COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. FUNDAMENTAL RIGHTS: NE BIS IN IDEM PRINCIPLE

Judgment of the Court of Justice (First Chamber), 14 September 2023, Volkswagen Group Italia and Volkswagen Aktiengesellschaft, C-27/22

Link to the full text of the judgment

Reference for a preliminary ruling – Article 50 of the Charter of Fundamental Rights of the European Union – Principle ne bis in idem – Penalty imposed concerning unfair commercial practices – Criminal nature of the penalty – Criminal penalty imposed in a Member State after the adoption of a penalty concerning unfair commercial practices in another Member State but which became final before the latter penalty – Article 52(1) – Limitations to the principle ne bis in idem – Conditions – Coordination of proceedings and penalties

In August 2016, the Italian competition authority imposed a fine of EUR 5 million on Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft (respectively, 'VWGI' and 'VWAG') for having implemented unfair commercial practices for the purposes of the Consumer Code. The infringements in question consisted, first, in the marketing in Italy, from 2009, of diesel vehicles equipped with systems intended to distort the measurement of pollutant emissions and, second, in the dissemination of advertising messages which emphasised the compliance of those vehicles with the criteria provided for under environmental legislation. VWGI and VWAG challenged the decision of the Italian competition authority before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

In June 2018, before that court delivered its judgment, the public prosecutor's office before which the case had been brought in Germany imposed a fine of EUR 1 billion on VWAG, in accordance with the Law on administrative offences. That fine related, inter alia, to the marketing of diesel vehicles equipped with systems intended to distort the measurement of pollutant emissions and the dissemination of advertising messages which emphasised the compliance of those vehicles with the criteria provided for under environmental legislation. The decision of that public prosecutor's office became final on 13 June 2018, since VWAG waived its right to challenge it and, moreover, paid the fine prescribed therein.

In April 2019, the Regional Administrative Court, Lazio, dismissed the action brought by VWGI and VWAG on the ground, inter alia, that the principle ne bis in idem does not preclude the fine prescribed by the decision of the Italian competition authority from being maintained.

The Consiglio di Stato (Council of State, Italy), before which VWGI and VWAG brought an appeal against that judgment, decided to ask the Court of Justice to clarify the conditions under which, in a situation where there is a duplication of proceedings in which a penalty is imposed in two Member States, conducted by competent authorities in different sectors of activity, limitations may be made to the principle ne bis in idem, as enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'). [1]

By its judgment, the Court states, first of all, that an administrative fine provided for under national legislation, which is imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under national

[1] Under that provision: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

legislation, constitutes a criminal penalty, for the purposes of Article 50 of the Charter, where it has a punitive purpose and has a high degree of severity.

Next, the Court states that the principle ne bis in idem enshrined in that provision precludes national legislation which allows a fine of a criminal nature imposed on a legal person for such unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of res judicata.

Lastly, the Court holds that Article 52(1) of the Charter [2] authorises the limitation of the application of the principle ne bis in idem, enshrined in Article 50 of the Charter, so as to permit a duplication of proceedings or penalties in respect of the same facts, provided that the conditions laid down in Article 52(1) of the Charter, as defined by the case-law, are satisfied. First, such duplication must not represent an excessive burden for the person concerned; second, there must be clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication; and, third, the sets of proceedings in question must have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

Findings of the Court

In the first place, as regards the assessment as to whether the proceedings and penalties are criminal in nature, the Court recalls that the principle ne bis in idem, as enshrined in Article 50 of the Charter, prohibits a duplication both of proceedings and of penalties of a criminal nature, for the purposes of that article, for the same acts and against the same person. In order to carry out such an assessment, the Court relies on three relevant criteria derived from the case-law. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty which the person concerned is liable to incur. As regards, in particular, the second criterion, the mere fact that a penalty also pursues a deterrent purpose does not mean that it cannot be characterised as a criminal penalty. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. As regards the third criterion, the Court notes that the degree of severity of the measures at issue is determined by reference to the maximum potential penalty for which the relevant provisions provide. Thus, a financial administrative penalty capable of reaching an amount of EUR 5 million has a degree of severity which is liable to support the view that that penalty is criminal in nature.

In the second place, in order to assess whether the Italian legislation at issue is in compliance with the principle ne bis in idem provided for in Article 50 of the Charter, the Court first of all provides clarification regarding the 'bis' condition. Thus, in order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case. While it is true that the application of the principle ne bis in idem presupposes the existence of a prior final decision, it does not necessarily follow that the subsequent decisions precluded by that principle can only be those which were adopted after that prior final decision. Where a final decision exists, that principle precludes criminal proceedings in respect of the same facts from being initiated or maintained.

Next, as regards the 'idem' condition, the Court notes that, for the purposes of assessing the existence of the same offence, the relevant criterion is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. By contrast, the legal

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2 According to that provision: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. 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 Union or the need to protect the rights and freedoms of others.'

classification under national law of the facts and the legal interest protected are not relevant, in so far as the protection conferred by Article 50 of the Charter cannot vary from one Member State to another. Furthermore, it is not sufficient that the facts be merely similar, since the principle ne bis in idem may apply only where the facts to which the two sets of proceedings or the two penalties at issue relate are identical, which is a matter for the referring court to assess.

Lastly, as regards the conditions under which limitations on the principle ne bis in idem, enshrined in the Charter, may be justified, the Court notes that, under Article 52(1) of the Charter, such a limitation may be justified in so far as it is provided for by law and respects the essence of Article 50 of the Charter as well as the principle of proportionality. The possibility of a duplication of proceedings and penalties respects the essence of Article 50 of the Charter, provided that the pieces of national legislation concerned do not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provide only for the possibility of a duplication of proceedings and penalties under different legislation. As for the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by the national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous. In that regard, public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society, provided that the accumulated legal responses do not represent an excessive burden for the person concerned. Consequently, the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued. With regard to the strict necessity of the duplication of proceedings and penalties, it is necessary to assess whether there are clear and precise rules making it possible to predict which acts or omissions may be subject to such duplication, and also to predict that there will be coordination between the different authorities, whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe and whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty, meaning that the resulting burden, for the persons concerned, of that duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed.

II. CITIZENSHIP OF THE UNION: LOSS OF CITIZENSHIP OF THE UNION ON ACCOUNT OF LOSS OF NATIONALITY OF A MEMBER STATE

Judgment of the Court of Justice (Grand Chamber), 5 September 2023, Udlændinge- og Integrationsministeriet (Loss of Danish nationality), C-689/21

Link to the full text of the judgment

Reference for a preliminary ruling – Citizenship of the European Union – Article 20 TFEU – Article 7 of the Charter of Fundamental Rights of the European Union – Citizen holding the nationality of a Member State and the nationality of a third country – Loss of the nationality of the Member State by operation of law upon reaching the age of 22 on the ground of lack of a genuine link with that Member State where no application to retain nationality has been made before the date on which that age is reached – Loss of citizenship of the Union – Examination of the proportionality of the consequences of that loss from the point of view of EU law – Limitation period

X, who was born in the United States of America to a Danish mother and an American father, held, since birth, Danish and American nationality. After reaching 22 years of age, she applied to the Udlændinge- og Integrationsministeriet (Ministry of Immigration and Integration, Denmark) to retain her Danish nationality.

By decision of 31 January 2017, the Ministry of Immigration and Integration informed X that she had lost her Danish nationality at the age of 22 and that it could not allow the retention of her nationality, since she had made her application after reaching that age. In the absence of an application for retention of nationality before reaching that age, Danish legislation provides for the loss of nationality by operation of law for Danish nationals born outside Danish territory and who have never resided or spent time there in conditions demonstrating a genuine link with Denmark. Accordingly, X lost her Danish nationality and, therefore, her citizenship of the Union, without the Danish authorities having carried out, in the light of EU law, any review of proportionality of the consequences of that loss for her situation.

On 9 February 2018, X brought an action before the Danish courts for annulment of that decision. In that context, the referring court, the Østre Landsret (High Court of Eastern Denmark, Denmark), raised the question of whether domestic legislation such as the Danish legislation on nationality is consistent with Article 20 TFEU, read in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union.

The Court of Justice, sitting as the Grand Chamber, holds that such national legislation is consistent with EU law provided that the person concerned has had the opportunity to lodge, within a reasonable period, an application for the retention or recovery of nationality, enabling an examination of the proportionality of the loss of nationality from the point of view of EU law to be made and, where appropriate, the retention or recovery ex tunc of that nationality to be obtained; such a period can begin to run only from the time when the competent authorities have duly informed that person of that loss or of the imminence of that loss, and of his or her right to apply, within that period, for the retention or recovery of that nationality.

Findings of the Court

The Court notes, first of all, that EU law does not preclude a Member State from providing, when laying down the conditions for the acquisition and loss of nationality, that the assessment of whether or not there is a genuine link with that Member State is based on the taking into account of criteria such as the place of birth and residence of the person concerned and on the conditions of that person's stay in the national territory, or from that Member State limiting that assessment to the period up to the date on which that person reached the age of 22.

However, the Court points out that, where the loss of the nationality of a Member State arises by operation of law at a given age and entails the loss of citizenship of the Union and the rights attaching thereto, the competent national authorities and courts must be in a position to examine the

consequences of the loss of that nationality from the point of view of EU law and, where appropriate, to enable that person to retain his or her nationality or to recover it ex tunc.

As regards, more specifically, the time limit for making an application for such an examination for the purposes of retaining or recovering nationality, it is, in the absence of a specific time limit laid down by EU law for that purpose, for each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law, provided that those rules comply, inter alia, with the principle of effectiveness in that they do not make it in practice impossible or excessively difficult to exercise rights conferred by EU law. The Member States may, in that regard, require, on the basis of the principle of legal certainty, that such an application be submitted to the competent authorities within a reasonable period.

However, in the light of the serious consequences created by the loss of the nationality of a Member State, where that loss entails the loss of citizenship of the Union, for the effective exercise of the rights which such citizens derive from Article 20 TFEU, national rules or practices liable to have the effect of preventing the person concerned from seeking an examination of the proportionality of those consequences from the point of view of EU law cannot be regarded as compatible with the principle of effectiveness. Thus, where that person has not been duly informed of the right to request such an examination and of the deadline for lodging such a request, his or her request cannot be held to be inadmissible on the ground that that deadline has expired.

In the present case, given that, in the context of the examination of the proportionality of the consequences of the loss of Danish nationality from the point of view of EU law, a person concerned, such as X, must be able to rely on all the relevant matters which may have arisen up to his or her 22nd birthday, the Court considers that the period must extend, for a reasonable length of time, beyond the date on which that person reaches that age. Moreover, that reasonable period cannot begin to run unless the competent authorities have duly informed that person of the loss of his or her nationality or of the imminence of that loss, and of his or her right to apply, within that period, for the retention or recovery of that nationality. Failing that, the competent national authorities and courts must be in a position to carry out an examination of proportionality of the consequences of the loss of nationality, as an ancillary issue, in the context of the application by the person concerned for a travel document or any other document showing his or her nationality.

The relevant date to be taken into account for the purposes of such an examination necessarily corresponds to the day on which the person concerned reached the age of 22, since that date forms an integral part of the legitimate criteria which the Member State has determined, and on which the retention or loss of that person's nationality depends.

Lastly, the Court notes that the absence of any possibility offered by national law, under conditions which are consistent with EU law, to obtain from the national authorities and, potentially, from the national courts, an examination of the proportionality of the consequences of the loss of the nationality of the Member State concerned from the point of view of EU law and which may, where appropriate, lead to the recovery ex tunc of that nationality, cannot be compensated for by the possibility of naturalisation, regardless of the conditions – possibly favourable – under which that naturalisation may be obtained.

III. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR ANNULMENT

Order of the General Court (Second Chamber), 20 September 2023, Nicoventures Trading and Others v Commission, T-706/22

Link to the full text of the order

Action for annulment – Public health – Withdrawal of certain exemptions for heated tobacco products – Direct concern – Lack of individual concern – Inadmissibility

Nicoventures Trading, one of the applicants, which was established in 2011 within the British American Tobacco group, develops and markets innovative non-combustible products, such as heated tobacco products. It sells them to other companies in the group, including the other applicants, which distribute or intend to distribute them on the markets of 14 Member States.

On 29 June 2022, the European Commission adopted Delegated Directive 2022/2100 [3] ('the contested measure') amending Directive 2014/40 [4] as regards the withdrawal of certain exemptions in respect of heated tobacco products. That measure has the effect of prohibiting the marketing of heated tobacco products with a characterising flavour and of subjecting heated tobacco products for smoking which contain no characterising flavour to the same labelling obligations as certain other tobacco products for smoking, namely cigarettes, roll-your-own tobacco and waterpipe tobacco. The Member States are required to adopt the transposing measures necessary to implement that new prohibition and those new obligations before 23 October 2023.

Arguing that the contested measure has a negative impact on their legal situation, the applicants brought an action for annulment of that measure before the General Court.

By its order, the Court dismisses the action as inadmissible on the ground that the applicants are not individually concerned by the contested measure.

Findings of the Court

As a preliminary point, the Court recalls that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and which does not entail implementing measures.

Since the contested measure, which is a regulatory act, entails implementing measures and is therefore not covered by the last situation provided for in the fourth paragraph of Article 263 TFEU, the Court examines whether the applicants are directly and individually concerned by that measure for the purpose of the second situation provided for in that provision.

As regards direct concern, the Court, after recalling the two cumulative criteria that have to be met in that regard, notes that the applicants are subject to a prohibition and to obligations arising directly from the contested measure, irrespective of whether that measure entails implementing measures, namely transposing measures. The transposing measures provided for in that measure are necessary only for the implementation in full of the prohibition and obligations in question in the laws of the Member States, without the Member States having any discretion of their own, since the contested

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3 Commission Delegated Directive (EU) 2022/2100 of 29 June 2022 amending Directive 2014/40/EU of the European Parliament and of the Council as regards the withdrawal of certain exemptions in respect of heated tobacco products (OJ 2022 L 283, p. 4).

4 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

measure does not leave any discretion to the Member States in those respects. The applicants must therefore be regarded as being directly concerned by the contested measure.

As regards individual concern, the Court recalls that a measure of general application may be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard where that measure affects specific natural or legal persons by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as an addressee.

In the first place, the Court finds that the marketing authorisations, declarations and notifications required by Directive 2014/40 before the placing on the market of tobacco products and relied on by the applicants do not make it possible to prove that the applicants are individually concerned by the contested measure.

In that regard, the Court takes the view, first, that the fact that the operators which have made a declaration or notification or hold an authorisation were identifiable at the time of the adoption of the contested measure is not, by itself, sufficient to conclude that those operators are individually concerned.

Secondly, the number of natural or legal persons affected by the contested measure is also not decisive.

Thirdly, even though the absolute prohibition on marketing heated tobacco products with characterising flavours laid down in the contested measure will necessarily have the effect of calling into question the authorisations held by some of the applicants, those authorisations cannot be regarded as differentiating the position of the holders of those authorisations and distinguishing that position individually with regard to the contested measure as if those holders had been its addressees. First of all, the effects of the contested measure are produced in the same way both in respect of operators which have been granted an authorisation and in respect of operators which have made the declarations or notifications provided for in Directive 2014/40, or even in respect of operators which have not yet been granted an authorisation or made a declaration or notification, but which intend to place such products on the market. Next, the authorisations and the declarations or notifications meet objective requirements, determined in a general and abstract manner for all operators, without any element of exclusivity for the operators in question. Lastly, since Directive 2014/40 provides that various delegated acts may specify or amend the conditions for marketing tobacco products falling within its scope, the marketing authorisations and rights cannot be regarded as having been acquired indefinitely.

Fourthly, the fact that the applicants are not in the same situation as operators which are upstream and downstream in the production and distribution chain of the products in question is irrelevant. The applicants must prove that they are affected by reason of an attribute or a factual situation which is peculiar to them and which distinguishes them in the same way as the addressee of a decision.

In the second place, the Court rejects the applicants' argument alleging a substantial effect on their competitive position. The fact that certain operators are more affected economically by a measure of general application than others is not sufficient to distinguish them individually from all other operators, since the application of that measure takes effect by virtue of an objectively determined situation. The mere fact that natural or legal persons may lose a major source of income as a result of new legislation does not prove that they are in a specific situation. It is also not sufficient to establish that that legislation applies to them individually, those persons having to adduce proof of circumstances which make it possible to consider that the harm allegedly suffered is such as to distinguish them individually from all other economic operators concerned by that legislation in the same way as they are.

Order of the General Court (First Chamber, Extended Composition), 6 September 2023, EDPS v Parliament and Council, T-578/22

Link to the full text of the order

Action for annulment – Law governing the institutions – Processing of personal data by Europol – Regulation (EU) 2016/794 – The institutional prerogatives of the EDPS – Locus standi – Action in part inadmissible and in part manifestly inadmissible

On 3 January 2022, following an own-initiative inquiry, the European Data Protection Supervisor (EDPS) adopted a decision against the European Union Agency for Law Enforcement Cooperation (Europol). [5] By that decision, the EDPS ordered Europol, in essence, for each contribution received as from 4 January 2022, to proceed to data subject categorisation within 6 months as from the date of reception of that contribution, and to proceed to data subject categorisation within 12 months for all datasets existing as at the date of that decision, after which periods Europol was required to erase those data.

On 8 June 2022, the European Parliament and the Council adopted the amended Europol regulation. [6] That regulation laid down, in essence, under two transitional provisions, [7] the conditions in which Europol is to proceed, within a specified period, to the categorisation of the datasets in its possession at the time of entry into force of the amended Europol regulation, and specifies the conditions and procedures according to which the processing of personal data not relating to categories of data subjects listed in Annex II to the amended Europol regulation, and which were transferred to Europol before 28 June 2022, is to be authorised in support of an ongoing criminal investigation.

The EDPS took the view that the contested provisions infringed his independence and his powers as a supervisory authority, since, in his view, they retroactively legalised Europol's contested data retention practices and de facto annulled the decision of 3 January 2022. Thus, pursuant to Article 263 TFEU, he sought, before the General Court, the annulment of those provisions. The EDPS submitted that his standing to bring an action was justified by the need to be able to have a judicial remedy in order to defend his institutional prerogatives and, in particular, his independence as a supervisory authority.

In the present case, the General Court has before it, for the first time, an action for annulment brought by the EDPS against a legislative act of the Council and the Parliament, which raises, inter alia, the issue of the jurisdiction of the General Court to hear and determine that action, the issue of the application of the judgment in Parliament v Council (C-70/88) [8] by analogy to the present case, and the issue of the direct concern of the EDPS, who is treated in the same way as a legal person, under the fourth paragraph of Article 263 TFEU.

Findings of the Court

In the first place, the Court examines whether it has jurisdiction to hear the action brought by the EDPS and observes, first of all, that the EDPS is not among the applicants referred to in the second

5 Pursuant to Article 43(3)(e) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ 2016 L 135, p. 53; 'the initial Europol regulation').

6 By means of Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation (OJ 2022 L 169, p. 1), thereby amending the initial Europol regulation ('the amended Europol regulation').

7 Articles 74a and 74b of the amended Europol Regulation ('the contested provisions').

8 Judgment of 22 May 1990, Parliament v Council (C-70/88, EU:C:1990:217).

and third paragraphs of Article 263 TFEU, [9] or in the list of institutions in Article 13(1) TEU. [10] Next, the Court notes that although the first paragraph of Article 263 TFEU expressly refers to EU bodies, offices and agencies in the list of authors of acts whose legality may be called into question in the context of an action for annulment, the same is not true as regards the second and third paragraphs of Article 263 TFEU. Thus, the General Court states that although the status of the EDPS, as an independent supervisory authority, is enshrined both in the FEU Treaty and in the Charter, [11] the EDPS was established as an EU body not by an act of primary law, but by an act of secondary legislation. [12] Consequently, the EDPS, although an EU body with a particular status, is not an EU institution and, in any event, cannot be regarded as one of the applicants referred to in the second and third paragraphs of Article 263 TFEU. Lastly, the General Court concludes that it has jurisdiction to rule on the action, since actions referred to in Article 263 TFEU, brought in particular by an EU institution against a legislative act, must be reserved to the Court of Justice, [13] and the EDPS is neither an institution nor an applicant referred to in the second and third paragraphs of Article 263 TFEU.

