brought a legal action to challenge that exclusion decision. Its action was dismissed at first instance, and then at second instance by the Kúria (Supreme Court, Hungary). In the meantime, the NMHH adopted a decision closing the contested auction procedure, by which it granted the rights to use radio frequencies that were the subject of that procedure to three providers of electronic communications services present on the Hungarian market.

By an action brought before the Fővárosi Törvényszék (Budapest High Court, Hungary), which is the referring court in the present case, DIGI Communications sought the annulment of the contested award decision, basing its standing to bring proceedings on its status as an 'affected undertaking' within the meaning of Article 4(1) of the Framework Directive. [56]

The referring court seeks a preliminary ruling from the Court of Justice on the interpretation to be given to that concept, noting the absence of a definition thereof in the Framework Directive and

[56] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 37) ('the Framework Directive').

relying, inter alia, on the judgments in Tele2 Telecommunication [57] and T-Mobile Austria. [58] It refers, more specifically, to the three conditions examined by the Court, in those two judgments, in order to establish that an undertaking is affected within the meaning of the Framework Directive. According to the referring court, those conditions consist in establishing, first, that the undertaking in question provides electronic communications networks or services and is in competition with those persons to whom the decision of the national regulatory authority concerned ('the NRA') is addressed, secondly, that that decision is adopted in the context of a procedure intended to safeguard competition and, thirdly, that the decision is likely to have an impact on the position on the market of the undertaking in question.

By its judgment, the Court clarifies, in particular, the personal scope of Article 4(1) of the Framework Directive, as regards the possibility for an undertaking, which is not itself a provider of electronic communications services on the market concerned, but which has already participated, as an applicant, in an auction procedure such as that at issue in the present case, of bringing an action against the decision of an NRA terminating that procedure, even though that undertaking has already been excluded from the procedure at an earlier stage and that exclusion has already been confirmed by a judicial decision which has become final.

Findings of the Court

In the first place, the Court examines whether, within the meaning of the Authorisation Directive, [59] a selection procedure for the award of rights to use frequencies and the award decision resulting from that procedure are intended to safeguard competition. In that regard, the Court considers that it is apparent from the regulatory framework applicable in the present case [60] that a procedure such as the contested auction procedure and, consequently, the award decision resulting from that procedure are intended to promote and develop effective and undistorted competition, while respecting the principles of equal treatment and proportionality.

In addition, the Court notes that the referring court seeks to ascertain whether that objective is called into question by the fact that, by a separate decision, the NRA concerned refused to register the application of the undertaking which, as a result, is no longer an addressee of the decision closing the contested auction procedure. As regards the procedures for awarding radio frequencies, the regulatory framework applicable in the present case permits, in principle, the reduction of the number of rights of use to be granted for radio frequencies, in view of the scarcity of radio frequencies and the need to ensure their efficient use. According to the Court, as regards the nature and detailed rules of the procedures for granting frequencies which they organise, the Member States enjoy discretion, and there is nothing to suggest, in principle, that such a procedure cannot include a stage for examining whether any applications comply with the tender specifications defined by the NRA, entailing, where appropriate, the exclusion from that procedure of some of the entities which have tendered, provided that that procedure, taken as a whole, can be regarded as complying with the requirements and conditions laid down in the Authorisation Directive. [61]

In the second place, the Court examines the interpretation of Article 4(1) of the Framework Directive. In that regard, it points out that that provision is an expression of the principle of effective judicial protection. [62]

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57 Judgment of 21 February 2008, Tele2 Telecommunication (C 426/05, EU:C:2008:103).

58 Judgment of 22 January 2015, T-Mobile Austria (C 282/13, EU:C:2015:24).

59 Within the meaning of Article 7 of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (OJ 2002 L 108, p. 21), as amended by Directive 2009/140 ('the Authorisation Directive').

60 Article 7(1)(a) and (3) of the Authorisation Directive and Article 8 of the Framework Directive.

61 More specifically, by Article 7 of the Authorisation Directive.

62 As guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

First, the Court recalls that neither the Framework Directive nor the Authorisation Directive contains a definition of 'provider of electronic communications services'. The Court therefore defines the scope of that concept, by referring to the legislative framework established by the Authorisation Directive and to the objectives pursued by all the relevant provisions. [63] It follows from the foregoing that, in a Member State such as Hungary, which requires interested undertakings to lodge a notification, within the meaning of the Authorisation Directive, [64] those undertakings must submit that notification only before commencing the actual provision of electronic communications networks or services. It cannot, therefore, be excluded that an undertaking which intends to commence such an activity may participate in a procedure such as the contested auction procedure before lodging such a notification with the NRA concerned.