In the second place, the General Court assesses whether the EDPS has standing under the case-law resulting from the judgment in Parliament v Council (C-70/88). It notes that, in that judgment, relied on by the EDPS in support of his specific standing to bring proceedings to defend his institutional prerogatives, the Court of Justice held that the Parliament did not have any opportunity to challenge, before the Courts of the European Union, the acts adopted by the other institutions liable to infringe its own prerogatives and the Court of Justice chose to fill that gap by having recourse to the general principle of institutional balance. By contrast, the EDPS may bring an action for annulment on the basis of the fourth paragraph of Article 263 TFEU, since the EDPS is a body created by an act of secondary EU legislation that may be treated in the same way as a legal person. Furthermore, the General Court states that although the EDPS has a particular status, recognised both by the FEU Treaty and the Charter, and that the creation of independent supervisory authorities is an essential element of the protection of individuals with regard to the protection of personal data, the independence in which the EDPS must carry out his duties in practice is not intended to limit the powers of the EU legislature. [14] Consequently, the EDPS is required to exercise his duties and powers in complete independence, and it is within the framework of the legislative acts adopted jointly by the Parliament and the Council and in accordance with them that he supervises compliance with the rules relating to the protection of individuals with regard to the processing of personal data by the EU institutions, bodies, offices and agencies. The General Court concludes that the judgment in Parliament v Council (C-70/88) cannot be applied by analogy to the EDPS's situation, who cannot be recognised as having standing to bring proceedings in accordance with that judgment and who has to be regarded as an applicant who must fulfil the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU.

In the third place, in the context of the examination of the EDPS's standing to bring proceedings, under the fourth paragraph of Article 263 TFEU, the Court analyses, as a preliminary point, whether the EDPS may, as an EU body, be treated in the same way as a legal person within the meaning of that

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9 Under that provision, an action may be brought before the Court, on the one hand, by a Member State, the Parliament, the Council or the Commission, and, on the other, by the Court of Auditors, the European Central Bank (ECB) and the Committee of the Regions.

10 The seven institutions referred to in that provision are the Parliament, the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

11 Under Article 16(2) TFEU and Article 8(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), compliance with the rules relating to the protection of individuals with regard to the processing of personal data by the EU institutions, bodies, offices and agencies is to be subject to the control of independent authorities.

12 Article 41(1) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

13 Pursuant to Article 51(b) of the Statute of the Court of Justice of the European Union.

14 As provided for in Article 14(1) and 16(1) TEU.

article. The Court notes that, by applying an interpretation of that provision in the light of the principles of effective judicial review and the rule of law, an EU body, such as the EDPS, has, as a 'legal person', standing to bring an action for annulment of the contested provisions, provided that the EDPS is directly and individually concerned by them within the meaning of that provision. Such a legal person is indeed equally as likely as any another person or entity to have its rights or interests adversely affected by an EU act and must, therefore, be able, in compliance with those conditions, to seek the annulment of such an act.

As regards the condition that a legal person must be directly concerned, the Court points out that two cumulative criteria must be met in that respect. As regards, first, the criterion relating to the effects of the contested provisions on the legal situation of the EDPS, the Court points out that the EDPS is responsible for monitoring the application by the EU institutions, bodies, offices or agencies of the relevant rules relating to the protection of personal data.[15] In the present case, the contested provisions amend the initial Europol regulation and have no bearing on the nature or scope of the tasks entrusted to the EDPS by EU legislation. Thus, while it is true that the legal regime which the EDPS is responsible for monitoring has been changed, his own powers have not been, since the way in which he can lawfully exercise those powers has not been altered as such. The EDPS is not, therefore, directly concerned by the contested provisions, inasmuch as his rights, obligations or powers have not been affected by those provisions. Furthermore, as regards the effects of the contested provisions on the decision of 3 January 2022, the Court makes clear that that decision is an administrative decision which cannot affect legislative acts, such as the amended Europol regulation, or affect the content thereof.

Secondly, as regards the criterion relating to the discretion of the addressees responsible for implementing the contested provisions, the Court notes that those provisions leave Europol a certain discretion. They are not, therefore, purely automatic in nature resulting from the EU rules alone vis-à-vis the EDPS, without the application of other intermediate rules.

Consequently, given that the contested provisions do not directly affect the legal situation of the EDPS and that the conditions that the act whose annulment is sought should be of direct concern and individual concern are cumulative, the Court concludes that the action is inadmissible.

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15 Pursuant to Article 1(3) of 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), and Article 43(1) of the initial Europol regulation.

IV. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (First Chamber), 7 September 2023, Lietuvos Respublikos generalinė prokuratūra, C-162/22

Link to the full text of the judgment

Reference for a preliminary ruling – Telecommunications – Processing of personal data in the electronic communications sector – Directive 2002/58/EC – Scope – Article 15(1) – Data retained by providers of electronic communications services and made available to authorities in charge of criminal proceedings – Subsequent use of those data in an investigation into misconduct in office

The Lietuvos Respublikos generalinė prokuratūra (Prosecutor General's Office of the Republic of Lithuania) ('the Prosecutor General's Office') opened an internal investigation into the appellant in the main proceedings, who at the time was a public prosecutor in a Lithuanian public prosecutor's office, on the ground that there was reason to believe that he had, when leading a pre-trial investigation, unlawfully provided information pertaining to that pre-trial investigation to the suspect and his lawyer.

In its report on that investigation, the Prosecutor General's Office found that the appellant in the main proceedings had in fact engaged in misconduct in office. According to that report, that misconduct in office was demonstrated by the evidence obtained during the internal investigation. In particular, information obtained during criminal intelligence operations and data collected during two pre-trial investigations confirmed telephone communications between the appellant in the main proceedings and the suspect's lawyer in the pre-trial investigation led by the appellant in the main proceedings concerning the suspect. On the basis of that report, the Prosecutor General's Office adopted two orders by which it imposed a penalty on the appellant in the main proceedings and dismissed him from service. The Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), before which the appellant in the main proceedings brought an action for annulment of those two orders, dismissed that action on the ground, inter alia, that the criminal intelligence operations carried out in the present case were lawful and that the information gathered in accordance with the provisions of the Law on criminal intelligence [16] had been used lawfully to assess whether the appellant in the main proceedings had engaged in misconduct in office.

The appellant in the main proceedings brought an appeal before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), the referring court in the present case, claiming that access by the intelligence bodies, in connection with a criminal intelligence operation, to traffic data and the actual content of electronic communications constituted such a serious interference with fundamental rights that, having regard to the provisions of the Directive on privacy and electronic communications [17] and the Charter of Fundamental Rights of the European Union ('the Charter'), such access could be granted only for the purpose of combating serious crime. However, according to the appellant in the main proceedings, the Law on criminal intelligence [18]

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16 Lietuvos Respublikos kriminalinės žvalgybos įstatymas (Law of the Republic of Lithuania on criminal intelligence) of 2 October 2012 (Žin., 2012, No 122-6093), in the version applicable to the facts in the main proceedings ('the Law on criminal intelligence').

17 Inter alia Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

18 Article 19(3) of the Law on criminal intelligence.

provides that such data may be used to investigate not only serious criminal offences, but also disciplinary misconduct or misconduct in office related to acts of corruption.

According to the referring court, the issues raised by the appellant in the main proceedings involve two elements: (i) access to data retained by providers of electronic communications services for purposes other than combating serious crime and preventing serious threats to public security; and (ii) once such access has been obtained, the use of those data in investigating corruption-related misconduct in office.

After recalling the conclusions drawn from the judgment in Privacy International [19] concerning the scope of the Directive on privacy and electronic communications, and those drawn from the judgment in Prokuratuur (Conditions of access to data relating to electronic communications) [20] so far as concerns the scope of the objective of preventing, investigating, detecting and prosecuting criminal offences, the referring court notes that the Court of Justice has not yet ruled on the impact of the subsequent use of the data concerned on the interference with fundamental rights. In those circumstances, the referring court harbours doubts as to whether such subsequent use must also be regarded as constituting such a serious interference with the fundamental rights enshrined in the Charter [21] that it can be justified only for the purposes of combating serious crime and preventing serious threats to public security, thus denying the possibility of using the data concerned for the investigation of corruption-related misconduct in office.

By its judgment, the Court clarifies the scope of its case-law stemming from the judgments in La Quadrature du Net and Others [22] and Commissioner of An Garda Síochána and Others, [23] holding that Article 15(1) of the Directive on privacy and electronic communications, read in the light of the Charter, [24] precludes the use, in connection with investigations into corruption-related misconduct in office, of personal data relating to electronic communications which have been retained, pursuant to a legislative measure adopted under that provision, by providers of electronic communications services and which have subsequently been made available, pursuant to that measure, to the competent authorities for the purpose of combating serious crime.

Findings of the Court

As regards the conditions under which traffic and location data relating to such communications may be used during an internal procedure concerning corruption-related misconduct in office, the Court recalls, first of all, that access to those data may be granted, pursuant to a measure adopted under Article 15(1) of the Directive on privacy and electronic communications, only in so far as those data have been retained by those providers in a manner that is consistent with that provision. Next, subsequent use of those data is possible only on condition, first, that the retention of those data by providers of electronic communications services was consistent with Article 15(1) of the Directive on privacy and electronic communications, as interpreted by the case-law of the Court, and, second, that the access to those data granted to the competent authorities was itself consistent with that provision.

As regards the objectives capable of justifying the use, by public authorities, of data retained by providers of electronic communications services pursuant to a measure in accordance with

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19 Judgment of 6 October 2020, Privacy International (C-623/17, EU:C:2020:790, paragraph 39).

20 Judgment of 2 March 2021, Prokuratuur (Conditions of access to data relating to electronic communications) (C-746/18, EU:C:2021:152, paragraphs 33 and 35).

21 Articles 7 and 8 of the Charter.

22 Judgment of 6 October 2020, La Quadrature du Net and Others (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

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

24 Articles 7, 8 and 11 and Article 52(1) of the Charter.

Article 15(1) of the Directive on privacy and electronic communications, read in the light of the Charter, the Court recalls that that provision enables the Member States to introduce exceptions to the obligation of principle to ensure the confidentiality of personal data, laid down in Article 5(1) of that directive, and to the corresponding obligations, referred to, inter alia, in Articles 6 and 9 of that directive, where such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence and public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system. To that end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on one of those grounds.

However, the Court recalls that Article 15(1) of the Directive on privacy and electronic communications cannot permit the exception to the obligation of principle to ensure the confidentiality of electronic communications and data relating thereto and, in particular, to the prohibition on storage of those data, laid down in Article 5 of that directive, to become the rule, if the latter provision is not to be rendered largely meaningless.

As regards the objectives that are capable of justifying a limitation of the rights and obligations laid down, in particular, in Articles 5, 6 and 9 of the Directive on privacy and electronic communications, the Court recalls that the list of objectives set out in the first sentence of Article 15(1) of that directive is exhaustive, as a result of which a legislative measure adopted under that provision must correspond, genuinely and strictly, to one of those objectives.

As regards the public interest objectives that may justify a measure taken pursuant to Article 15(1) of the Directive on privacy and electronic communications, the Court recalls that it is clear from its case-law, in particular from the judgments in La Quadrature du Net and Others and Commissioner of An Garda Síochána and Others, that, in accordance with the principle of proportionality, there is a hierarchy amongst those objectives according to their respective importance and that the importance of the objective pursued by such a measure must be proportionate to the seriousness of the interference that it entails. In that regard, the importance of the objective of safeguarding national security exceeds that of the other objectives referred to in Article 15(1) of the Directive on privacy and electronic communications, inter alia the objectives of combating crime in general, even serious crime, and of safeguarding public security. Subject to meeting the other requirements laid down in Article 52(1) of the Charter, the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives.

As regards, more specifically, the objective of preventing, investigating, detecting and prosecuting criminal offences, the Court notes that, in accordance with the principle of proportionality, only action to combat serious crime and measures to prevent serious threats to public security are capable of justifying serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, such as the interference entailed by the retention of traffic and location data. Accordingly, only non-serious interference with those fundamental rights may be justified by the objective of preventing, investigating, detecting and prosecuting criminal offences in general.

It follows from that case-law that the fight against serious crime and the prevention of serious threats to public security are of lesser importance in the hierarchy of objectives of public interest than the safeguarding of national security, but, by contrast, that their importance is greater than that of fighting crime generally and of preventing non-serious threats to public security. In that context, the Court nevertheless recalls that the question whether the Member States may justify a limitation on the rights and obligations laid down, inter alia, in Articles 5, 6 and 9 of the Directive on privacy and electronic communications must be assessed by measuring the seriousness of the interference entailed by such a limitation and by verifying that the importance of the public interest objective pursued by that limitation is proportionate to that seriousness.

Moreover, the Court recalls that access to traffic and location data retained by providers in accordance with a measure taken under Article 15(1) of the Directive on privacy and electronic communications, which must be given effect in full compliance with the conditions resulting from the case-law interpreting that directive, may, in principle, be justified only by the public interest objective for which those providers were ordered to retain those data. It is otherwise only if the importance of the objective pursued by access is greater than that of the objective which justified retention.

According to the Court, those considerations apply mutatis mutandis to the subsequent use of traffic and location data retained by providers of electronic communications services pursuant to a measure adopted under Article 15(1) of the Directive on privacy and electronic communications for the purpose of combating serious crime. Once they have been retained and made available to the competent authorities for the purpose of combating serious crime, such data cannot be transmitted to other authorities and used in order to achieve objectives, namely, in the present case, combating corruption-related misconduct in office, which are of lesser importance in the hierarchy of objectives of public interest than the objective of combating serious crime and preventing serious threats to public security. To authorise, in that situation, access to retained data and the use thereof would be contrary to that hierarchy of public interest objectives recalled above.

V. BORDER CONTROLS, ASYLUM AND IMMIGRATION

1. ASYLUM POLICY

Judgment of the Court of Justice (First Chamber), 21 September 2023, Staatssecretaris van Justitie en Veiligheid (Diplomatic Card), C-568/21

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Dublin System – Regulation (EU) No 604/2013 – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Responsibility of the Member State which issued a residence document to the applicant – Article 2(l) – Meaning of 'residence document' – Diplomatic card issued by a Member State – Vienna Convention on Diplomatic Relations

A third-country national worked at the embassy of his country of origin, established in Member State X. He lived in the territory of the latter with his wife and their children. During that stay the family was issued with diplomatic cards by the Ministry of Foreign Affairs of that Member State, in accordance with the Vienna Convention on Diplomatic Relations. [25] Some years later, the family left Member State X and applied for international protection in the Netherlands.

In January 2020, the competent authority in the Netherlands refused to examine the applications for international protection of the applicants in the main proceedings, considering that Member State X was responsible for examining them, in accordance with Article 12(1) of the Dublin III Regulation. [26] That competent authority took the view that the diplomatic cards issued by the authorities of that Member State constitute residence documents within the meaning of Article 2(l) of that regulation, capable of leading to that Member State being competent to examine the applications.

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25 Vienna Convention on Diplomatic Relations, concluded in Vienna on 18 April 1961 and entered into force on 24 April 1964 (United Nations, Treaty Series, Vol. 500, p. 95; 'the Vienna Convention').

26 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180, p. 31) ('the Dublin III Regulation'). Under Article 12(1) of that regulation: 'Where the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection.'

In March 2020, the rechtbank Den Haag (District Court, The Hague, Netherlands), before which the applicants in the main proceedings brought an action, upheld their actions, holding that the diplomatic cards issued by the authorities of Member State X could not be regarded as authorisation to stay, because the applicants in the main proceedings already had a right to stay in that Member State under the Vienna Convention, irrespective of whether diplomatic cards had been issued.

The competent authority of the Netherlands lodged an appeal against that judgment with the Raad van State (Council of State, Netherlands). In order to determine the Member State responsible for examining the applications for international protection lodged by the applicants in the main proceedings, that court referred to the Court of Justice the question whether a diplomatic card issued by a Member State under the Vienna Convention constitutes a 'residence document' within the meaning of Article 2(l) of the Dublin III Regulation. In its judgment, the Court answers that question in the affirmative.

Findings of the Court

In order to reach that conclusion, the Court states, in the first place, that the words 'any authorisation', which are used in Article 2(l) of the Dublin III Regulation, are broadly construed. The definition of 'residence document' given by that provision does not refer to the constitutive or declaratory nature of the authorisation, nor does it expressly exclude diplomatic cards issued under the Vienna Convention.

In the second place, as regards the context of that provision, the Court notes that the concept of a 'residence document' is one of the decisive criteria for the application of Article 12 of the Dublin III Regulation. Under Article 12(1) of that regulation, where the applicant is in possession of a valid residence document, responsibility for examining the application for international protection lies with the Member State which issued it. The application of the various criteria for determining the Member State responsible set out in Articles 12 to 14 of the Dublin III Regulation should, as a general rule, enable the responsibility for examining an application for international protection that may be lodged by a third-country national to be allocated to the Member State which that national first entered or stayed in upon entering on the territory of the Member States, taking into account the role played by that Member State when the national entered the territory of the Member States. In that regard, the Court states that, in accordance with the Vienna Convention, a receiving State is granted certain prerogatives as regards the admission to its territory of persons as members of the diplomatic staff of a mission, such as to declare a person non grata or not acceptable, to refuse to recognise the person concerned as a member of the mission [27], or even to refuse to give agrément for a person proposed as head of the mission [28]. In those circumstances, the issue of a diplomatic card to a person by a Member State reflects the latter's acceptance of that person's stay on its territory as a member of the diplomatic staff of a mission, and thus demonstrates the role played by that Member State in the presence of that person on the territory of the Member States.

In the third place, as regards the objective pursued by the Dublin III Regulation, recitals 4 and 5 thereof emphasise the importance of a clear and workable method for determining the Member State responsible, based on objective and fair criteria both for the Member States and for the persons concerned and enabling that that Member State be determined rapidly. Taking account of the issue of a diplomatic card contributes to that objective of rapidity and thus makes it possible to prevent third-country nationals from being able to choose the Member State in which they lodge an application for international protection.

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27 See Article 9 of the Vienna Convention.

28 See Article 4 of the Vienna Convention.

2. MOVEMENT ACROSS BORDERS

Judgment of the Court of Justice (Grand Chamber), 5 September 2023, Parliament v Commission (Visa exemption for nationals of the United States), C-137/21

Link to the full text of the judgment

Action for failure to act – Regulation (EU) 2018/1806 – Point (f) of the first paragraph of Article 7 – List of third countries whose nationals must be in possession of visas when crossing the external borders of the Member State – List of third countries whose nationals are exempt from that requirement – Principle of reciprocity – Request to adopt a delegated act temporarily suspending the visa exemption for a 12-month period for nationals of the United States of America

Under Regulation 2018/1806, [29] which lists the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States and those whose nationals are exempt from that requirement, the European Union set the objective of the principle of full visa reciprocity in order to improve the credibility and consistency of its external policy in respect of third countries. [30] On that bass, that regulation provides that a mechanism enabling the principle of reciprocity to be implemented must enable the European Union to respond in solidarity if one of the third countries included in the list in Annex II of the regulation decides to make the nationals of one or more Member States subject to a visa requirement. [31] The regulation delegates to the Commission the power to adopt acts in accordance with Article 290 TFEU concerning in particular the temporary suspension of the exemption from the visa requirement for nationals of such a third country. [32]

In April 2016, the Commission presented to the European Parliament and the Council of the European Union a communication [33] which stated that a situation of non-reciprocity continued in relation to three third countries, including the United States of America, which at that time imposed a visa requirement on nationals of five Member States. After the Commission found [34] that visa non-reciprocity concerned only two third countries, including the United States of America, the Parliament adopted a resolution [35] in March 2017 in which it considered that the Commission was 'legally obliged

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29 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) (OJ 2018 L 303, p. 39).

30 See recital 14 of Regulation 2018/1806.

31 See recital 15 of Regulation 2018/1806.

32 See recital 17 and Article 7(e), (f) and (h) of Regulation 2018/1806. In particular, under Article 7:

'Where a third country listed in Annex II applies a visa requirement for nationals of at least one Member State, the following provisions shall apply:

...

(f) if within 24 months of the date of the publication referred to in the third subparagraph of point (a), the third country concerned has not lifted the visa requirement, the Commission shall adopt a delegated act in accordance with Article 10 temporarily suspending the exemption from the visa requirement for a period of 12 months for the nationals of that third country. ... Without prejudice to the application of Article 6, during the periods of that suspension the nationals of the third country concerned by the delegated act shall be required to be in possession of a visa when crossing the external borders of the Member States;

...'

33 Communication from the Commission to the European Parliament and the Council of 12 April 2016 – State of play and the possible ways forward as regards the situation of non-reciprocity with certain third countries in the area of visa policy (COM(2016) 221 final).

34 By its second follow-up communication of 21 December 2016.

35 European Parliament resolution of 2 March 2017 on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No 539/2001 (2016/2986(RSP)) (OJ 2018 C 263, p. 2; 'the resolution of March 2017').

to adopt a delegated act – temporarily suspending the exemption from the visa requirement for nationals of third countries which have not lifted the visa requirement for citizens of certain Member States' and called upon the Commission to adopt such an act. The Commission replied unfavourably to that request in May 2017. [36] Following the submission by the Commission of its sixth follow-up communication in March 2020, the Parliament reiterated its call to act [37] given that the United States of America continued to impose a visa requirement on nationals of four Member States. Again, the Commission did not respond favourably to that call. [38]

The Parliament – taking the view that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 requires the Commission to adopt a delegated act where the conditions for the adoption of such an act laid down by that provision are satisfied – brought an action for failure to act against the Commission under Article 265 TFEU.

In its judgment, the Court of Justice rules on the admissibility of the action for failure to act, that is to say, on the one hand, on the time limit for bringing proceedings laid down in that provision and, on the other, on the concept of position defined by an institution within the meaning of that provision in an interinstitutional context. The Court dismisses the action as to the substance on the ground that, by complying with the criteria of that regulation, the Commission did not exceed its discretion when it took the view that it was not required to adopt the delegated act requested.

Findings of the Court

In the first place, the Court rules on the admissibility of the action. [39]

The first plea of inadmissibility alleges that the action was brought out of time, since the Parliament brought its action for failure to act after sending the Commission, by a resolution of October 2020, a second invitation to act, whereas it had not brought such an action following the resolution of March 2017. In this respect, the Court finds that the question whether the Parliament thus failed to comply with the time limit for bringing proceedings laid down in the second paragraph of Article 265 TFEU depends on whether that second call to act is, in the light of objective factors relating to its content or its context, distinct from the first. In that regard, in the communication which followed the resolution of March 2017, the Commission had considered, inter alia, that the adoption of a delegated act temporarily suspending the visa exemption would be counterproductive 'at this moment' and would not serve to contribute to achieving the objective of visa-free travel for all EU citizens. By its resolution of October 2020, the Parliament had asked the Commission to reconsider the approach it had chosen three years earlier, in the light of developments which had occurred in the meantime. The Court notes, in that regard, that various reasons – both of a legal and political nature – may have led the Parliament, in the first instance, not to bring legal proceedings following the adoption of that communication by the Commission. Moreover, it is apparent that the Parliament adopted the resolution of October 2020 after having assessed the evolution of the situation since the adoption of the first call to act. Since the calls to act contained in the two resolutions are distinct in the light of both their content and the context in which they were adopted, the Court concludes that the purpose of the resolution of October 2020 could not have been to circumvent the time limit for bringing proceedings laid down in the second paragraph of Article 265 TFEU, which had started to run with the call to act contained in the resolution of March 2017.

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36 By its follow-up communication of 2 May 2017 (COM(2017) 227 final).

37 European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity in accordance with Article 7 of Regulation (EU) 2018/1806 (2020/2605(RSP)) (OJ 2021 C 404, p. 157; 'the resolution of October 2020').

38 Communication from the Commission to the European Parliament and the Council defining the position of the Commission following the European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity and reporting on the state of play (COM(2020) 851 final) ('the communication of December 2020'),

39 Under the second paragraph of Article 265 TFEU, an action for failure to act is admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, that institution, body, office or agency has not defined its position, that action may be brought within a further period of two months.

As regards the second plea of inadmissibility, alleging that the Commission had defined its position in its communication of December 2020, the Court recalls that, under the first paragraph of Article 265 TFEU, the matter may be brought before it for a declaration that the institution concerned has failed to act, in infringement of the Treaties. In that regard, the Court points out that the fact that the response of an institution to a call to act does not satisfy the person who addressed that call to the institution does not mean that that answer does not amount to a position defined by an institution, the adoption of which puts an end to the failure to act. However, that solution cannot apply in an interinstitutional context, in cases where the inadmissibility of an action for failure to act would allow the institution concerned to persist in a state of inaction. That would be the case if the communication of the Commission at issue were to be classified as a position defined by an institution, for the purposes of the second paragraph of Article 265 TFEU. A refusal to act following a call to act can thus be brought before the Court on the basis of the second paragraph of Article 265 TFEU since that refusal, however explicit it may be, does not put an end to the failure to act. In those circumstances, in an interinstitutional context, the response of an institution consisting – as in the present case – in a statement of the reasons why, according to that institution, it is appropriate not to adopt the requested measure, must necessarily be regarded as a refusal to act on the part of that institution and must therefore be capable of being referred to the Court in the context of an action brought under Article 265 TFEU.

In the second place, as regards the single plea in law raised, on the substance, by the Parliament, according to which the Commission infringed the Treaties by failing to adopt, pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806, a delegated act temporarily suspending the exemption from the visa requirement for nationals of the United States of America, the Court observes that, admittedly, it appears from the wording of that provision that the Commission is required to adopt such an act where the conditions required for its adoption are satisfied. However, that interpretation must be ruled out in the light of the general scheme of the first paragraph of Article 7 of Regulation 2018/1806, characterised in particular by the multi-stage structure of the reciprocity mechanism which it establishes. It is thus apparent, in particular, from a combined reading of the provisions set out in that article, read in the light of recital 17 of that regulation, that the Commission enjoys discretion as to whether or not to adopt a delegated act based on that article. The Commission is therefore not obliged to adopt the delegated act in question after the expiry of the 24-month period commencing on the date of publication of the notification referred to in point (a) of the first paragraph of Article 7 of that regulation.

By contrast, the Commission must take into account the three criteria set out in point (d) of the first paragraph of Article 7 of Regulation 2018/1806 for the purpose of determining whether it is appropriate, in the light of the objective of full reciprocity, to suspend the exemption from the visa requirement for nationals of the third country concerned or whether, on the contrary, it is appropriate to refrain from taking such a measure, in the light of interests relating, in particular, to the external relations of the Member States, the countries associated with the Schengen area and the European Union. [40] After having examined those three criteria, the Court finds that the Commission did not exceed the discretion it enjoyed in this case in taking the view, following the call to act which the Parliament had addressed to it in October 2020, that it was not required to adopt the delegated act in question. Consequently, it dismisses the action as unfounded.

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40 According to Article 7(d) Regulation 2018/1806:

'Where a third country listed in Annex II applies a visa requirement for nationals of at least one Member State, the following provisions shall apply:

...

(d)the Commission shall, when considering further steps in accordance with point (e), (f) or (h), take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, the steps taken in accordance with point (b), and the consequences of the suspension of the exemption from the visa requirement for the external relations of the Union and its Member States with the third country in question;'

...'

VI. COMPETITION: STATE AID

Judgment of the Court of Justice (Fourth Chamber), 28 September 2023, Ryanair v Commission, C-320/21 P

Link to the full text of the judgment

Appeal – State aid – Article 107(2)(b) TFEU – Swedish air transport market – Aid granted by the Kingdom of Sweden to an airline amid the COVID-19 pandemic – Temporary Framework for State aid measures – State guarantee on a revolving credit facility – Decision by the European Commission not to raise objections – Aid intended to make good the damage suffered by a single victim – Principles of proportionality and non-discrimination – Freedom of establishment and freedom to provide services

Judgment of the Court of Justice (Fourth Chamber), 28 September 2023, Ryanair v Commission, C-321/21 P

Link to the full text of the judgment

Appeal – State aid – Article 107(2)(b) TFEU – Danish air transport market – Aid granted by the Kingdom of Denmark to an airline amid the COVID-19 pandemic – Temporary Framework for State aid measures – State guarantee on a revolving credit facility – Decision by the European Commission not to raise objections – Aid intended to make good the damage suffered by a single victim – Principles of proportionality and non-discrimination – Freedom of establishment and freedom to provide services

In April 2020 the Kingdom of Denmark and the Kingdom of Sweden notified the European Commission of two separate aid measures for SAS AB, each involving a guarantee on a revolving credit facility of up to 1.5 billion Swedish kronor (SEK) ('the measures at issue'). Those measures were intended to compensate SAS in part for the damage resulting from the cancellation or rescheduling of its flights after the imposition of travel restrictions amid the COVID-19 pandemic.

The notification of the Swedish aid measure immediately followed the Commission's approval, under Article 107(3)(b) TFEU, [41] of a Swedish loan guarantee scheme to support certain airlines amid the COVID-19 pandemic. [42] In that respect, Sweden had confirmed that SAS, which was experiencing difficulties in obtaining loans from credit institutions under the Swedish loan guarantee scheme, would benefit either from aid under that scheme or from the new notified guarantee, but not from both measures at the same time.

By decisions of 15 April 2020 [43] and of 24 April 2020, [44] the Commission classified the measures at issue as State aid that was compatible with the internal market pursuant to Article 107(2)(b) TFEU. In accordance with that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the internal market.

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41 Under that provision, aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State may be declared compatible with the internal market.

42 Decision C(2020) 2366 final on State aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines (OJ 2020 C 269, p. 1).

43 Commission Decision C(2020) 2416 final of 15 April 2020 on State aid SA.56795 (2020/N) – Denmark – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines (OJ 2020 C 220, p. 7).

44 Commission Decision C(2020) 2784 final of 24 April 2020 on State aid SA.57061 (2020/N) – Sweden – Compensation for the damage caused by the COVID-19 outbreak to Scandinavian Airlines (OJ 2020 C 220, p. 9).

The airline Ryanair brought actions for annulment of those decisions, which were, however, dismissed by two judgments of the General Court. [45]

The appeals brought by Ryanair against those judgments are dismissed by the Court of Justice, [46] which confirms, in that context, that aid measures adopted in order to address the consequences of the COVID-19 pandemic may lawfully be reserved to a single undertaking, even if its competitors are also affected by that pandemic.

Findings of the Court

First of all, the Court of Justice confirms the General Court's analysis that aid granted under Article 107(2)(b) TFEU and intended to deal with an exceptional occurrence may, as in the present case, be limited to a single undertaking to the exclusion of all other adversely affected undertakings.

In that regard, the Court of Justice notes that it is in no way apparent from the wording of Article 107(2)(b) TFEU, read in the light of its objective, that only aid granted to all undertakings which suffered damage caused by an exceptional occurrence could be declared compatible with the internal market.

It is true that if, when examining an aid measure under that provision, the Commission were to find that the selection of the beneficiary is not consistent with the objective of compensating for the disadvantages caused directly by an exceptional occurrence and that it thus meets other considerations unrelated to that objective, that measure cannot be declared compatible with the internal market.

However, the mere fact that aid is granted to only one undertaking, among a number of undertakings potentially adversely affected by an exceptional occurrence, still does not mean that that aid necessarily pursues other objectives to the exclusion of the objective pursued by Article 107(2)(b) TFEU or that it is granted arbitrarily.

In that context, the Court of Justice also rejects Ryanair's argument that the purpose of that provision presupposes that the Member State concerned acts as an 'insurer of last resort' offering the same protection to all undertakings exposed to certain exceptional occurrences, since such an interpretation is not apparent either from the wording or from the objective of Article 107(2)(b) TFEU.

Accordingly, the General Court did not err in law in finding that, notwithstanding the fact that the measures at issue did not benefit all the undertakings which suffered damage caused by the COVID 19 pandemic, the Commission was entitled to classify them as aid compatible with the internal market under Article 107(2)(b) TFEU.

Moreover, contrary to what Ryanair maintained, the fact that the Commission had declared the Swedish loan guarantees scheme compatible with the internal market on the basis of Article 107(3)(b) TFEU did not prevent it from declaring the new guarantee notified by the Kingdom of Sweden compatible with the internal market under Article 107(2)(b) TFEU. Since an event such as the COVID-19 pandemic may be classified both as an 'exceptional occurrence', within the meaning of the latter provision, and as an event giving rise to a 'serious disturbance in the economy', within the meaning of the former provision, the FEU Treaty does not preclude the concurrent application of those provisions, provided that the respective conditions for their application are met.

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45 Judgments of 14 April 2021, Ryanair v Commission (SAS, Denmark; Covid-19) (T-378/20, EU:T:2021:194) and Ryanair v Commission (SAS, Sweden; Covid-19) (T-379/20, EU:T:2021:195).

46 The appeal brought against the judgment in Case T-379/20 is dismissed by the judgment of the Court of Justice in Case C-320/21 P. The appeal brought against the judgment in Case T-378/20 is dismissed by the judgment of the Court of Justice in Case C-321/21 P.

Next, in the context of the review of proportionality, while confirming that individual aid granted under Article 107(2)(b) TFEU cannot exceed the losses incurred by its beneficiary as a result of the exceptional occurrence concerned, the Court of Justice rejects Ryanair's complaints that the General Court should have taken into account possible overcompensation of SAS in relation to the damage suffered by the other airlines operating in Sweden and Denmark. On that point, the Court of Justice states, first, that the question whether, or to what extent, other companies also suffered damage as a result of the COVID-19 pandemic is clearly irrelevant for the purposes of assessing possible overcompensation in favour of SAS. Second, since the Kingdom of Denmark and the Kingdom of Sweden were not required to take into account all the damage caused by the COVID-19 pandemic or to grant all adversely affected undertakings the benefit of the aid, the authorisation to grant, under Article 107(2)(b) TFEU, aid to SAS alone cannot be made subject to the Commission demonstrating that the damage caused by that pandemic caused damage only to that undertaking.

Moreover, the General Court was right to hold that, in the case of aid in the form of a guarantee on a credit facility, the amount of aid granted to the beneficiary which the Commission must take into account in order to determine whether there has been any overcompensation corresponds, in principle, to the difference in the rate granted to that beneficiary with or without the guarantee on the date its decision was adopted. By contrast, for the purposes of that determination, the Commission must not have regard to any advantage which the beneficiary might have indirectly derived from it, such as the competitive advantage resulting, as the case may be, from the fact that it was the sole beneficiary of the aid.

The Court of Justice also endorses the General Court's conclusion that the measures at issue are not contrary to the principle of non-discrimination solely because they are inherently exclusive, since EU law allows Member States to grant individual aid, provided that all the conditions laid down in Article 107 TFEU are fulfilled.

In that regard, the Court of Justice recalls that, although Article 107(1) TFEU lays down the principle that measures meeting the conditions laid down in that provision, which include the requirement of selectivity, are incompatible with the internal market, the fact remains that paragraphs 2 and 3 of that article provide for certain derogations from that principle. It follows that State aid granted for the purposes of an objective recognised by those derogations and within the limits of what is necessary and proportionate to achieve that objective cannot be held to be incompatible with the internal market having regard solely to the characteristics or effects inherent in any State aid, that is to say, in particular, for reasons relating to whether the aid is selective or distorts competition.

In that context, the Court of Justice also rejects Ryanair's claim that the General Court erred in law in failing to apply the principle of non-discrimination on grounds of nationality laid down in Article 18 TFEU, but examined the measures at issue in the light of Article 107(2)(b) TFEU. In accordance with settled case-law, Article 18 TFEU is intended to apply independently only to situations governed by EU law in respect of which the FEU Treaty does not lay down specific rules prohibiting discrimination. According to the Court of Justice, the derogations provided for in Article 107(2) and (3) TFEU constitute such specific rules.

Nor did the General Court err in law in rejecting Ryanair's complaints alleging infringement of the provisions on the freedom to provide services and freedom of establishment. In that regard, the Court of Justice notes that, in order to establish that the measures at issue, because they benefited only SAS, constituted an obstacle to the freedom of establishment and the freedom to provide services, Ryanair would have had to show that they produced restrictive effects that go beyond those inherent in State aid granted in accordance with the requirements laid down in Article 107(2)(b) TFEU. However, in its line of argument, Ryanair merely criticised the choice of SAS as the sole beneficiary of the measures at issue and the consequences of that choice, even though that choice is inherent in the selective nature of those measures.

Lastly, the Court of Justice rejects the ground of appeal alleging that the General Court disregarded the requirements to state reasons for the Commission's decisions not to raise objections to the measures at issue and, consequently, dismisses Ryanair's two appeals in their entirety.

Judgment of the General Court (Fourth Chamber, Extended Composition), 13 September 2023, ITD and Danske Fragtmænd v Commission, T-525/20

Link to the judgment as published in extract form

State aid – Postal and road haulage sector – Complaint from a competitor – Capital contribution granted by a public undertaking to its subsidiary – Decision finding no State aid after the preliminary examination stage – Parent company of the group jointly controlled by two Member States – Approval of the capital contribution by the parent company of the group – Whether imputable to the State

PostNord Logistics A/S is a road haulage undertaking in Denmark entirely owned by PostNord Group AB. The latter is, for its part, a wholly owned subsidiary of PostNord AB, the share capital of which is 40% owned by the Kingdom of Denmark and 60% owned by the Kingdom of Sweden.

At the end of 2018, PostNord Group decided to make a capital injection of 115 million Danish kroner (approximately EUR 15.4 million) in favour of PostNord Logistics, an initial tranche of which was paid on 20 December 2018 ('the capital injection'). In view of the amount at stake, PostNord Group subjected that injection to the prior approval of PostNord's board of directors.

It is in those circumstances that ITD, [47] a trade association comprising Danish haulage and logistics companies, lodged a complaint with the European Commission alleging, inter alia, that the capital injection constituted unlawful State aid incompatible with the internal market.

Taking the view, inter alia, that, not being imputable to the Danish and Swedish States, the capital injection did not constitute State aid, the Commission rejected that complaint without initiating the formal investigation procedure provided for in Article 108(2) TFEU. [48]

Hearing an action for annulment brought by ITD and by a competitor of PostNord Logistics, the General Court annuls that Commission decision in part, on the ground that that institution erred in law by failing to initiate the formal investigation procedure despite the serious difficulties raised by the assessment of the capital injection in the light of Article 107 TFEU.

Findings of the Court

The lodging of a complaint informing the Commission of alleged illegal aid triggers the initiation of the preliminary examination stage provided for by Article 108(3) TFEU. If, following that preliminary examination, the Commission finds that, notwithstanding the fact that the measure in question falls within the scope of Article 107(1) TFEU, it does not raise any doubts as to its compatibility with the internal market, the Commission is to adopt a decision not to raise objections. On the other hand, if there are serious difficulties encountered during the examination of the aid character of the measure at issue or its compatibility with the internal market, the initiation of the formal investigation procedure provided for in Article 108(2) TFEU is required. In that latter regard, it follows from the case-law that, if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes an indication of the existence of such difficulties.

In the light of those principles, the applicants have, in essence, argued that the conclusion of the Commission according to which the capital injection was not imputable to the Danish and Swedish States was contradicted by the circumstances of the case, which in their view demonstrates the existence of serious difficulties necessitating the initiation of the formal investigation procedure.

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47 ITD, Brancheorganisation for den danske vejgodstransport A/S ('ITD').

48 Decision C(2020) 3006 final of the Commission of 12 May 2020 concerning State aid SA.52489 (2018/FC) – Denmark and SA.52658 – Sweden ('the contested decision').

In that regard, the Court notes that, while it is true that the imputability of the capital injection to the Danish and Swedish States could not be inferred from the mere fact that PostNord Group, which was required to approve the said capital injection, is a public undertaking, it was still necessary for the Commission to examine whether the public authorities had to be regarded as having been involved, in one way or another, in the adoption of that measure.