According to the Court, in order to be recognised as an undertaking 'providing electronic communications networks and/or services', within the meaning of Article 4(1) of the Framework Directive, an undertaking does not necessarily have to have lodged a formal notification with the competent authorities of the Member State concerned, in cases where such a notification would be required by the law of that Member State pursuant to the Authorisation Directive; [65] nor, more generally, must it already be present on the market of that Member State, provided that that undertaking fulfils the objective conditions to which the general authorisation referred to in that provision is subject in that Member State, which is for the referring court to ascertain. Consequently, an undertaking which, although it has not yet entered the market, has participated as an applicant in a procedure such as the contested auction procedure, is considered to satisfy the aforementioned requirements, provided that it fulfils those objective conditions, irrespective of whether it has a subsidiary which is itself present on the market.

Secondly, as regards the condition laid down in Article 4(1) of the Framework Directive, according to which an undertaking must be 'affected by' the decision taken by an NRA which it intends to challenge, that condition is fulfilled if the rights of the undertaking in question are potentially affected by the decision of the NRA concerned by reason of its content and the activity exercised or envisaged by that undertaking. Therefore, an undertaking which participated, as an applicant, in a procedure such as the contested auction procedure is 'affected', within the meaning of Article 4(1) of the Framework Directive (as interpreted by the Court, in particular in the T-Mobile Austria judgment), by a decision taken by the NRA at the end of that procedure, where that decision has, by its content, an impact on the activity envisaged by that same undertaking.

The Court considers, in that regard, that, in the context of an action brought under Article 4(1) of the Framework Directive – which differs from that of an action brought under the provisions of Directive 89/665 [66] – by an undertaking with a view to challenging the award decision closing the auction procedure in which that undertaking participated by submitting an application, but from which it was eliminated by an earlier decision which has become final, that undertaking's legal interest in bringing proceedings may be derived, inter alia, from the fact that it might possibly participate in a new auction procedure relating to the award of the same rights to use radio frequencies and, where appropriate, be awarded those rights if, following the annulment of the decision in question, the contracting authority decided to launch such a procedure.

Third and lastly, however, the Court recalls the importance, both in the legal order of the European Union and in the national legal orders, of the principle of res judicata. Consequently, where an undertaking, which has been excluded from an auction procedure such as the contested auction

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63 Article 3(2) and Article 6(1) of the Authorisation Directive.

64 Within the meaning of Article 3(2) of the Authorisation Directive.

65 Under Article 3(2) of the Authorisation Directive.

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

procedure by a decision of the NRA which has become final following a judicial decision, brings an action, under Article 4(1) of the Framework Directive, in order to challenge the award decision terminating that procedure, that action must not undermine the force of res judicata attaching to the aforementioned judicial decision.

In that regard, the Court points out that the force of res judicata extends to the matters of fact and law actually or necessarily settled by a judicial decision. Thus, the application of the principle of res judicata in the present case depends, as a rule, on the scope of the action brought by DIGI Communications with a view to challenging the contested award decision and, therefore, on any overlap between that scope and that of the judicial decision by which its action challenging the decision to exclude it from the contested auction procedure was definitively dismissed.

4. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Fourth Chamber, Extended Composition), 8 March 2023, Assaad v Council, T-426/21

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds – Errors of assessment – Retroactivity – Legitimate expectations – Legal certainty – Res judicata

The applicant, Mr Nizar Assaad, is a businessperson who holds Syrian, Lebanese and Canadian nationalities and, according to the Council of the European Union, has close ties to the Syrian regime.

His name was included in 2011 on the lists of persons and entities subject to restrictive measures against the Syrian Arab Republic by the Council, [67] then, in the absence of precise identification, after correction and addition of supplementary identifying information, [68] the Council had considered that those acts did not designate him. He was again included on the lists in 2020, [69] then retained on them in 2021 and 2022, [70] on the grounds, according to the Council, that he was a leading businessperson with close ties to the regime, that he was associated with the Assad and Makhlouf families and that he was, as the founder and head of the company Lead Contracting & Trading Ltd, one of the biggest investors in the oil sector.