While finding that the Commission examined the involvement of the Danish and Swedish authorities in the capital injection by reference to 12 different factors, however, the Court considers that that examination and the conclusion reached by the Commission of lack of involvement are indicators of serious difficulties, such as to oblige it to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

On that point, the Court considers, in the first place, that the arguments put forward by the applicants, according to which PostNord's board of directors was composed of 8 members out of 11 the appointment of whom fell to the ministers of the Danish and Swedish States, and 2 of whom were, moreover, senior civil servants, tend to establish that, at the time of the capital injection, PostNord had a limited degree of independence from those Member States. The circumstance that those organic factors, capable of constituting a non-negligible indicator that the capital injection was imputable to the Danish and Swedish States, had not been duly taken into consideration by the Commission, demonstrates the incomplete and insufficient nature of its examination and therefore constitutes a first indication of the existence of serious difficulties.

Given that the organic links between a public undertaking and the State which owns it cannot, in principle, suffice to establish the imputability to the State of a measure taken by that undertaking, the Court looks, in the second place, at other signs of involvement of the Danish and Swedish public authorities available to the Commission, which confirm the incomplete and insufficient nature of its examination.

In that regard, the Court notes first of all that the Commission failed to examine whether the existence of a dialogue on the restructuring of PostNord's Danish business, which had taken place between PostNord and the Danish and Swedish States, was capable of concerning PostNord Logistics' business, even though that matter had been put forward by ITD in its complaint, as an indication of the role of supervision and control exercised by those States over the capital injection, approved by PostNord.

Next, the Court emphasises that PostNord, the primary purpose of which is to operate nationwide postal services in Denmark and Sweden and the subsidiaries of which are, moreover, entrusted with the universal service obligation in those Member States, pursues public policy objectives falling within the competence of those States. Although that fact tends to prove, according to the case-law, that the Danish and Swedish public authorities pay special attention to the decisions taken by PostNord, the Commission failed to take into account that element during its analysis of the imputability to those Member States of the capital injection, as approved by PostNord.

Last, the Court finds that the Commission's analysis, according to which the amount of the capital injection in absolute terms did not raise suspicions as to the involvement of the Danish and Swedish States in the adoption of that measure, demonstrates once more the incomplete and insufficient nature of its examination, especially since that amount, approximately EUR 15.4 million, exceeded the threshold above which capital injections within the group had to obtain approval from PostNord, the board of directors of which had close links with those States.

The applicants having therefore adduced evidence of the existence of serious difficulties which the Commission did not overcome during its assessment of the capital injection in the light of Article 107 TFEU, the Court upholds their action in so far as it is directed against the part of the contested decision in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, concluded that that capital injection was not imputable to the Danish and Swedish States and, therefore, did not constitute State aid.

Judgment of the General Court (Second Chamber, Extended Composition), 20 September 2023, Belgium v Commission, T-131/16 RENV

Link to the full text of the judgment

State aid – Aid scheme put into effect by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Taxable profit – Excess profit exemption – Advantage – Selectivity – Adverse effect on competition – Recovery

Judgment of the General Court (Second Chamber, Extended Composition), 20 September 2023, Magnetrol International v Commission, T-263/16 RENV, T-265/16, T-311/16, T-319/16, T-321/16, T-343/16, T-350/16, T-444/16, T-800/16 and T-832/16

Link to the full text of the judgment

State aid – Aid scheme put into effect by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Taxable profit – Excess profit exemption – Advantage – Selectivity – Recovery

Between 2004 and 2014, the Belgian tax administration issued tax rulings to Belgian entities of multinational corporate groups. On the basis of those tax rulings, those entities were able to reduce their tax base in Belgium by deducting what was considered to be 'excess' profit from the profit which they had recorded. According to the Belgian tax authorities, that excess profit arose from synergies, economies of scale or other benefits resulting from membership of a multinational group and, accordingly, was not attributable to the Belgian entities in question.

By a decision of 11 January 2016, [49] the European Commission found that the excess profit exemption scheme, pursuant to which the Kingdom of Belgium had issued the tax rulings, constituted a State aid scheme for the purposes of Article 107(1) TFEU that was incompatible with the internal market. Taking the view that that scheme had been put into effect in breach of Article 108(3) TFEU, the Commission ordered that the aid thus granted be recovered from its beneficiaries, a definitive list of which was to be drawn up by the Kingdom of Belgium following the decision.

After actions for annulment were brought before it by the Kingdom of Belgium and by a number of undertakings that were identified in the Commission's decision or that had benefited from a tax ruling, the General Court annulled the Commission's decision by a judgment of 14 February 2019, [50] on the ground that the Commission had incorrectly found that there was an aid scheme.

Sur pourvoi introduit par la Commission, la Cour a, d'une part, annulé l'arrêt du Tribunal, et, d'autre part, rejeté définitivement les moyens contestant l'existence d'un régime d'aides et la compétence de la Commission [51]. Le litige n'étant pas en état d'être jugé s'agissant des moyens d'annulation non encore examinés par le Tribunal, la Cour a renvoyé l'affaire devant le Tribunal pour qu'il statue sur ces moyens.

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49 Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61; 'the contested decision').

50 Judgment of 14 February 2019, Belgium and Magnetrol International v Commission (T-131/16 and T-263/16, EU:T:2019:91).

51 Judgment of 16 September 2021, Commission v Belgium and Magnetrol International (C-337/19 P, EU:C:2021:741).

In the proceedings following referral, the General Court rejects all of the pleas for annulment which it was required to review and accordingly dismisses in their entirety the actions brought by the Kingdom of Belgium and the applicant undertakings.

Findings of the Court

In support of their actions for annulment, the Kingdom of Belgium and the applicant undertakings challenged in particular the existence of an advantage arising from the excess profit scheme and the selectivity of that advantage.

As regards the reference system, that is to say, the ordinary or 'normal' tax system in relation to which the two aforementioned elements must be analysed, the Kingdom of Belgium and the applicants claimed that the Commission had erred in finding that the Belgian corporate income tax system provided for all of a company's recorded profit to be taxed, while disregarding the possibility that adjustments might be made. Moreover, the Commission had, in their submission, incorrectly excluded the excess profit scheme from that reference system.

In that regard, it was apparent, however, from the applicable provisions of the Belgian Income Tax Code that the taxable profit consisted, fundamentally, of all profits recorded by undertakings subject to taxation in Belgium. Those recorded profits constituted the starting point for calculating that tax, and could be subject to the upward and downward adjustments provided for by law. However, while the applicable legislation made the downward adjustment of profits subject to a twofold condition, namely that the Belgian entity's profit that was to be adjusted should have been included in the profit of another associated company and that the latter company would have made that profit if conditions similar to those agreed between independent companies had been applicable, the excess profit exemption which the Belgian tax authorities applied in their tax rulings was not subject to that twofold condition. In the light of that finding, the Court concludes that the Commission was right to find that the excess profit exemption scheme, as applied by the Belgian tax authorities, did not form part of the reference system applicable in the present case.

The Court also rejects the criticism which the Kingdom of Belgium and the applicant undertakings levelled against the finding, in the contested decision, of the existence of an advantage favouring the beneficiaries of the tax rulings.

First, the Court confirms that the Commission did indeed consider the advantage criterion and disclosed the factors taken into account in considering the existence of an advantage. The fact that the analysis of advantage was included in a section that also covers the examination of selectivity did not have any impact in that regard. Secondly, the Court notes that the implementation of the excess profit scheme, characterised by the grant of exemptions in disregard of the legal conditions applicable, was capable of resulting in a reduction of the tax which the benefiting entities would otherwise have had to pay. In those circumstances, the Commission cannot be criticised for having found that that scheme was such as to favour its beneficiaries.

The Court rejects, moreover, the various complaints put forward to counter the Commission's finding, concluding its primary line of reasoning, that the excess profit scheme derogated from the ordinary Belgian corporate income tax system, in that the Belgian tax authorities' practice of making a unilateral downward adjustment without the need to establish that the profit that was to be adjusted had been included in the profit of another company, and that it was profit which would have been made by that other company if the relevant transactions had been between independent companies, was not provided for by that system. The Court also rejects the complaints against the Commission's conclusion that the advantage resulting from that practice of the Belgian tax authorities, in derogation from the reference system, was not available to all entities in a similar legal and factual situation.

In the first place, the Court rules that, in the light of the administrative practice of the tax authorities, the Commission did not err in finding that the entities forming part of a multinational group which benefited from the excess profit exemption were treated differently from other entities in Belgium that did not benefit from it, although those entities were in a comparable factual and legal situation in the light of the objective of the ordinary tax rules, which is the taxation of all taxable profits of all companies resident or operating through a permanent establishment in Belgium.

In the second place, the Court finds that the Commission did not, moreover, make an error of assessment when it stated that the scheme at issue was selective in that it excluded companies that

had decided not to make investments, centralise activities or create employment in Belgium. In fact, it was apparent from the sample of tax rulings analysed in the contested decision that all of those rulings had been granted following proposals by requesting parties to invest, to relocate certain operations or to create a certain number of jobs in Belgium.

In the third place, in view of the fact that none of the tax rulings in that sample concerned entities belonging to small groups of undertakings, the Commission also cannot be criticised for having stated that the scheme at issue was selective in that it was not open to undertakings that were part of a small group.

In those circumstances, the Court does not consider it necessary to examine the complaints against the Commission's subsidiary line of reasoning as to selectivity, in so far as the excess profit exemption derogated from the arm's length principle.

The Court also rejects the arguments put forward by the Kingdom of Belgium to the effect that the excess profit scheme was not financed through State resources since the excess profit did not fall within its tax jurisdiction.

On that point, the Court makes clear that, under the ordinary system of taxation of corporate profits in Belgium, the total amount of profit recorded by resident companies is, fundamentally, taxable in Belgium. Thus, it is by taking into account that choice made by the Belgian legislature, in the exercise of its tax jurisdiction, that the Commission was able to conclude that the non-taxation of the excess profit of Belgian entities of multinational groups, when it was, fundamentally, taxable profit, constituted a loss of resources that belonged to that State.

The Kingdom of Belgium's argument that the excess profit exemption, as applied by the tax authorities, was justified by the nature and general scheme of the tax system and, more specifically, by the objective of avoiding double taxation, is not compelling either. In practice, that exemption was not conditional upon proof that the excess profit had been included in the profit of another associated company or that it had actually been taxed in another State. The Commission was, therefore, right to conclude that the exemption system at issue did not address situations of double taxation in a necessary and proportionate manner.

Nor had the Commission erred in finding that the excess profit exemption scheme distorted or threatened to distort competition and was liable to affect trade within the European Union.

In that regard, the Court notes that the exemption system at issue was capable of altering the activities within the groups of undertakings that included a Belgian entity, in that decisions on making investments, the location of activities and creating employment were liable to be taken in such a way that that Belgian entity would make profits that would subsequently be exempt in Belgium. In those circumstances, the Commission cannot be criticised for having found that the aid granted by the tax rulings was liable to affect trade between the Member States and to distort or threaten to distort competition.

The Court rejects, moreover, the pleas put forward by the Kingdom of Belgium and the applicant undertakings alleging errors by the Commission in identifying the Belgian entities that had obtained an advance ruling and the multinational groups to which those entities belonged as beneficiaries of the scheme at issue.

On that point, the Court states that, in the contested decision, the Commission highlighted elements that supported its conclusion that there were, in principle, links of control within the multinational corporate groups to which the Belgian entities that had obtained advance rulings belonged. In view of those elements, the Commission did not exceed the limits of its broad discretion when it found that those groups constituted an economic unit with those entities, benefiting from State aid under the scheme at issue, within the meaning of Article 107(1) TFEU. Nor, in the light of those considerations, had the Commission breached the principles of legal certainty and legality by ordering that the unlawful aid be recovered from those groups.

Furthermore, it is also apparent from the contested decision that the Commission had, in accordance with the case-law, provided explanations enabling the Kingdom of Belgium to look at the individual situation of each undertaking concerned both as regards the beneficiaries from which the aid was to be recovered and the amount to be recovered.

In the same context, the Court rejects the arguments of the applicant undertakings alleging breach of the principle of proportionality in that recovery was ordered from all beneficiaries, regardless of their size, resources and degree of sophistication. Indeed, since recovery of State aid is the only consequence of its unlawfulness and of its incompatibility with the rules on State aid, it cannot be contingent on the situation of its beneficiaries.

Lastly, the Court rejects the complaint of the applicant undertakings that, in ordering the recovery of an amount equal to the tax that would have been imposed on the beneficiaries' income had a tax ruling not been issued, without taking into account any upward adjustments that might have been made by another tax administration in respect of the excess profit, the contested decision had required an amount to be recovered that might have been higher than the advantage received by the beneficiaries.

In that regard, the Court recalls, first, that the Commission is not required to carry out an analysis of the aid granted in individual cases under an aid scheme. It is only at the stage of recovery of the aid that it becomes necessary to look at the individual situation of each undertaking concerned. Secondly, and in any event, the contested decision does not affect the rights on which any taxpayer may rely, under the double taxation treaties applicable, inter alia, in order to secure an appropriate adjustment of that taxpayer's taxable profit, following an upward adjustment by the tax authorities of other jurisdictions.

Judgment of the General Court (Eighth Chamber), 27 September 2023, Banco Santander and Santusa v Commission, T-12/15, T-158/15 and T-258/15

Link to the full text of the judgment

State aid – Aid scheme implemented by Spain – Deduction of corporation tax allowing companies which are tax resident in Spain to amortise goodwill resulting from the indirect acquisition of shareholdings in non-resident companies through the direct acquisition of shareholdings in non-resident holding companies – Decision declaring the aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid paid out – Decision 2011/5/EC – Decision 2011/282/EU – Scope – Withdrawal of an act – Legal certainty – Legitimate expectations

In order to encourage investment abroad by Spanish companies, Article 12(5) of the Spanish Law on Corporation Tax ('the TRLIS') [52] provides, subject to certain conditions, for a tax amortisation of financial goodwill in the case of the acquisition of shareholdings of at least 5% in a foreign company. For the purposes of that provision, financial goodwill is defined as the part of the difference between the purchase price of the shareholding and its book value on the date of the acquisition that has not been booked under the goods and rights of the non-resident company.

In 2005 and 2006, that tax amortisation scheme ('the scheme at issue') was the subject of several questions from Members of the European Parliament. [53] In its replies of 19 January and 17 February

52 Ley 43/1995 del Impuesto sobre Sociedades (Law 43/1995 on corporation tax) of 27 December 1995 (BOE No 310 of 28 December 1995, p. 37072).

53 That scheme has also already given rise, inter alia, to the judgments of 21 December 2016, Commission v World Duty Free Group and Others (C-20/15 P and C-21/15 P, EU:C:2016:981); of 6 October 2021, Sigma Alimentos Exterior v Commission (C-50/19 P, EU:C:2021:792); of 6 October 2021, World Duty Free Group and Spain v Commission (C-51/19 P and C-64/19 P, EU:C:2021:793); of 6 October 2021, Banco Santander v Commission (C-52/19 P, EU:C:2021:794); and of 6 October 2021, Banco Santander and Others v Commission (C-53/19 P and C-65/19 P, EU:C:2021:795), of 6 October 2021, Axa Mediterranean v Commission (C-54/19 P, EU:C:2021:796); of 6 October 2021, Prosegur Compañía de Seguridad v Commission (C-55/19 P, EU:C:2021:797); and of 15 November 2018, Deutsche Telekom v Commission (T-207/10, EU:T:2018:786).

2006, the European Commission stated that the scheme did not fall within the scope of the State aid rules.

By letter of 26 March 2007, the Commission nevertheless asked the Spanish authorities to provide it with information so that it could assess the scope and effects of the scheme at issue, in particular as regards the types of transactions covered. In response, the Spanish authorities stated that only the financial goodwill arising from direct acquisitions was deductible under the scheme at issue.

Having initiated the formal investigation procedure by a decision published in summary form in December 2007, the Commission adopted Decisions 2011/5 [54] and 2011/282 [55] declaring the scheme at issue incompatible with the internal market ('the initial decisions'). However, in the light of the legitimate expectation created on the part of certain beneficiary undertakings by the Commission's replies of 19 January and 17 February 2006, the Commission accepted that the scheme could continue to apply for the entire amortisation period provided for therein to acquisitions of shareholdings which took place before the publication of the decision to initiate the formal investigation procedure or, under certain conditions, before the publication of Decision 2011/282.

In April 2012, the Spanish authorities informed the Commission of the adoption of a new binding opinion by the Spanish Directorate-General for Taxation, according to which financial goodwill arising not only from direct, but now also from indirect acquisitions of shareholdings in foreign companies, including those already carried out, was covered by the scheme at issue ('the new administrative interpretation').

After initiating a second formal investigation procedure, the Commission found, by decision of 15 October 2014, [56] that the new administrative interpretation was not covered by the initial decisions and that it constituted new aid that was incompatible with the internal market. The Commission also refused to recognise the existence of a legitimate expectation entertained by certain beneficiary undertakings under the conditions laid down in that regard in the initial decisions. Consequently, the Commission required the Kingdom of Spain to put an end to the aid scheme as a result of the new administrative interpretation and to recover all the aid granted under it.

Seised of several actions for annulment brought by Spanish undertakings which benefited from a tax amortisation of financial goodwill from indirect acquisition of shareholdings in foreign companies, the Court annuls the contested decision for infringement of the principles of legal certainty and the protection of legitimate expectations.

Findings of the Court

In support of their actions, the applicants challenged, in the first place, the Commission's classification of the new administrative interpretation as new aid. In that context, they argued, in essence, that indirect shareholding acquisitions were already covered by the initial decisions, so that the Commission was no longer entitled to adopt the contested decision specifically in respect of that type of transaction.

In that regard, the Court notes, first, that it is apparent from the wording of the initial decisions that, despite the assurances provided by the Spanish authorities during the administrative procedure, according to which the scheme at issue related only to direct acquisitions, the Commission examined that scheme as covering both direct and indirect acquisitions of shareholdings. Moreover, it cannot validly be inferred from the evidence put forward by the Commission in the contested decision that the new administrative interpretation had broadened the scope of Article 12(5) of the TRLIS.

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54 Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

55 Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C-45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1).

56 Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain – Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ 2015 L 56, p. 38; 'the contested decision').

In the light of those considerations, the Court finds that, contrary to the Commission's finding in the contested decision, the initial decisions already covered indirect shareholding acquisitions for the purposes of applying the scheme at issue.

In those circumstances, the Court then examines whether the Commission was entitled to adopt the contested decision, having regard to the scope of the initial decisions.

On that point, the Court points out that the contested decision requires the Kingdom of Spain to recover all the aid granted under that scheme, as applied to indirect acquisitions, whereas some of that aid was not subject to the recovery obligation under the initial decisions because of the legitimate expectation recognised by the Commission in those decisions Such a result is tantamount to withdrawing the initial decisions, in so far as they related to indirect acquisitions.

In accordance with Article 9 of Regulation No 659/1999, [57] read in conjunction with Article 13(3) thereof, it is true that a decision may be revoked where it was based on incorrect information provided during the procedure which was a determining factor for the decision. However, there is nothing in the documents before the Court, nor is there anything which the Commission relies on, to show that the contested decision was based on inaccurate information provided during the administrative procedure leading to its adoption.

Similarly, although the abovementioned provisions of Regulation No 659/1999 are merely a specific expression of the general principle of law according to which retroactive withdrawal of an unlawful administrative act which has created individual rights is permissible, the Commission has never claimed that the initial decisions were unlawful in that they related to indirect acquisitions of shareholdings. In fact, the case at hand does not by any means concern the withdrawal of an unlawful act, but the withdrawal of two legal decisions, namely the initial decisions in so far as they related to indirect acquisitions.

According to settled case-law, the retroactive withdrawal of a lawful administrative act which has conferred individual rights or similar benefits is contrary to the general principles of law.

In that regard, the Court finds that the initial decisions conferred on the Kingdom of Spain an individual right to implement the scheme at issue as regards certain acquisitions and, incidentally, on the undertakings which had benefited from that scheme an individual right not to have to repay certain unlawful aid and that the contested decision subsequently withdrew that right in respect of indirect acquisitions. Thus, in addition to undermining the principle of legal certainty, the contested decision called into question the legitimate expectation which the Spanish authorities and the undertakings concerned had been able to derive from the initial decisions that those decisions would be applicable to indirect acquisitions.

In the light of that error of law committed by the Commission, the Court annuls the contested decision in its entirety.

For the sake of completeness, the Court upholds, in the second place, the applicants' claims that the principle of the protection of legitimate expectations was infringed in the light of the replies given by the Commission to the questions put by Members of the European Parliament in 2006.

According to the Court, the Commission had given such precise, unconditional and consistent assurances in those statements to the Parliament that the beneficiaries of the scheme at issue, whether in respect of their direct acquisitions or their indirect acquisitions, entertained justified hopes that the aid scheme at issue was lawful, in the sense that it did not fall within the scope of State aid rules, and that any advantages derived from it could not, therefore, be subject to subsequent recovery proceedings.

57 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

Moreover, the fact that the applicants had been aware of the initial administrative interpretation, which excluded indirect acquisitions from the scope of Article 12(5) of the TRLIS, does not deprive of legitimacy the expectations which they were able to derive from the Commission's statements. According to the case-law, only statements and conduct originating from the Commission must be taken into account in order to assess the legitimate expectation of the beneficiaries of the scheme at issue.

Therefore, even it was entitled to adopt the contested decision, the Commission could not, without erring in law, refuse to recognise, in that decision, a legitimate expectation on the part of the beneficiaries of the scheme at issue in respect of their indirect acquisitions before the publication of the decision to initiate the first formal investigation procedure, or even, under certain conditions, before the publication of Decision 2011/282, in the same terms as in the initial decisions.

VII. COMMON FOREIGN AND SECURITY POLICY: ANTI-DUMPING

Judgment of the Court of Justice (Second Chamber), 21 September 2023, China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others v Commission, C-478/21 P

Link to the full text of the judgment

Appeal – Dumping – Implementing Regulation (EU) 2018/140 – Imports of certain cast iron articles originating in the People's Republic of China and in India – Definitive anti-dumping duty – Action for annulment – Admissibility – Standing to bring proceedings – Representative association of exporters – Regulation (EU) 2016/1036 – Article 3(2), (3), (6) and (7) – Injury – Calculation of the import volume – Positive evidence – Objective examination – Extrapolation – Calculation of the EU industry's cost of production – Prices charged intra-group – Causal link – Assessment of injury by segment – None – Article 6(7) – Article 20(2) and (4) – Procedural rights

Following a complaint lodged by certain European producers of cast iron articles, the European Commission adopted, following its anti-dumping investigation, Implementing Regulation 2018/140, [58] imposing a definitive anti-dumping duty on imports of certain cast iron articles originating in the People's Republic of China ('the product concerned').

The China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('the CCCME'), an association under Chinese law, the members of which include Chinese exporting producers of the product concerned and other Chinese exporting producers, brought an action seeking the annulment of the regulation at issue.

By judgment of 19 May 2021, [59] the General Court declared admissible the action brought by the CCCME, holding that the CCCME had standing to bring legal proceedings in its own name, in order to

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58 Commission Implementing Regulation (EU) 2018/140 of 29 January 2018 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cast iron articles originating in the People's Republic of China and terminating the investigation on imports of certain cast iron articles originating in India (OJ 2018 L 25, p. 6; 'the regulation at issue').

59 Judgment of 19 May 2021, China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others v Commission (T-254/18, EU:T:2021:278; 'the judgment under appeal').

ensure that its procedural rights were safeguarded, and on behalf of its members. However, it dismissed the action as regards the substance.

Hearing an appeal brought by the CCCME, the Court of Justice rules on the plea of inadmissibility raised by the Commission alleging that the CCCME lacks standing to bring proceedings. In that regard, the Court confirms that the CCCME does have standing to bring legal proceedings on behalf of its members, but concludes that it has no such standing to bring proceedings in its own name in order to ensure that its procedural rights are safeguarded. That having been established, the Court of Justice upholds the judgment of the General Court as to the remainder and, consequently, dismisses the appeal in its entirety.

Findings of the Court

As a preliminary point, the Court of Justice recalls that, in accordance with the fourth paragraph of Article 263 TFEU, any natural or legal person may bring proceedings against an act which is not addressed to such person in two alternative situations, namely, first, if the act in question is of direct and individual concern to such a person and, second, if it is a regulatory act which is of direct concern to such person and does not entail implementing measures.

In the light of that distinction, the Court of Justice analyses whether the General Court, in examining the first of those two situations, was justified in finding that the CCCME was entitled to bring legal proceedings in its own name in order to safeguard its procedural rights.

As regards individual concern, it is apparent from the case-law that the persons capable of being distinguished individually by an EU act in the same way as the addressees of a decision include those who have participated in the process by which that act is adopted, solely where, however, provision has been made under the EU rules for procedural guarantees in favour of that person. The precise scope of an individual's right of action against an EU measure depends on his or her legal position as defined by EU law with a view to protecting the legitimate interests thus afforded him or her.

In the present case, the General Court found that the CCCME was individually concerned by the regulation at issue on the ground that, during the procedure which led to the adoption of that regulation, the Commission had regarded it as an interested party representing, in particular, the Chinese industry of the product concerned, since it had granted it procedural rights including the right to access the investigation file, the right to disclosure of the provisional and final conclusions and the right to submit comments on those conclusions, as well as the right to participate in hearings organised as part of that proceeding. However, by failing to verify whether those procedural rights were lawfully granted to the CCCME, the General Court erred in law when examining whether the CCCME was individually concerned and subsequently repeated that error when examining whether the CCCME was directly concerned.

However, the Court of Justice notes that those errors may result in the CCCME's action in its own name being inadmissible only where it is established that it could not lawfully be granted the procedural rights in question. In those circumstances, it is necessary to examine in the light of the basic anti-dumping regulation [60] whether the CCCME could lawfully be granted those rights.

In that regard, the Court notes that, although certain provisions of the basic anti-dumping regulation [61] confer certain procedural rights on representative associations of importers or exporters of the dumped product, that regulation does not define the concept of 'representative association of importers or exporters'.

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

61 Basic anti-dumping regulation, Article 5(11), Article 6(7), Article 20(1) and (2) and Article 21(2).

Taking into account not only the wording of the provisions in which that concept appears but also the context in which they occur and the objectives pursued by the rules of which they form part, the Court states, first, that that concept does not designate persons or bodies which represent interests other than those of importers or exporters, such as, in particular, the interests of States. It follows from the basic anti-dumping regulation that the EU legislature intended to make a distinction between 'representative associations of importers or exporters' on the one hand, and the 'authorities' or 'representatives' of the exporting country on the other. Accordingly, those associations can be regarded as a representative association in accordance with that regulation only if they are not subject to interference by the exporting State, but, on the contrary, enjoy the necessary independence as regards that State so that they may actually act in a capacity representing general and collective interests of importers or exporters and not as a front for that State.

In the second place, the objects of such a representative association must include representing importers or exporters of the dumped product, which requires that that group's membership include a large number of importers or exporters whose imports or exports of that product are significant.

Given that it is for the applicant to provide proof of its standing to bring legal proceedings, it was incumbent, in the present case, on the CCCME to demonstrate that it was a representative association of importers or exporters of the product concerned.

Although the CCCME's members include exporting producers of the product concerned and it is entitled to safeguard their interests, it does not have sufficient independence as regards the Chinese State courts to be able to be regarded as a 'representative association' of the exporters of the product concerned.

In addition, the CCCME has demonstrated neither that its members included a large number of importers or exporters of the product concerned, nor that exports of that product by its members were significant.

In the light of those findings, the Court of Justice concludes that (i) the CCCME did not have standing to bring proceedings pursuant to the fourth paragraph of Article 263 TFEU, with the result that the action which it lodged in its own name must be rejected as being inadmissible and (ii) the General Court erred in examining the pleas in law alleging an infringement of the procedural rights of the CCCME which were put forward in support of that action. By contrast, the Court of Justice confirms that the CCCME had the right to bring legal proceedings on behalf of its members, since that right is not subject to a condition relating to such an entity being organised democratically. As regards the substance, the Court of Justice holds that the General Court was justified in finding that the Commission had not erred in the determination of injury to the EU industry. Furthermore, the General Court did not apply a wrong legal standard nor did it make a classification error in finding that the CCCME was precluded from relying on infringements of the procedural rights of its members and of the other appellants.

In the light of all those factors, the Court of Justice dismisses the appeal in its entirety.

VIII. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Grand Chamber), 13 September 2023, Venezuela v Council, T-65/18 RENV

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures taken in view of the situation in Venezuela – Prohibition on the sale, supply, transfer or export of certain goods and services – Right to be heard – Obligation to state reasons – Material inaccuracy of the facts – Manifest error of assessment – Public international law

Having regard to the worsening of the situation regarding human rights, the rule of law and democracy, in 2017 the Council of the European Union adopted restrictive measures in view of the situation in the Bolivarian Republic of Venezuela ('Venezuela'). Articles 2, 3, 6 and 7 of Regulation 2017/2063 [62] lay down, in essence, a prohibition on the sale, supply, transfer or export of equipment which might be used for internal repression and services related to that equipment and to military equipment to any natural or legal person, entity or body in, or for use in, Venezuela.

In 2018, Venezuela brought an action seeking the annulment of Regulation 2017/2063, in so far as the provisions of that act concerned it. Subsequently, Venezuela amended its action to cover, in addition, Decision 2018/1656 [63] and Implementing Regulation 2018/1653, [64] acts by which the Council had, respectively, extended and amended the restrictive measures adopted. By judgment of 20 September 2019, the General Court dismissed that action as inadmissible, on the ground that Venezuela's legal situation was not directly affected by the provisions at issue. [65] Hearing the appeal, the Court of Justice, by judgment of 22 June 2021, [66] set aside the decision of the General Court, holding that Venezuela did indeed have standing to bring proceedings against Articles 2, 3, 6 and 7 of Regulation 2017/2063. [67] It also referred the case back to the General Court for a ruling on the substance.

In its judgment, delivered by the Grand Chamber and dismissing the action, the General Court, in an unprecedented situation, regarding an action brought by a third State in the field of restrictive measures, rules on Venezuela's right to be heard and on the alleged infringements of international law relied on by that party.

Findings of the Court

As a preliminary point, the Court finds that the restrictive measures provided for in Articles 2, 3, 6 and 7 of the contested regulation constitute restrictive measures of general application, as they constitute, in accordance with Article 215(1) TFEU, measures interrupting or reducing economic relations with a third country as regards certain goods and services. Those measures do not target identified natural

62 Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21) ('the contested regulation').

63 Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10).

64 Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1).

65 Judgment of 20 September 2019, Venezuela v Council (T-65/18, EU:T:2019:649).

66 Judgment of 22 June 2021, Venezuela v Council (Whether a third State is affected) (C-872/19 P, EU:C:2021:507).

67 In that judgment, the Court of Justice indicated that the initial judgment had become final concerning the inadmissibility of the action with regard to Implementing Regulation 2018/1653 and Decision 2018/1656.

or legal persons, but apply to objectively determined situations and to a category of persons viewed generally and in the abstract.

Regarding, in the first place, the plea alleging infringement of the right to be heard, the Court recalls, first of all, that the right to be heard cannot be transposed, in a context such as in the present case, to the adoption of measures of general application, and that there is no provision that requires the Council to inform any person potentially affected by a new criterion of general application of the adoption of that criterion. In addition, Article 41(2)(a) of the Charter of Fundamental Rights of the European Union applies to 'individual [measures]' taken in respect of a person, with the result that that provision cannot be relied on in connection with the adoption of measures of general application. The Court also adds that the contested regulation reflects a choice made by the Union in the field of international policy. The interruption or reduction of economic relations with a third country pursuant to Article 215(1) TFEU forms part of the very definition of the common foreign and security policy (CFSP) [68] adopted by the Union authorities at their discretion, in response to a particular international situation, in order to influence such a situation. Hearing the third country concerned beforehand would, according to the Court, be tantamount to requiring the Council to conduct discussions similar to international negotiations with that country and would, accordingly, negate the desired effect of imposing those measures with regard to that country, namely exerting pressure on that country in order to bring about a change in its behaviour. Lastly, the fact that Venezuela is directly concerned by Articles 2, 3, 6 and 7 of the contested regulation cannot, in itself, confer on it the right to be heard. In the light of those various elements, the Court concludes that Venezuela cannot rely on that right with regard to the restrictive measures adopted by the Council in the contested regulation.

Regarding, in the second place, the plea alleging material inaccuracy of the facts, as well as a manifest error in assessing the political situation in Venezuela, the Court recalls that the Council has a broad discretion as to what to take into consideration for the purpose of adopting restrictive measures on the basis of Article 29 TEU and Article 215 TFEU, and that the review carried out by the EU judicature in that regard is to be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such measures are based. The Court observes that, in the present case, Articles 2, 3, 6 and 7 of the contested regulation reproduce, in essence, the political position of the Union expressed in Decision 2017/2074. It states in that regard that it is apparent from recitals 1 and 8 of that decision that the restrictive measures provided for in those articles are based on the continuing deterioration of democracy, the rule of law and human rights in Venezuela, as well as, in particular, the occurrence of violence, the recurrence of which it was necessary to prevent by means of those restrictive measures.

Concerning, first of all, the items of evidence put forward by the Council in order to establish the material accuracy of the facts on which those measures are based, the Court notes that those items of evidence come from credible sources and refer in detail to, inter alia, the brutal repression, by the regime, of dissidents and opponents thereto, and the pressure put on the Prosecutor-General of Venezuela investigating security forces' conduct.

Concerning, next, the items of evidence produced, in response, by Venezuela, the Court concludes that that party has not shown that the facts on which the Council relied in order to adopt the restrictive measures at issue are vitiated by material inaccuracies, as almost all of those items of evidence do not relate to Venezuela and are based on two internal government reports, which are not supported by items of evidence originating from sources outside that government.

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68 As set out in the second subparagraph of Article 24(1) TEU.

Concerning, lastly, the Council's assessment of the political situation in Venezuela, the Court remarks that the items of evidence put forward by the applicant in that regard appear to be a means of disputing the appropriateness of adopting the restrictive measures at issue. However, it is not for the Court to substitute its own assessment regarding that matter for that expressed by the Council, which has a broad political discretion as regards defining the approach of the Union to a matter relating to the CFSP, in accordance with Article 29 TEU.

Regarding, in the third and last place, the plea alleging that unlawful countermeasures have been imposed and there has been an infringement of international law, the Court begins by recalling the wording of Article 49 – relating to the object and limits of countermeasures – of the Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the United Nations International Law Commission. [69] It emphasises, in that regard, that the contested regulation was adopted in a context of reacting to the continuing deterioration of the situation in Venezuela, with the aim of preventing, inter alia, the risk of further violence and violations of human rights in that country. The Court finds, in addition, that the restrictive measures provided for in Articles 2, 3, 6 and 7 of the contested regulation were not intended as a reaction to an internationally wrongful act imputable to Venezuela through the temporary non-performance of the Union's international obligations. It concludes from this that those measures do not constitute countermeasures for the purposes of Article 49 of the Draft articles of the ILC and, consequently, rejects Venezuela's allegations relating to the Council acting in breach of the principle of non-interference in that country's internal affairs.

Similarly, the Court rejects the argument based on the restrictive measures at issue having been adopted without the prior authorisation of the United Nations Security Council. It recalls that the Treaties give the Council the power to adopt acts containing independent restrictive measures, [70] distinct from measures specifically recommended by the United Nations Security Council. The Court notes that Venezuela has not established, in that regard, the existence of a 'general practice accepted as law', in accordance with Article 38(1)(b) of the Statute of the International Court of Justice, which would require authorisation to be obtained from the United Nations Security Council prior to the adoption, by the Council, of restrictive measures.

In addition, regarding the alleged breach of the principle of proportionality, the Court finds that there is a reasonable relationship between the restrictive measures at issue and the objective pursued, which is to prevent the risk of further violence, excessive use of force, and violations of human rights. It considers, in the light of the limited nature of the measures provided for in Articles 2, 3, 6 and 7 of the contested regulation, as well as the derogations provided for therein, that (i) those measures are not manifestly inappropriate and do not go beyond what is necessary to achieve the objective pursued, and (ii) the principle of proportionality has not, therefore, been disregarded.

Accordingly, the Court rejects Venezuela's arguments alleging infringement of customary international law in view of the alleged imposing of unlawful countermeasures.

Lastly, as regards Venezuela's argument that the measures adopted by the Council involve the exercise of extraterritorial jurisdiction on the part of the Union, which is, accordingly, unlawful under international law, the Court recalls again the power conferred on the Council by the Treaties [71] in relation to the adoption of restrictive measures, as these provide for, inter alia, 'the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries'. It emphasises that the restrictive measures at issue concern persons and situations falling within the

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69 Draft adopted in 2001 by the United Nations International Law Commission ('the Draft articles of the ILC'). Article 49 states: '1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two. 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.'

70 Article 29 TEU and Article 215 TFEU.

71 Article 29 TEU and Article 215 TFEU.

jurisdiction of the Member States ratione loci or ratione personae. The Council's power to adopt restrictive measures falls within the sphere of independent measures of the Union adopted in the context of the CFSP, in accordance with the objectives and values of the Union, [72] namely (inter alia) the objective of promoting, in the wider world, democracy, the rule of law, and the universality and indivisibility of human rights and fundamental freedoms, which constitutes a common 'legal interest' in the rights in question being protected, in accordance with the case-law of the International Court of Justice. [73]

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

IX. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: GRANT AGREEMENT

Judgment of the General Court (Seventh Chamber), 6 September 2023, Commission v CEVA and Others, T-748/20

Link to the full text of the judgment

Arbitration clause – Specific programme for research and development in the field of 'Quality of Life and Management of Living Resources' – Grant agreement – OLAF investigation report finding financial irregularities – Reimbursement of the sums paid – Applicable law – Limitation period – Impact of the OLAF report

On 17 January 2001, the European Commission concluded a contract with Centre d'étude et de valorisation des algues SA (CEVA) for the implementation of a project in the context of the specific programme for research and development and providing for the payment of a grant ('the Seapura contract'). That contract is governed by Belgian law. [74]

In 2006, the European Anti-Fraud Office (OLAF) opened an investigation following suspicions of fraud in relation to several projects implemented by CEVA, including the project covered by the Seapura contract. In December 2007, OLAF adopted its final report, in which it found, in the context of the performance of the Seapura contract, financial irregularities. In October 2008, the Commission informed CEVA that, in view of the serious financial irregularities established in the OLAF report, it intended to issue debit notes for the purposes of reimbursement of the grant paid under the Seapura contract. Thus, on 13 March 2009, the Commission sent CEVA four debit notes, then, on 11 May 2009, four reminder letters, and finally, on 12 June 2009, in the absence of payment by CEVA, the Commission sent it four letters of formal notice.

By judgment of the tribunal correctionnel de Rennes (Criminal Court, Rennes, France) of 26 April 2011, CEVA and its former director were found guilty of fraud and misappropriation of public funds and sentenced, respectively, to a fine and to a prison sentence. Ruling on the civil action brought by the Commission, the tribunal correctionnel de Rennes (Criminal Court, Rennes) ordered the accused

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72 Article 3(5) TEU and Article 21 TEU.

73 Judgments of the International Court of Justice of 5 February 1970, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (ICJ Reports 1970, p. 3, paras 33 and 34), and of 20 July 2012, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (ICJ Reports 2012, p. 422, paras 68 to 70).