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67 Council Decision (CFSP) 2022/515 of 23 August 2011 amending Decision 2011/273/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 218, p. 20), and Council Implementing Regulation (EU) 2022/2011 of 23 August 2011 implementing Article 8a of Regulation (EC) No 442/2011 concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 218, p. 1).

68 Council Decision 2011/735/CFSP of 14 November 2011 amending Decision 2011/273/CFSP (OJ 2011 L 296, p. 53), and Council Regulation (EU) No 1150/2011 of 14 November 2011 amending Regulation (EU) No 442/2011 (OJ 2011 L 296, p. 1).

69 Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1).

70 Council Implementing Decision (CFSP) 2021/751 of 6 May 2021 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2021 L 160, p. 115), and Council Implementing Regulation (EU) 2021/743 of 6 May 2021 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2021 L 160, p. 1); Council Decision (CFSP) 2022/849 of 30 May 2022 amending Decision 2013/255/CFSP (OJ 2022 L 148, p. 52), and Council Implementing Regulation (EU) 2022/840 of 30 May 2022 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2022 L 148, p. 8) ('the contested acts').

Those grounds were based on, first, the 'leading businesspersons operating in Syria' criterion, [71] second, the 'association with the Syrian regime' criterion, [72] and, last, the 'association with persons or entities subject to restrictive measures' criterion, on account, according to the Council, of the applicant's ties to the Assad and Makhlouf families. [73]

The applicant brought an action for annulment against the acts adopted in 2021 and 2022 in so far as they concern him. The General Court upholds that action by dealing, inter alia and for the first time, with the question whether the Council may lawfully attach retroactive effect to acts adopted in the context of a restrictive measures regime. The Court also addresses the question of the force of res judicata of an earlier judicial decision with regard to the question whether the Council and the Court are bound by the finding made by that decision as to the identity of a listed person.

Findings of the General Court

As regards, in the first place, the plea alleging errors of assessment, the Court first of all examines the criterion of the status of a leading businessperson operating in Syria in the light of the grounds for listing relied on by the Council against the applicant. Although it is apparent from the evidence submitted by the Council that the applicant was indeed an investor in the Syrian oil sector, first, the applicant has demonstrated that he no longer has any interests in the company Lead Syria, [74] which was in liquidation when the contested acts were adopted, and, second, the Council has failed to forward any argument to call into question the reliability of the evidence adduced by the applicant or to challenge the latter's resignation from Lead UAE, [75] with the result that the applicant may be regarded as no longer being involved in that company. The same applies to the applicant's lack of involvement in several other Syrian entities and his participation in various chambers of commerce. The Council has therefore failed to substantiate to the requisite legal standard that the applicant had commercial interests in Syria or was a member of certain trade-related bodies. The Court concludes that the Council has failed to demonstrate, when the contested acts were adopted, that the applicant was a leading businessperson operating in Syria in accordance with the criterion laid down in Decision 2013/255.

Next, as regards the applicant's ties to members of the Assad family, the Court notes that the applicant is not a member of that family and that the ties attributed to him by the Council are of a professional nature only, on account of activities in the oil sector in particular. However, the examination of the evidence submitted by the Council in that regard leads the Court to conclude that the Council has failed to adduce a sufficiently concrete, precise and consistent body of evidence to support that finding. It reaches a similar conclusion concerning the absence of ties, on the applicant's part, with the Makhlouf family.

Lastly, as regards the applicant's alleged association with the Syrian regime as a result of his support for that regime or the benefit he derives from the policies pursued by that regime, the Court finds, first of all, that it is not on account of his business activities in Syria or his ties to members of the Makhlouf and Assad families, or even on account of other responsibilities or activities of Lead Syria, that the applicant can be associated with the Syrian regime. On the contrary, he distanced himself from that regime, specifically in 2012. The Council has therefore failed to demonstrate to the requisite legal standard that the applicant is associated with the Syrian regime and, accordingly, the Court

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71 See Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255/CFSP, as amended by Decision (CFSP) 2015/1836, and Article 15(1a)(a) of Regulation (EU) No 36/2012, as amended by Regulation (EU) 2015/1828.

72 See Article 27(1) and Article 28(1) of Decision 2013/255/CFSP, as amended by Decision (CFSP) 2015/1836, and Article 15(1)(a) of Regulation (EU) No 36/2012, as amended by Regulation (EU) 2015/1828.