74 Article 5(1) of the Seapura contract.

parties, in part on a joint and several basis, to compensate the Commission for the material damage suffered, inter alia as a result of the financial irregularities in the implementation of the Seapura contract. By judgment of 1 April 2014, the cour d'appel de Rennes (Court of Appeal, Rennes, France) acquitted CEVA and its former director of all the charges and dismissed the Commission's civil action. On 12 November 2015, on referral by the Public Prosecutor at the cour d'appel de Rennes (Court of Appeal, Rennes), the Criminal Chamber of the Cour de cassation (Court of Cassation, France) set aside the judgment of the Court of Appeal in respect solely of its provisions ordering that the accused parties be acquitted of the charge of misappropriation of public funds and to that extent referred the case to the cour d'appel de Caen (Court of Appeal, Caen, France).

By judgment of 22 June 2016, the tribunal de commerce de Saint-Brieuc (Commercial Court, Saint-Brieuc, France) opened a financial recovery procedure concerning CEVA and appointed a court-appointed representative. On 15 September 2016, the Commission, in the course of that procedure, declared to that court-appointed representative that it had a claim corresponding to the total amount of the debit notes issued with a view to securing reimbursement of the subsidies paid under, inter alia, the Seapura contract. On 6 December 2016, that court-appointed representative challenged the Commission's claim.

By judgment of 21 July 2017, the tribunal de commerce de Saint-Brieuc (Commercial Court, Saint-Brieuc) adopted the financial recovery plan for CEVA and appointed an administrator for the implementation of that plan.

By judgment of 23 August 2017, which has become final, the cour d'appel de Caen (Court of Appeal, Caen), ruling after the case had been referred to it following the setting aside of the judgment, acquitted CEVA of the charge of misappropriation of public funds and sentenced its former director to a suspended prison sentence and to a fine for misappropriation of public funds.

By order of 11 September 2017, the Juge-Commissaire (judge responsible for supervising the financial recovery procedure) rejected the Commission's claim in its entirety. The Commission appealed against that order. By judgment of 24 November 2020, the cour d'appel de Rennes (Court of Appeal, Rennes) set aside that order and found that there were two serious challenges concerning the limitation period and the validity of the debit notes, taking the view that those challenges had to be resolved by the competent court, before which the Commission had to bring the matter.

In that context, by its action based on Article 272 TFEU, [75] the Commission has asked the General Court to determine the amount of the debt owed to it corresponding to the reimbursement of the grants paid under the Seapura contract.

By its judgment, the Court upholds the Commission's claim and sets the amount of its claim against CEVA pursuant to Article 3(5) of Annex II to the Seapura contract.

Findings of the Court

After confirming its jurisdiction to hear the Commission's action under an arbitration clause in the Seapura contract, [76] the Court first examines the objection raised by CEVA, namely that the Commission's claim was time-barred.

With regard to the version of the Financial Regulation applicable to the facts of the present case, the Court notes that, on the date on which the Seapura contract was concluded, 17 January 2001,

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75 Under Article 272 TFEU, the Court of Justice of the European Union has jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the European Union, whether that contract be governed by public or private law. In accordance with Article 256(1) TFEU, the General Court has jurisdiction to hear and determine at first instance actions or proceedings referred to in Article 272 TFEU.

76 Article 5(2) of the Seapura contract.

Financial Regulation No 2548/98 [77] did not contain any specific provisions on the limitation period or on the means by which the limitation period could be interrupted. Consequently, the rules on limitation periods applicable in the present case are those laid down by the law governing the contract, namely Belgian law.

Thus, the Court observes that, under Belgian law, Article 2262bis(1) of the Belgian Civil Code, which applies to contractual actions, provides that 'the limitation period for all personal actions shall be 10 years'. The Court adds that, in accordance with Article 2257 of the Belgian Civil Code, the limitation period for personal actions begins to run from the day following the date on which the debt becomes due.

First, the Court states that the present dispute is contractual in nature. Article 3(5) of Annex II to the Seapura contract provides that 'after the date of completion of the contract, or the termination of the contract or the end of the participation of a contractor, the Commission may or shall, as the case may be, claim from the contractor, in the event of fraud or serious financial irregularities discovered in the course of an audit, reimbursement of the whole of the EU contribution paid to it'. It is apparent from the wording of that provision that the parties to the Seapura contract agreed that the reimbursement in full of the EU contribution paid to CEVA following fraud or serious financial irregularities established in the course of an audit would be subject to a prior request for reimbursement made by the Commission. To that end, on 13 March 2009, the Commission sent CEVA four debit notes intended to secure recovery of its debt. The Court therefore takes the view that it was on that date that the Commission sought reimbursement of the amounts that CEVA had received under the Seapura contract. In those circumstances, in accordance with Article 3(5) of Annex II to the Seapura contract, the amount receivable by the Commission became payable on 13 March 2009.

Secondly, the Court notes that CEVA has not put forward any specific argument which would make it possible to establish that the claim had become due prior to 13 March 2009. Thus, the 10-year period during which the Commission could bring its action against CEVA began to run on the day following that on which the obligation became payable, namely 14 March 2009, in accordance with Article 2257 of the Belgian Civil Code referred to above. Consequently, the Court holds that the limitation period expired, in principle, on 14 March 2019.

In the present case, the Commission submits that the limitation period was interrupted twice: first, when it was joined as a civil party before the tribunal correctionnel de Rennes (Criminal Court, Rennes) on 26 April 2011 and, secondly, when it lodged its declaration of claim, regularised on 15 September 2016, in the context of the financial recovery procedure concerning CEVA. In that regard, the Court confines itself to an examination of whether the limitation period could have been validly interrupted by the declaration of claim submitted by the Commission in the financial recovery procedure concerning CEVA, without it being necessary also to examine the effects of the Commission being joined as a civil party before the tribunal correctionnel de Rennes (Criminal Court, Rennes). The Commission submits that its claim was declared before the court-appointed representative on 15 September 2016 and that, according to the case-law of the Cour de cassation (Court of Cassation, Belgium), a declaration of claim interrupts the limitation period until the insolvency proceedings have concluded. The Commission adds that it is justified in relying on the French proceedings in order to plead the 'suspension' of the limitation period on the basis of Belgian law.

In the present case, the Court recalls that, on 22 June 2016, the tribunal de commerce de Saint-Brieuc (Commercial Court, Saint-Brieuc) opened a financial recovery procedure concerning CEVA. On 15 September 2016, in the context of that procedure, the Commission declared its claim to the court-appointed representative. It is clear from Article L.62224 of the French Commercial Code that, from the date of publication of the judgment initiating the financial recovery procedure, all creditors whose

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77 Council Regulation (EC, ECSC, Euratom) No 2548/98 of 23 November 1998 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1998 L 320, p. 1).

claims arose prior to that initiating judgment, with the exception of employees, must send the declaration of their claims to the court-appointed representative. It was therefore on the basis of that provision that the Commission, in the context of the financial recovery procedure initiated in respect of CEVA, declared its claim to the designated court-appointed representative. In addition, Article L.622-25- 1 of the French Commercial Code provides: 'The declaration of a claim shall interrupt the limitation period until the conclusion of the proceedings; it dispenses with any formal notice and is equivalent to an act in pursuance of the proceedings.'

In that regard, the Court notes that the opening of the financial recovery procedure in France entails the direct applicability of Regulation No 1346/2000 on insolvency proceedings, [78] which was then in force, and that the latter designated French law as the lex concursus. It also notes that, according to Article 4(2)(f) of Regulation No 1346/2000, 'the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure' and 'it shall determine in particular: … the effects of the insolvency proceedings on proceedings brought by individual creditors'. Furthermore, Article 16(1) of that regulation provides that 'any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings'. Moreover, Article 17(1) of that same regulation states that 'the judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State'.

It follows, on the basis of the foregoing provisions, that the initiation, in France, of the financial recovery procedure with regard to CEVA and the subsequent declaration made by the Commission in the context of that financial recovery procedure produced, pursuant to French law and in particular Article L.622-25- 1 of the French Commercial Code, effects in Belgian law and, more specifically, that it interrupted the 10-year limitation period provided for by that law. The Court points out that the effects of the initiation of the financial recovery procedure initiated in respect of CEVA would be disregarded if the declaration of a claim made in France by the Commission on 15 September 2016 did not have the effect of interrupting the limitation period under Belgian law.

In those circumstances, since the Commission's application was brought on 19 December 2020, the Court considers that the limitation period has not expired in the present case, and, accordingly, rejects the plea of limitation raised by CEVA, before upholding the Commission's application and determining the Commission's claim against CEVA.

78 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

X. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS

1.1. INSTITUTIONS AND BODIES OF THE EUROPEAN UNION

Judgment of the General Court (Seventh Chamber, Extended Composition), 26 July 2023, Stockdale v Council and Others, T-776/20

Link to the full text of the judgment

Action for annulment and compensation – International contracted staff with the European Union Special Representative in Bosnia and Herzegovina – Common foreign and security policy – Termination of the employment contract following the withdrawal of the United Kingdom from the European Union – Jurisdiction of the EU Courts – Contractual nature of the dispute – Absence of arbitration clause and jurisdiction clause – Articles 263, 268, 272 and 274 TFEU – Regulation (EU) No 1215/2012 – Admissibility – Identification of the defendants – Concept of 'body, office or agency of the Union' – Partial lack of competence and inadmissibility

The applicant, a national of the United Kingdom of Great Britain and Northern Ireland, held the position of Head of Finance and Administration with the European Union Special Representative ('the EUSR') in Bosnia and Herzegovina between 2006 and 31 December 2020 and, as such, had concluded 17 fixed-term employment contracts with the EUSR. Following the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom, [79] which entered into force on 1 February 2020 and provided for a transition period ending on 31 December 2020, the EUSR in Bosnia and Herzegovina took the decision to terminate the applicant's last employment contract as of that date.

In an action for annulment and for damages brought against the Council of the European Union, the European Commission, the European External Action Service (EEAS) and the EUSR in Bosnia and Herzegovina, the applicant sought, primarily, the annulment of the termination decision, together with compensation for the damage he allegedly suffered as a result of that decision. The applicant also claimed that his contractual relationship should be reclassified as a permanent contract and sought compensation for the damage he allegedly suffered as a result of the failure to adopt a clear status applicable to him. In the alternative, the applicant claimed that the non-contractual liability of the European Union should be incurred in the event that his principal claims were dismissed.

Examining the pleas of lack of jurisdiction and inadmissibility raised by the defendants, the General Court rules on those applications – which it upholds in part – before going to the substance of the case. In that respect, the Court rules on a number of issues which have not previously been addressed. First, it establishes that, where a contractual dispute involving the European Union is brought before the Court, when the contract at issue does not contain an arbitration clause in its favour, it retains jurisdiction to review the legality of acts adopted by EU entities [80] and to rule on the liability of the European Union, [81] if no competent national court can be identified on the basis of the

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

80 Pursuant to Article 263 TFEU.

81 Pursuant to Article 268 TFEU.

contract or the Brussels Ia Regulation. [82] It then identifies the EUSR in Bosnia and Herzegovina as the EU body that adopted the termination decision. Lastly, with regard to the compensation claim in respect of damage allegedly caused by the absence of a general legal regime applicable to common foreign and security policy (CFSP) staff, the Court considers that it is for the Council to adopt such a regime, where appropriate.

Findings of the Court

In the first place, the Court examines its jurisdiction to rule on the heads of claim relating to the termination decision and the succession of fixed-term contracts, respectively.

As a preliminary point, it notes that the applicant's claims made under those heads of claim are contractual in nature. First, the termination decision has a direct link with the contract at issue. Second, the claims that the employment relationship should be reclassified as a permanent contract stem from the successive fixed-term contracts concluded between the applicant and the EUSR in Bosnia and Herzegovina. Since the fixed-term contracts do not contain an arbitration clause, the Court declares that it has no jurisdiction to rule under Article 272 TFEU, such that, in accordance with Article 274 TFEU, those heads of claim fall, in principle, within the jurisdiction of the national courts.

Nevertheless, the Court recalls that, when, in the context of a contractual dispute, the EU judicature declines the jurisdiction conferred on it by Articles 263 and 268 TFEU, it is to ensure that those provisions are interpreted consistently with Articles 272 and 274 TFEU and, accordingly, to preserve the coherence of the judicial system of the European Union, which is a complete system of legal remedies and procedures designed to ensure, respectively, review of the legality of acts of the institutions, bodies, offices and agencies of the European Union, and the compensation of the damage caused by the European Union. Therefore, in the context of a contractual dispute, the EU judicature may not decline the jurisdiction conferred on it by the FEU Treaty when this has the effect of excluding from any judicial review, either by the EU Courts or the national courts, the acts of the European Union or a claim for compensation for damage caused by the European Union.

In those circumstances, despite the contractual nature of the heads of claim put forward in the present case, the Court assesses whether the applicant may bring such claims before a court of a Member State in order to ensure that an effective judicial review exists. That is the reason why, from the outset, it rejects the defendants' argument that those heads of claim could fall within the jurisdiction of the Bosnian courts. Similarly, it rejects the argument that the applicant had the option of referring the matter to the arbitration body provided for in the contract at issue, since such a body cannot be considered to have jurisdiction to the exclusion of the courts of the European Union or the courts of the Member States.

In addition, since the content of the contract at issue does not make it possible to identify a court of a Member State with jurisdiction to rule on the heads of claim in question, the Court points out that the EU legislature adopted the Brussels Ia Regulation, which applies in the present case. Indeed, the termination decision does not constitute an act of a public authority, [83] but has its basis in the contract at issue. Accordingly, the heads of claim in question relate to civil and commercial matters and – since they concern a dispute of a contractual nature which is intended to fall within the general jurisdiction of the national courts – the Court examines whether the provisions of the Brussels Ia Regulation make it possible to identify a court of a Member State with jurisdiction to rule on those heads of claim.

The Court notes that the applicant's employer was the EUSR in Bosnia and Herzegovina, and that since no court of a Member State has jurisdiction to rule on the heads of claim in question, relating to

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82 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) ('the Brussels Ia Regulation').

83 Pursuant to Article 1(1) of the Brussels Ia Regulation.

the contract, the general provision of the Brussels Ia Regulation, according to which, 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall … be determined by the law of that Member State' [84] should in principle apply.

However, the Court points out that the application of that provision would imply that the jurisdiction of a national court is random, to the extent that it is the law of each Member State that determines whether the courts of that Member State may hear the dispute, with the possible consequence that, ultimately, no court of a Member State has jurisdiction. It considers that such an outcome is particularly likely in the present case since – like the EUSR in Bosnia and Herzegovina – the applicant is domiciled in a third country, and it is not obvious that the present dispute has a connection with a Member State.

Since the Court may not, in the context of a contractual dispute involving the European Union, decline the jurisdiction conferred on it by Articles 263 and 268 TFEU, when this leads to the exclusion from any judicial review of acts of the European Union or of a claim for compensation of the damage caused by the European Union, it examines whether the claims made in the heads of claim in question come within the scope of the jurisdiction it derives from those provisions.

First, under the first head of claim, the Court has jurisdiction to rule (i) on the basis of Article 263 TFEU, on the application for a review of the legality of the termination decision, which is a decision adopted by an EU entity established under the Treaties, namely the EUSR in Bosnia and Herzegovina, and (ii) on the basis of Article 268 TFEU, on the claim for financial compensation for the psychological and material damage allegedly suffered as a result of that decision.

Conversely, regarding the applicant's claim that the Court should order his reinstatement as a member of staff of the EUSR in Bosnia and Herzegovina, the Court declines jurisdiction, since the EU judicature cannot, in principle – even in the context of an action for damages – issue directions to an institution, body, office or agency of the European Union without encroaching on the prerogatives of the administrative authority. Although the provisions of the FEU Treaty relating to the non-contractual liability of the European Union allow, under certain conditions, the granting of a compensation in kind which may take the form of an injunction to do or not to do something, causing the defendant institution to act in a certain way, such a scenario can be envisaged only in certain cases, where the applicant is alleging damage that cannot be entirely remedied by damages, and whose specific characteristics require an injunction to do or not to do something, particularly if that injunction is intended to address the root cause of damage where the effects are ongoing, which is not the case here.

Second, the Court dismisses the second head of claim in its entirety, on the ground that it lacks jurisdiction. The Court lacks jurisdiction to rule on the application to issue directions to the EUSR in Bosnia and Herzegovina, as the applicant's employer, seeking the reclassification of his employment contract as a permanent contract. In addition, since the claim that the Court should find that the defendants were in breach of their contractual obligations was not put forward in support of a claim for annulment or for damages, it must be regarded as seeking only that the Court take a position by means of a general declaration or statement of principle, which does not fall within the jurisdiction conferred on it by the Treaties.

In the second place, on the pleas of inadmissibility relating to the identification of the defendant(s), the Court recalls, as regards the first head of claim, to the extent that it has jurisdiction to examine that claim in so far as it seeks the annulment of the termination decision and financial compensation for the psychological and material damage allegedly caused by that decision, first that actions for annulment must be brought against the institution, body, office or agency of the European Union that adopted the act in question and, second, that in matters of non-contractual liability of the European Union, it has jurisdiction to hear disputes relating to compensation for damage caused by the latter,

84 Article 6(1) of the Brussels Ia Regulation.

represented before the Court by the institution, body, office or agency against which the matter giving rise to liability is alleged.

In the present case, since the first head of claim relates to the termination decision, which is imputable to the EUSR in Bosnia and Herzegovina, the Court examines whether the EUSR can be classified as a body, office or agency of the European Union capable of being a defendant in the actions for annulment and for non-contractual liability at issue in the present case.

In that regard, it recalls that an entity or structure coming under or working within the European Union's organisational framework may be regarded as an office or agency of the European Union if, in the light of the provisions governing its status, it has sufficient legal capacity in order to be regarded as an independent body of the European Union and to be recognised as having legal capacity to be a defendant. In particular, it must be classified as an office or agency of the European Union when, on the one hand, it has a mandate intrinsically linked to the functioning of the European Union and, on the other hand, it is legally distinct from the existing institutions, bodies, offices and agencies of the European Union.

The EUSR in Bosnia and Herzegovina has such a mandate, since, first of all, he was appointed by the Council to exercise a 'mandate in relation to particular policy issues'. [85] In addition, although the EUSR is responsible for executing his mandate and acts on the authority of the High Representative of the European Union for Foreign Affairs and Security Policy, that authority does not extend to administrative management in connection with that mandate, particularly as regards his staff. Furthermore, the EUSR is legally distinct from the other institutions, bodies, offices or agencies of the European Union in so far as he or she has the legal capacity to award contracts and to purchase goods, to conclude a contract with the Commission for the management of his or her expenditure and to employ staff seconded by EU institutions or by the EEAS. Lastly, as regards the management of his or her contract staff, the EUSR has the legal capacity to act independently and, as such, is responsible for constituting a team. He or she may also conclude contracts to recruit international staff, whom he or she may choose without requiring the approval of the other institutions, bodies, offices or agencies of the European Union, since such staff come under his or her direct authority.

The Court concludes that, for the purposes of the present case, concerning matters relating to the management of staff of the EUSR in Bosnia and Herzegovina, the EUSR must be regarded as having the same status as the bodies, offices and agencies of the European Union, capable of being the defendants in an action for annulment or for non-contractual liability, and that the first head of claim is admissible in respect of the EUSR.

Second, with regard to the head of claim seeking compensation for the damage allegedly suffered by the applicant as a result of the failure to adopt a clear status applicable to him, the Court considers that any failure to adopt a general regime applicable to CFSP contract staff in general or to the contract staff of the EUSR in Bosnia and Herzegovina in particular must be imputed to the Council, such that this head of claim is admissible in respect of the latter.

Indeed, the Council is responsible for framing the CFSP and for taking the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council. The adoption, where appropriate, of a legal regime applicable to contract staff recruited under the CFSP falls within the implementation of that policy and is therefore a matter for the Council. Moreover, the Court observes that in 2012, the Commission had suggested that the Council apply the Conditions of Employment of Other Servants of the European Union to contract staff of CFSP missions and of the EUSRs. The Court notes that the adoption of a legal regime applicable to contract staff recruited under the CFSP, which is applicable to the international contracted staff of the EUSR in Bosnia and Herzegovina, falls within the competence of the Council

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[85] According to Article 33 TEU.

and is at its discretion and that if that recommendation was not followed up, it is because the Member State delegations were unable to reach an agreement within the Council.

1.2. RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the General Court (First Chamber), 12 July 2023, Bulgaria v Commission, T-377/21

Link to the full text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Final report of the investigation by OLAF into the performance of a service contract financed by the EDF – Refusal to grant access – Exception relating to the protection of the decision-making process – Exception relating to protection of the purpose of inspections, investigations and audits – General presumption – Obligation to state reasons

The applicant is a company active in the provision of IT-related services. In 2014, the Association of Overseas Countries and Territories of the European Union (OCTA) signed a service contract with it, financed by the European Development Fund (EDF), which was aimed at strengthening sustainable development and economic diversification and improving the competitiveness of overseas countries and territories.

In 2020, in response to a request from the European Commission for review of possible irregularities in the performance of that contract, the European Anti-Fraud Office (OLAF) opened an investigation.

By letter of 4 December 2020, OLAF informed the applicant that the final report on the investigation had been sent to the Venice Public Prosecutor's Office (Italy) and to the Commission's Directorate-General for International Cooperation and Development. That report was accompanied by recommendations concerning follow-up measures involving, inter alia, the opening of a criminal investigation for fraud and the recovery of sums paid and found to be ineligible on account of missing invoices and unjustified costs on the part of the applicant. In 2021, the applicant requested access to OLAF's final report and the annexes thereto. Shortly after that request was made, it received a pre-information letter from the Commission informing it of the commencement of the recovery procedure. By its decision of 26 April 2021, OLAF refused access to the requested documents, relying on the application of the general presumption of confidentiality recognised for documents relating to its investigations ('the contested decision').

Hearing an action for annulment of that decision, the General Court analyses the relationship between the principles stemming from the case-law relating to the obligation to state reasons and those concerning the general presumption of confidentiality recognised for documents relating to OLAF investigations, under the exception relating to the protection of the purpose of inspections. [86] Drawing inspiration from the case-law according to which the protection of such investigations extends to their follow-up in so far as it is carried out within a reasonable period, the Court observes that the statement of reasons for a decision refusing access must contain information demonstrating OLAF's reasoning as to the temporal application of that general presumption of confidentiality. [87]

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86 Pursuant to the third indent of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

87 See, to that effect, judgments of 19 December 2019, ECB v Espírito Santo Financial (Portugal) (C-442/18 P, EU:C:2019:1117, paragraph 55), and of 21 October 2020, ECB v Estate of Espírito Santo Financial Group (C-396/19 P, not published, EU:C:2020:845, paragraph 62).

Finding, in the present case, that the statement of reasons for the contested decision is inadequate on that point, the Court accordingly annuls it.

Findings of the Court

In the first place, the Court finds that the statement of reasons for the contested decision enabled the applicant to understand that OLAF relied on the general presumption of confidentiality in order to refuse disclosure of the requested documents. It is apparent from the contested decision that OLAF considered that the documents requested fell within the exception relating to the protection of the purpose of inspections, by reason of a general presumption of non-accessibility to documents relating to its investigations.

In the second place, the Court notes that, in the absence of the necessary information, the applicant was not, however, in a position to understand the reasons why, on the date of adoption of the contested decision, OLAF considered that the requested documents were covered by that general presumption of confidentiality.

Although the contested decision states that those documents form part of OLAF's investigation file, OLAF merely states, in that decision, that that investigation was closed and that its final report was sent to the Commission and the Venice Public Prosecutor's Office, accompanied by recommendations on possible follow-up actions. However, the reasons given in the contested decision do not mention the fact that, prior to its adoption, which occurred after the transmission of the OLAF report, the Commission sent a pre-information letter to the applicant with a view to recovering most of the sums paid and found to be ineligible. According to the Court, that undertaking by the Commission of the recovery procedure may be considered a follow-up action in respect of one of the recommendations of the OLAF report and, therefore, as a decision marking the closure of the investigation. Given the silence of the contested decision on that point, it may be presumed that OLAF considered that the pre-information letter from the Commission had neither the object nor the effect of closing the investigation and that, on the date of adoption of the contested decision, the authorities to which its final report was addressed had not yet decided, within a reasonable period, on the action to be taken following that report.

In that context, the Court observes that, in the statement of reasons in the contested decision, OLAF ought to have taken a position on whether the period which elapsed between the date of transmission of its report to the authorities to which it was addressed and the date of adoption of that decision was to be regarded as reasonable. It points out in that regard that, although documents relating to an OLAF investigation which has just been closed benefit from the general presumption of confidentiality where the competent authorities have not yet decided on the action to be taken on the corresponding investigation report, that is on the condition that, on the date of adoption of the decision refusing disclosure of those documents, the period which elapsed since the transmission of the OLAF report to the competent authorities cannot be regarded as unreasonable. [88] In the present case, although it may be presumed that OLAF considered that the period which had elapsed was not unreasonable, the reasons for such an interpretation are not apparent from the contested decision.

In the third and last place, the Court finds that, in view of the incomplete nature of the reasoning contained in the contested decision, that decision does not enable the Court to assess the merits of the applicant's second plea, according to which OLAF had not established the existence of a presumption of confidentiality of the documents requested on the basis of the exception relating to the protection of the purpose of inspections, investigations and audits and nor, therefore, to exercise its power of review of legality.

In that regard, the Court observes that there is neither a right of the EU institutions to remedy before the EU Courts their insufficiently reasoned decisions, nor an obligation on the part of the latter to take

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88 See judgment of 1 September 2021, Homoki v Commission (T-517/19, not published, EU:T:2021:529, paragraph 63 and the case-law cited).

into account additional explanations provided by the author of the measure in question only during the proceedings in order to assess whether the obligation to state reasons has been satisfied. Such a state of law would risk blurring the division of powers between the administration and the EU Courts, weakening the review of legality and jeopardising the exercise of the right of appeal. [89]

Furthermore, even if it is accepted that the additional explanations provided by the Commission in the course of the proceedings may be regarded not as supplementary reasons for the contested decision, but as clarifications necessary to fully understand the analysis underpinning OLAF's reasoning, the Court finds that, in the context of judicial proceedings, the Commission neither adopted a position on whether the pre-information letter constituted a follow-up action entailing the closure of the investigation nor, if so, set out the reasons why the transmission of the OLAF report to the Venice Public Prosecutor's Office had the effect of extending the general presumption of confidentiality. Lastly, the Commission did not adopt a position on the question whether, on the date of adoption of the contested decision, a reasonable period had elapsed since the documents requested were sent to the Commission and the Venice Public Prosecutor's Office.

1.3. NON-CONTRACTUAL LIABILITY OF THE EUROPEAN UNION

Judgment of the General Court (Seventh Chamber), 28 June 2023, IMG v Commission, T-752/20

Link to the judgment as published in extract form

Non-contractual liability – OLAF investigations – Press leaks – Material and non-material damage – Causal link – Imputability of the leaks – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Confidentiality of legal advice

According to its Statute, International Management Group (IMG) was established as an international organisation with the aim of providing the States participating in the reconstruction of Bosnia and Herzegovina with a dedicated entity for that purpose. As part of its activities, which have expanded in the meantime, it has concluded a number of agreements with the European Commission, in application, inter alia, of the 'indirect or joint management' method of implementing the EU budget.

At the end of its investigation into the applicant's legal status, on 9 December 2014 the European Anti-Fraud Office (OLAF) drew up a final report, in which it found that the applicant is not an 'international organisation' within the meaning of the EU financial regulations and that it might not even have its own legal personality.

Shortly after it was drawn up, the OLAF report was sent to the legal addressees, namely the competent national authorities and the Commission. Subsequently, its content was leaked to the press. On 13 February 2015, the information regarding the content of that report was published in the magazine Der Spiegel and, on 11 December 2015, the report was published on the website of the newspaper New Europe. The Commission's investigations failed to identify the source of that leak.

The applicant has brought an action for compensation of the material and non-material damage which it claims to have suffered following the leak of the OLAF report to the press as a result of the unlawfulness of the conduct of the Commission and of OLAF.

89 See judgment of 11 June 2020, Commission v Di Bernardo (C-114/19 P, EU:C:2020:457, paragraph 58).

In dismissing that action, the General Court provides clarification of (i) the conditions to be fulfilled in order to establish a sufficiently serious breach, resulting from an omission by an EU institution, of a rule of law intended to confer rights on individuals and (ii) the scope of the duty of diligence in that context, in particular in the light of the action to be taken, in response to the disclosure of a document to the press, by the EU institution responsible for ensuring the confidentiality of that document.

Findings of the Court

In its judgment, the Court finds that the plea of illegality raised by the applicant, based on breach of the Commission's duty to have regard for the welfare of officials and to act diligently and consisting of a failure to act on the part of the Commission, inasmuch as it did not publicly condemn the leak of the OLAF report, did not put an end to the dissemination of false information caused by that leak and did not correct that information, must be rejected.

As regards the duty to have regard for the welfare of officials, the Court finds that it relates specifically to the obligations of the EU institutions towards their officials and other servants, which involves, inter alia, taking account of their individual interests. The present case, however, does not relate to the relationship between the EU administration and one of its officials or other servants. Consequently, the duty to have regard for the welfare of officials does not apply.

As regards the breach of the duty to act diligently, the Court begins by recalling that, first, the non-contractual liability of the Union cannot be triggered unless the person who claims to have suffered loss or harm establishes the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. In particular, the requirement that the breach be sufficiently serious depends on the discretion enjoyed by the EU institution, body, office or agency which has allegedly acted in breach of that rule and on whether it has manifestly and gravely disregarded the limits placed on that discretion, in view of, inter alia, the degree of clarity and precision of the rule, the difficulties of interpretation or application which may ensue therefrom, and the complexity of the situation to be resolved. Secondly, omissions by EU institutions are capable of triggering liability on the part of the Union only when those institutions have failed to fulfil a legal obligation to act resulting from a provision of EU law.

Thus, the Court concludes that the examination of the question whether an institution has committed a sufficiently serious breach of a rule of law intended to confer rights on individuals on account of an omission involves determining whether three conditions are satisfied, namely (i) the existence of a legal obligation to act, (ii) the existence of discretion on the part of the EU institution, body, office or agency in question, and (iii) a manifest and serious breach by that institution of the limits placed on that discretion.

The Court notes that, in the present case, the applicant has not established that the Commission was under a legal obligation to act. In that context, it notes that the breach of the duty to act diligently relied on by the applicant is intrinsically linked to Regulation No 883/2013 [90] and that, under that regulation, the Commission is required to ensure that the confidentiality of OLAF investigations is respected. Nevertheless, despite that obligation, the duty to act diligently to which the Commission is subject cannot impose on it, since it has not failed to fulfil that obligation of confidentiality and since responsibility for the leak of the OLAF report to the press cannot be attributed to it, an obligation to act consisting in condemning the leaking to the press of information relating to such an investigation and distancing itself from the information published. The duty to act diligently does not have the scope which the applicant ascribes to it. It is the leak of that report to the press, and not the omission of which the Commission is accused by the applicant, which constitutes a failure to fulfil the obligation

90 Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1).

of confidentiality. However, the imputability of that leak to the Commission has not been demonstrated.

The Court adds that, even assuming that the Commission was under a legal obligation to act by virtue of its duty to act diligently, it cannot be held that the breach of that duty, alleged by the applicant, constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals.

In that regard, it states that, in the event that such an obligation exists, the duty to act diligently should be interpreted as meaning that, in the event of the leak of a confidential document in respect of which it has not been demonstrated that the institution concerned is the source, it would be for that institution not to aggravate the damage which might result from that breach of confidentiality.

However, no such obligation to act in order not to aggravate the damage caused by a breach of confidentiality which is not imputable to that institution arises from Regulation No 883/2013. By providing that the institutions concerned are to ensure that the confidentiality of OLAF investigations is respected, that regulation imposes an obligation on those institutions to ensure that the content of OLAF investigations remains confidential. Nevertheless, it does not impose on them, where that confidentiality has not been respected and the disclosure does not originate from within the institution concerned, obligations to condemn the leak, to put an end to the dissemination of the information at issue, or to correct the parts of that information which are incorrect. Such obligations cannot be regarded as forming part of the obligation to ensure that the confidentiality of OLAF investigations is respected. First, since that confidentiality has been breached, the Commission's obligation to ensure respect therefor has become devoid of purpose. Secondly, (i) the possible need to condemn the leak exceeds the mere obligation to ensure that confidentiality is respected, (ii) in such a case, it is impossible for the Commission to put an end to the dissemination of the OLAF report resulting from such a leak to the press, and (iii) assuming that some of the information disseminated is incorrect, the correction of that information is not such as to restore its confidential nature, which has permanently disappeared.

2. ENVIRONMENT: EMISSION ALLOWANCE TRADING

Judgment of the General Court (Second Chamber), 26 July 2023, Arctic Paper Grycksbo v Commission, T-269/21

Link to the full text of the judgment

Environment – Directive 2003/87/EC – Scheme for greenhouse gas emission allowance trading – National implementing measures – Transitional free allocation of greenhouse gas emission allowances – Decision to exclude an installation exclusively using biomass – Duty of diligence – Right to be heard – Obligation to state reasons – Manifest error of assessment – Equal treatment – Legitimate expectations – Plea of illegality – Paragraph 1 of Annex I to Directive 2003/87

The applicant, Arctic Paper Grycksbo AB, is a Swedish company that operates an installation for the production of paper and has, since 2005, come under the European Union's scheme for greenhouse gas emission allowance trading ('the ETS'), as established by Directive 2003/87. [91]

[91] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3).

In 2019, the applicant submitted an application to the Naturvårdsverket (Environmental Protection Agency, Sweden) for the free allocation of emissions allowances for the fourth trading period (2021-2025). Since its actual fossil carbon dioxide emissions for the baseline period (2014-2018) were less than 0.5 tonnes, it rounded its reported emissions to zero, pursuant to the rounding rules applicable during emissions reporting. [92]

The same year, in the context of the adoption of national implementation measures for the allocation of greenhouse gas emission allowances, the Kingdom of Sweden submitted to the European Commission [93] the list of Swedish installations to be covered by the ETS for the fourth trading period, on which the applicant's installation appeared.

By decision of 25 February 2021 ('the contested decision'), [94] the Commission considered that the installations using exclusively biomass [95] during the baseline period, in relation to which that operated by the applicant was treated in the same way, had to be excluded from the ETS, which had, in particular, the effect of depriving that latter installation of all free allocations of greenhouse gas allowances for the fourth trading period.

By its judgment, the Court dismisses the action brought by the applicant and rules on the lawfulness of the exclusion of the installations exclusively using biomass from the scope of application of the ETS ('the biomass exception').

Findings of the Court

As a preliminary point, the Court recalls that the ETS concerns installations meeting the criteria set out in Annex I to Directive 2003/87 and emitting one or more of the greenhouse gases mentioned in Annex II thereto. However, the installations exclusively using biomass are not covered by paragraph 1 of Annex I to that directive. Furthermore, the installations whose inscription on the list of national implementation measures has been refused by the Commission are not eligible for the free allocation of allowances. [96]

In the first place, with regard to the regularity of the procedure for adoption of the contested decision, the Court stresses the mandatory nature of the rounding rule which applies to all emissions reports linked to the activities referred to in Annex I to the directive. This is an objective method for determining whether or not an installation exclusively using biomass comes within the scope of application of the ETS. As a result, the applicant was required to round to zero the fossil carbon dioxide emissions report in question. The applicant is not, therefore, justified in complaining that the Commission took account of the report sent to it, which indicated the absence of fossil carbon dioxide emissions and, consequently, the exclusive use of biomass.

Next, the Court draws attention to the Commission's duty of diligence when assessing emissions reports which have been sent to it, and points out that the obligation to examine carefully and impartially all the relevant aspects of the individual case is of fundamental importance, particularly when the Commission has a power of discretion. By refusing in principle, in the present case, to take

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92 Article 72(1) of Commission Implementing Regulation (EU) 2018/2066 of 19 December 2018 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council and amending Commission Regulation (EU) No 601/2012 (OJ 2018 L 334, p. 1).

93 In accordance with Article 11 of Directive 2003/87.

94 Commission Decision (EU) 2021/355 of 25 February 2021 concerning national implementation measures for the transitional free allocation of greenhouse gas emission allowances in accordance with Article 11(3) of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2021 L 68, p. 221).

95 Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82) includes biomass among renewable energy sources. Point 24 of the second paragraph of Article 2 of that directive defines biomass as 'the biodegradable fraction of products, waste and residues from biological origin from agriculture, ... from forestry and related industries, ... as well as the biodegradable fraction of waste ...'.

96 Article 11(1) of Directive 2003/87.

into account all new information likely to have an impact on the list of installations included in the ETS, the Commission infringed that duty. However, that infringement has no effect on the lawfulness of the exclusion of the applicant's installation from the ETS, which results from Annex I to Directive 2003/87. [97]

In the second place, so far as concerns the merits of the contested decision, the Court confirms, first of all, that the interpretation of the biomass exception upheld by the Commission is compliant with Directive 2003/87.

Accordingly, contrary to what the applicant submits, no distinction should be drawn between the baseline period, in respect of which the historical data of each installation must be taken into account in calculating the number of free allowances that may be allocated to it, and the period which must be taken into account for the application of the exclusion of installations exclusively using biomass. The allocation of allowances requires that the installations concerned be included on the list covered by the directive. That is not, however, the case for installations exclusively using biomass. It follows that taking into account an operator's future intentions to appear on that list and benefit from the free allowances would be contrary to the directive.

Furthermore, the exclusion from the scope of application of the directive of installations exclusively using biomass is not secondary or contrary to Article 10a of that directive, since the ex ante product benchmarks which are defined therein for the calculation of the free allocation of allowances apply only to installations included in the ETS.

The Court then goes on to set out its view that the Commission did not commit a manifest error of assessment in finding that the applicant's installation exclusively used biomass. In that regard, although judicial review is limited when the competent EU authorities proceed to assess highly complex scientific and technical facts, as in the present case, it is for the EU Courts to take into consideration all the relevant information. In the present case, even if the actual fossil carbon dioxide emissions emitted by the applicant's installation had been communicated to the Commission in good time, their inclusion would have infringed the rounding rules which are general and mandatory in nature.

Lastly, the Court rejects the plea of illegality raised by the applicant against the exclusion from the ETS of installations exclusively using biomass, provided for in paragraph 1 of Annex I to Directive 2003/87, in so far as it infringes the principles of equal treatment and proportionality.

In an area in which the EU legislature has a broad discretion, only a manifest infringement of those principles could establish the illegality of the contested exclusion. Although it is true that the current system leads to the applicant being penalised for having reduced almost to zero its fossil carbon dioxide emissions, negative effects are inherent in any system providing for inclusion and exclusion thresholds. Therefore, the exclusion from the ETS of installations exclusively using biomass as well as the treatment of those installations in the same way as those which emit less than 0.5 tonnes of fossil carbon dioxide are not capable of showing that there has been an infringement of those principles.

97 Paragraph 1 of Annex I to Directive 2003/87.

3. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (Fourth Chamber, Extended Composition), 21 June 2023, Guangdong Haomei New Materials and Guangdong King Metal Light Alloy Technology v Commission, T-326/21

Link to the judgment as published in extract form

Dumping – Importation of aluminium extrusions originating in China – Implementing Regulation (EU) 2021/546 – Imposition of a definitive anti-dumping duty – Article 1(4) of Regulation (EU) 2016/1036 – Definition of the product concerned – Determination of the normal value – Article 2(6a) of Regulation 2016/1036 – Report finding significant distortions in the exporting country – Burden of proof – Use of a representative country – Article 3(1), (2), (3), (5) and (6) of Regulation 2016/1036 – Injury – Economic factors and indices having a bearing on the state of the EU industry – Rights of the defence – Principle of good administration

Following a complaint lodged with it by the association European Aluminium, the European Commission adopted Implementing Regulation 2021/546 imposing a definitive anti-dumping duty on imports of aluminium extrusions originating in China. [98]

Guangdong Haomei New Materials Co. Ltd and Guangdong King Metal Light Alloy Technology Co. Ltd, companies governed by Chinese law which produce aluminium extrusions and export them to the European Union, brought an action seeking inter alia the annulment of that implementing regulation. The Italian company Airoldi Metalli SpA ('Airoldi') intervened in the proceedings in support of the applicants.