73 See the last sentence of Article 27(2) and the last sentence of Article 28(2) of Decision 2013/255/CFSP, as amended by Decision (CFSP) 2015/1836, as well as the last sentence of Article 15(1a) of Regulation (EU) No 36/2012, as amended by Regulation 2015/1828.

74 Lead Contracting and Trade Company.

75 Lead Contracting and Trading Limited.

upholds the applicant's first plea in law concerning the lack of merit for the reasons for listing relied on by the Council against the applicant.

As regards, in the second place, the reference, made by the Council in the contested acts, to the date of the applicant's initial listing on 23 August 2011, the Court examines, first, whether those acts have, by their content, retroactive effect. That is true of the acts adopted in 2021, which are a continuation of previous acts which they amend and which were adopted after the Council admitted having made an error as to the identity of the person concerned. The amendment, in those acts, of the date of the applicant's initial listing does have a retroactive effect on his legal situation. That is the case, first, as to his reputation and integrity and, second, with regard to his legal situation in France in the light of a ministerial decision of 12 February 2020, based on the 2019 acts, which had frozen his funds in that Member State.

The Court then examines the possible infringement of the principles of legal certainty and of the protection of legitimate expectations by reason of that retroactivity. As regards the possible existence of a public interest, it points out that legal certainty can be guaranteed, and the effectiveness of the restrictive measures ensured, only if the persons and entities concerned are clearly identified by the Council in the acts at issue. It is therefore legitimate and necessary for the Council to be able to correct errors made as to the identity of a person, in order to ensure that the objectives of the restrictive measures are attained by enabling third parties to know who the subject of those measures is and the person concerned to bring, where appropriate, an action against those measures. As to the existence of a legitimate expectation on the part of the applicant, based on the situation prior to the correction of that error of identification, the Court recalls that it is not necessary for the applicant to have been the addressee of acts constituting subjective rights in order for him to be able to rely on the protection of his legitimate expectations, just as it is not for him to show that he received precise, unconditional and consistent assurances such as to establish the existence of a legitimate expectation on his part. In the light of the circumstances of the present case, namely the exchanges of correspondence between the Council and the applicant's representatives, the corrigenda adopted by the Council on account of those exchanges [76] and the position taken by the Council in an earlier case, Assaad v Council, [77] the Court finds that the Council affirmed to the applicant, on several occasions, that he was not the person initially referred to in the acts adopted in 2011. In that regard, the Court disputes the Council's argument that any conclusion as to the identity of a person subject to restrictive measures is merely declaratory and notes that the letters in question, together with the various acts adopted by the Council, gave rise to the applicant's expectation that he was not the person concerned. The Court concludes that the Council failed to respect the applicant's legitimate expectations and the principle of legal certainty by adopting measures against him with retroactive effect.

As regards, in the third and last place, the plea alleging infringement of the principle of res judicata, in the present case, of the order handed down in the earlier case of Assaad v Council, which had found that the applicant's action was inadmissible since, not being the person referred to in the 2011 lists, he had no interest in bringing proceedings, the Court finds that, by stating in the contested acts that the applicant was the subject of the 2011 measures, the Council has caused a decision and measures which are contrary, or even incompatible in terms of their effects, to coexist in the EU legal order and has, consequently, infringed the principle of res judicata of the aforementioned order in relation to the 2011 acts. However, since the principle of res judicata cannot be extended so that an order settles questions relating to another set of legal acts, adopted on the basis of other evidence and relating to

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76 Decision 2011/735/CFSP amending Decision 2011/273/CFSP (OJ 2011 L 296, p. 53) and Council Regulation (EU) No 1150/2011 of 14 November 2011 amending Regulation No 442/2011 (OJ 2011 L 296, p. 1), and corrigenda to Council Implementing Decision 2013/185/CFSP of 22 April 2013 implementing Council Decision 2012/739/CFSP concerning restrictive measures against Syria, and to Council Implementing Regulation (EU) No 363/2013 of 22 April 2013 implementing Regulation No 36/2012 (OJ 2013 L 123, p. 28).

77 Order of 24 May 2012, Assaad v Council (T- 522/11, not published, EU:T:2012:266).

different basic acts, the Court concludes that the applicant has no basis for maintaining that the contested measures were adopted, from 2020 onwards, in breach of the principle of res judicata.

In the light of the foregoing, the Court annuls the contested acts in so far as they concern the applicant, while maintaining the effects of Decision 2022/849 as regards the applicant until the date of expiry of the period for bringing an appeal or, if an appeal is brought within that period, until any dismissal of that appeal.