In dismissing the action for the annulment, the General Court provides a number of clarifications regarding the new method of constructing the normal value of the product concerned by an anti-dumping investigation where there are significant distortions of the market in the exporting country, a method introduced by Article 2(6a)(a) of the basic anti-dumping Regulation. [99]

Findings of the Court

In support of their action, the applicants allege, inter alia, that the Commission erred in law in defining the 'product concerned' by the anti-dumping investigation, namely aluminium extrusions originating in China. In that regard, they claim that they produce thousands of types of aluminium extrusions, and therefore the Commission should have made distinctions.

Pointing out that the definition of the product concerned falls with the exercise by the EU institutions of the broad discretion afforded to them in the sphere of measures to protect trade, the General Court finds that, in accordance with relevant case-law, the Commission took account of a number of relevant factors for the purposes of that definition, such as the physical, technical and chemical characteristics of the products in question, their use, interchangeability, customer demand and the manufacturing process.

In addition, even though the burden of proof rested with them, the applicants have failed to demonstrate that the Commission had incorrectly assessed those factors and to indicate which other, more relevant factors should have been used.

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98 Commission Implementing Regulation (EU) 2021/546 of 29 March 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of aluminium extrusions originating in the People's Republic of China (OJ 2021 L 109, p. 1).

99 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21), as amended by Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 (OJ 2017 L 338, p. 1).

Accordingly, the complaint alleging a manifest error of assessment in the definition of the product concerned is dismissed. Next, the General Court examines the criticisms made by the applicants concerning the Commission's finding of significant distortions on the Chinese market and Airoldi's arguments contesting the legality of the 'report on significant distortions on the Chinese market', [100] drawn up by the Commission in 2017 and taken into account by it for the purpose of adopting Implementing Regulation 2021/546.

With regard to the plea raised by Airoldi, the General Court observes that arguments raised by an intervener are admissible only if they fall within the scope provided by the forms of order sought and pleas in law raised by the main parties. Since the applicants had not called into question the legality of the report on significant distortions on the Chinese market, Airoldi's plea challenging that report is dismissed as inadmissible.

As regards the applicants' arguments criticising the Commission's analysis of the existence of significant distortions on the Chinese market, the General Court observes that the concept of 'significant distortions' in the exporting country and the method of constructing the normal value of the product concerned when such distortions exist were inserted into the basic anti-dumping Regulation by amending Regulation 2017/2321. [101]

In that context, point (a) of the new Article 2(6a) of the basic anti-dumping Regulation provides that, if there are significant distortions in the exporting country, derogation is permitted from the principle that the normal value must be established, primarily, on the basis of the price actually paid or payable in the ordinary course of trade in that country. In accordance with point (c) of that same provision, the Commission may produce a report describing the market circumstances in a certain country or a certain sector where it has well-founded indications of the possible existence of significant distortions in that country or that sector. Such reports and the evidence on which they are based are to be placed on the file of any investigation relating to that country or sector.

Having made those points, the General Court finds that, in the present case, the Commission found there to be significant distortions in the aluminium extrusions sector in China based on an analysis of the various elements that must be taken into account in particular, pursuant to Article 2(6a)(b) of the basic anti-dumping Regulation. In addition, far from conducting merely a vague and hypothetical analysis as the applicants allege, the Commission took into account not only the report on significant distortions on the Chinese market, produced in accordance with point (c) of that same provision, but also a series of reports, documents and data from a considerable variety of sources, including Chinese sources. Moreover, nor did the Commission fail to fulfil its obligation to enable the applicants to make their point of view effectively known as regards the accuracy and relevance of the facts and circumstances alleged and the evidence used by the Commission to support its conclusion regarding the significant distortions on the Chinese market.

Accordingly, the General Court rejects the various complaints calling into question the analysis of the existence of significant distortions on the Chinese market.

In the General Court's opinion, nor did the Commission make a manifest error of assessment in choosing Türkiye as the representative country in order to construct the normal value of the product concerned.

Where it is determined that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions, Article 2(6a)(a) of the basic anti-dumping Regulation provides that the normal value of the product concerned is to be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks.

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[100] Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations of 20 December 2017 (SWD(2017) 483 final/2).

[101] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending the basic regulation and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not member of the European Union (OJ 2017 L 338, p. 1).

To that end, the Commission may use sources that include corresponding costs of production and sale in an appropriate representative country, which has a similar level of economic development as the exporting country.

The criterion that must now be met when selecting the appropriate representative country is, therefore, a similar level of economic development as the exporting country. It is by satisfying that new criterion that the core of the case-law on the replaced provisions of the basic anti-dumping Regulation remains applicable, namely that the Commission must take as a basis a non-member country in which the price of a like product is established in circumstances that are as comparable as possible with those of the exporting country.

In the light of those clarifications, the General Court dismisses, first, the applicants' references to earlier non-transposable case-law and finds, second, that the applicants do not dispute that Türkiye has a similar level of development as China. In addition, in rejecting the arguments based on China's larger population than that of Türkiye and the fact that the domestic demand is different, the General Court concludes that the applicants have failed to demonstrate that the Commission made a manifest error of assessment in the choice of Türkiye as the representative country.

According to the General Court, nor did the Commission make a manifest error of assessment in its finding of injury to the EU industry and of a causal link between that injury and the imports of aluminium extrusions originating in China.

In that regard, the General Court rejects the applicants' argument that the significant market share held by EU producers meant that the EU industry could not have suffered material injury. The General Court also rejects the complaints alleging that the Commission disregarded the significant growth in consumption and in profitability of that industry. On that point, the General Court observes, first, that it is unnecessary, to support a finding that there is injury to EU industry which justifies the adoption of anti-dumping duties, that all the relevant economic factors and indices show a negative trend. Second, the Commission stated that, despite the increase in demand, the EU industry had lost market shares and its profitability had declined over the period considered.

Similarly, nor did the Commission err when it took into consideration the market share of the imports from China which, according to the applicants, is less than 15% in absolute terms. Whilst Article 5(7) of the basic anti-dumping regulation does provide that proceedings are not to be initiated if the imports from a country represent a market share of below 1%, the market share of the imports of aluminium extrusions from China is considerably higher than that percentage. Since the basic anti-dumping Regulation does not specify another market share threshold for the finding that the imports from a non-member country are incapable of causing injury, the General Court finds that the applicants have not raised other arguments capable of supporting the view that the Commission made a manifest error of assessment.

As the other pleas in law raised have likewise proved to be inadmissible or unfounded, the General Court dismisses the action in its entirety.

4. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: GRANT AGREEMENT

Judgment of the General Court (Seventh Chamber), 26 July 2023, Engineering - Ingegneria Informatica v Commission and REA, T-222/22

Arbitration clause – 'Horizon 2020' Framework Programme for Research and Innovation (2014-2020) – 'aDvanced sOcial enGineering And vulNerability Assessment framework (Dogana)' Project – Grant agreement – Action for annulment – Final audit report – Debit note – Acts not open to challenge – Acts forming part of a purely contractual context from which they are not separable – Inadmissibility – Identification of the defendant – Lack of jurisdiction – Personnel costs – Bonuses calculated on the basis of commercial targets – Ineligibility – Legitimate expectations

The applicant, Engineering – Ingegneria Informatica, is a company which carries out research and development activities in the technology sector. In 2015, in the context of the 'Horizon 2020' Framework Programme for Research and Innovation, [102] Engineering International Belgium SA and other beneficiaries, on the one hand, and the European Research Executive Agency (REA), on the other hand, concluded a grant agreement relating to the project entitled 'aDvanced sOcial enGineering And vulNerability Assessment framework'. In 2017, the applicant became a beneficiary of the grant awarded for that project.

During 2021, the European Commission carried out an audit relating to the implementation of the grant agreement. In the course of that audit, the Commission made a number of adjustments to the eligible costs and, more specifically, reduced the costs that were eligible under the grant agreement. In particular, the Commission considered that the costs corresponding to certain bonuses and commissions ('the bonuses at issue'), paid to two employees of the applicant and declared by the applicant as personnel costs, were neither incurred nor necessary for the implementation of the project, and accordingly did not fulfil the eligibility conditions contained in the grant agreement. [103]

In January 2022, the REA informed the applicant that, by way of implementation of the audit carried out by the Commission, it intended to recover the sum of EUR 9 049.14. Subsequently, in February 2022, the REA confirmed its intention to recover that sum.

Before the General Court, the applicant contested, on the basis of Article 263 TFEU, the legality of the acts which had been adopted with regard to it by the Commission and the REA. In addition, it sought a declaration, on the basis of Article 272 TFEU, that the bonuses at issue were eligible.

In its judgment, the General Court clarifies the concept of 'eligible costs' within the meaning of the standard clauses in grant agreements concluded by the EU institutions and agencies in relation to framework programmes for research and innovation, as regards personnel costs, and more particularly bonuses calculated on the basis of commercial targets.

Findings of the Court

In the course of its examination of the pleas in law based on breach of the grant agreement, the Court observes, first of all, that it is apparent from the provisions of that agreement [104] that actual personnel

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[102] Regulation (EU) No 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC (OJ 2013 L 347, p. 104).

[103] By virtue of Article 6.1(a)(iv) of the grant agreement, actual costs are eligible provided, in particular, that they are 'incurred in connection with the [project] and necessary for its implementation'.

[104] Article 6.1(a)(iv), and Article 6.2(A.1) of the grant agreement.

costs and indirect costs are eligible on condition, inter alia, of having been incurred 'in connection with the [project]' and of being 'necessary for its implementation'.

Next, the Court notes that the grant agreement must be interpreted in the light of the explanations given in the annotated model grant agreement. [105] While that document is not binding, it is published and accessible to all contracting parties, and thus forms part of the context in which the grant agreement was concluded. As regards the present case, the model grant agreement excludes, as ineligible, two distinct categories of costs, namely, first, dividends and profits distributed to employees and, secondly, complements of remuneration calculated on the basis of commercial or fundraising targets. Those two categories of costs cannot be regarded as 'costs incurred in connection with [the project in question] and necessary for its implementation'. [106]

In relation, first, to dividends and profits distributed to employees, the annotated model grant agreement states that complements of remuneration which are based on the overall financial performance of the organisation may nevertheless be eligible, if they fulfil certain conditions. Thus, a first condition relates to the method used to calculate such complements, as the annotated model grant agreement states that they may take the form of a lump sum or a percentage of basic remuneration, but not that of a certain percentage of company profits.

Secondly, as regards complements of remuneration which are calculated on the basis of commercial or fundraising targets, the Court states that, in accordance with the annotated model grant agreement, fixed or variable bonuses which are granted in consideration of such targets being achieved, such as bonuses taking the form of a lump sum which is conditional on a sales or fundraising target being achieved, or on a certain percentage of sales being achieved or a certain percentage of funds raised, are ineligible.

Thus, the eligible complements of remuneration envisaged in the annotated model grant agreement must, first, be set at the level of the whole organisation, secondly, be based on the overall financial performance of that organisation and, lastly, not refer to commercial or fundraising targets.

Lastly, ruling on whether or not the bonuses at issue were eligible, the Court observes that the bonus scheme put in place by the applicant is based on two types of objectives. First, certain objectives, in particular those relating to the margin on a given order and the contribution margin, are defined in relation either to a specific order, or to the activity of a division of the applicant during the year. Such objectives are commercial in nature and do not relate to the overall financial performance of the applicant. In addition, the bonuses paid in respect of those objectives are conditional on and directly proportional to the margins achieved. Secondly, the objective relating to earnings before interest, taxes, depreciation and amortisation is connected with the overall financial performance of the applicant and the other companies in its group, but is not used to calculate a free-standing bonus. It is used purely to adjust the amount of the bonuses paid in respect of the first set of objectives, an amount which depends on the attainment of commercial targets. Accordingly, the General Court rules that the bonuses paid by the applicant to its employees do not fulfil the eligibility conditions contained in the grant agreement, in so far as they are essentially based on commercial targets and the costs relating to them are neither incurred in connection with the project nor necessary for its implementation.

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[105] That document aims to explain the general model grant agreement produced by the Commission and help users understand and interpret grant agreements drawn up on the basis of that model.

[106] Within the meaning of Article 6.1(a)(iv) of the general model grant agreement.

5. FINANCIAL PROVISIONS: COMBATTING FRAUD

Judgment of the Court (Grand Chamber), 24 July 2023, EUROAPTIEKA, C-107/23 PPU

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of the financial interests of the European Union – Article 325(1) TFEU – PFI Convention – Article 2(1) – Obligation to counter fraud affecting the financial interests of the European Union by taking effective deterrent measures – Obligation to provide for criminal penalties – Value added tax (VAT) – Directive 2006/112/EC – Serious VAT fraud – Limitation period for criminal liability – Judgment of a constitutional court invalidating a national provision governing the grounds for interrupting that period – Systemic risk of impunity – Protection of fundamental rights – Article 49(1) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Requirements of foreseeability and precision of criminal law – Principle of the retroactive application of the more lenient criminal law (lex mitior) – Principle of legal certainty – National standard of protection of fundamental rights – Duty on the courts of a Member State to disapply judgments of the constitutional court and/or the supreme court of that Member State in the event that they are incompatible with EU law – Disciplinary liability of judges in the event of non-compliance with those judgments – Principle of the primacy of EU law

In 2010, C.I., C.O., K.A., L.N. and S.P. ('the interested parties') omitted to indicate in their accounting documents the commercial transactions and income relating to the sale, to national recipients, of diesel fuel acquired under the excise duty suspension regime, thereby causing a loss to the State budget, in particular as regards value added tax (VAT) and excise duty on diesel fuel.

By a judgment published on 25 June 2018, the Curtea Constituțională (Constitutional Court, Romania) declared a national provision governing the interruption of the limitation period for criminal liability unconstitutional on the ground that it infringed the principle that offences and penalties must be defined by law. [107] That court subsequently clarified, in a judgment published on 9 June 2022, that, having regard to the lack of action by the Romanian legislature immediately after its 2018 judgment, Romanian positive law did not provide for any ground for interrupting that limitation period between the date of publication of the latter judgment and the date of entry into force, on 30 May 2022, of the provision replacing the invalidated provision. [108]

By judgment delivered on 30 June 2020, the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), the referring court, convicted or upheld the convictions of the interested parties and sentenced them to terms of imprisonment for tax evasion and establishment of an organised criminal group. The interested parties brought extraordinary appeals against that judgment, on the ground that they had been been convicted even though the limitation period for their criminal liability had expired. More specifically, they claim that the fact that, during the abovementioned period, positive law did not provide for any possibility of interrupting the prescription periods constituted, in itself, a more favourable criminal law, which should be applied to them in accordance with the principle of the retroactive application of the more lenient criminal law (lex mitior). They invoke in that context a

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107 That provision, namely Article 155(1) of the Romanian Criminal Code, provided that the limitation period for criminal liability was to be interrupted by the performance of 'any procedural act'. According to the Constitutional Court, that provision lacked foreseeability and infringed the principle that offences and penalties must be defined by law, given that the expression 'any procedural act' also covered acts which were not notified to the suspect or accused person, thus preventing him or her from becoming aware of the fact that a new limitation period for his or her criminal liability had begun to run.

108 Article 155(1) of the Criminal Code was amended so that the limitation period for criminal liability is interrupted by any procedural act which must be notified to the suspect or accused person.

judgment of 25 October 2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), by which that court held that a final conviction may, in principle, be the subject of an extraordinary appeal based on the effects of judgments of the Constitutional Court as a more favourable criminal law (lex mitior). [109]

The referring court finds that, if that interpretation were accepted, the limitation period in the present case would have expired before the decision convicting the interested parties became final, which would entail the discontinuation of the criminal proceedings and would render impossible their conviction.

The referring court questions the compatibility of that interpretation with EU law, since it would have the effect of exempting the interested parties from their criminal liability for serious fraud offences liable to affect the European Union's financial interests. Moreover, it emphasises that it might be required – if it transpires that an interpretation consistent with EU law is not possible – to disapply the judgments of the Constitutional Court and/or the High Court of Cassation and Justice. The new disciplinary regime allows for the imposition of penalties on judges who, knowingly or through gross negligence, disregard the judgments of those courts.

In the context of the urgent preliminary ruling procedure, initiated by the Court of Justice, sitting as a Grand Chamber, of its own motion, the Court specifies the Member States' obligations resulting from (i) the obligation to counter fraud affecting the financial interests of the European Union and (ii) the need to respect fundamental rights, as protected by EU law and national law.

Findings of the Court

The Court holds that neither Article 325(1) TFEU nor Article 2(1) of the PFI Convention [110] require the courts of a Member State to disapply the judgments of the Constitutional Court invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability.

In that regard, the Court clarifies first of all that, although the adoption of rules governing the limitation periods for criminal offences affecting the financial interests of the European Union fell, at the time of the facts in the main proceedings, within the competence of the Member States, those Member States are required, when exercising that competence, to comply with their obligations deriving from EU law. Accordingly, they must counter fraud and any other illegal activities affecting the financial interests of the European Union through effective deterrent measures and take the necessary measures to ensure that conduct constituting fraud affecting those interests, including VAT fraud, is punishable by effective, proportionate and dissuasive criminal penalties. Accordingly, the Member States must ensure that the limitation rules laid down by national law allow effective punishment of infringements linked to such fraud.

The application of judgments of the Constitutional Court invalidating the national legislative provision governing the grounds for interruption of the limitation period for criminal liability would entail the discontinuation of the criminal proceedings and would render impossible the conviction of the interested parties. That application could, moreover, lead to the removal of criminal liability in a substantial number of other cases, and thus entail a systemic risk of serious fraud offences

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109 In that judgment of 25 October 2022, the High Court of Cassation and Justice specified that, in Romanian law, the rules relating to the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and that, consequently, they are subject to the principle of non-retroactivity of criminal law, without prejudice to the principle of the retroactive application of the more lenient criminal law (lex mitior).

110 The Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 49; 'the PFI Convention').

affecting the financial interests of the European Union going unpunished. The existence of such a systemic risk is incompatible with the requirements of Article 325(1) TFEU and Article 2(1) of the PFI Convention.

Since those provisions have direct effect, under the principle of primacy of EU law, it is, in principle, for the national courts to give full effect to the obligations under those provisions and to disapply national provisions which, in connection with proceedings concerning serious fraud affecting the financial interests of the European Union, prevent the application of effective and deterrent penalties in order to counter such offences. It thus appears that, in principle, those courts are required to disapply those judgments.

That being said, given that the criminal proceedings instigated for VAT offences amount to an implementation of EU law, within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), it remains necessary to ascertain whether the obligation to disapply such judgments conflicts with the protection of fundamental rights and, in the present case, of those enshrined, in the EU legal order, in Article 49(1) of the Charter. [111] Since the rules governing limitation periods in criminal matters do not fall within the scope of that provision, the obligation to disapply those judgments is not such as to undermine the fundamental rights as guaranteed in that provision.

However, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where the? action of the Member States is not entirely determined by EU law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, and the primacy, unity and effectiveness of EU law are not thereby compromised. In so far as, in Romanian law, the rules concerning the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and, consequently, are subject to the principle that offences and penalties must be defined by law and to the principle of the retroactive application of the more lenient criminal law (lex mitior), those principles must therefore be regarded as national standards of protection of fundamental rights.

In this respect, the Court notes, in the first place, the importance given, both in the EU legal order and in national legal systems, to the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability, precision and non-retroactivity of criminal law. Those requirements constitute a specific expression of the principle of legal certainty, which is an essential element of the rule of law, which is identified in Article 2 TEU both as a founding value of the European Union and as a value common to the Member States.

In the present case, the Constitutional Court applied a national standard of protection of the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability and precision of criminal law, which supplements the protection against arbitrariness in criminal matters offered by EU law, under the principle of legal certainty. Having regard to the importance of that protection against arbitrariness, such a standard may preclude the obligation which the national courts are under, pursuant to Article 325(1) and (2) TFEU, to disapply national provisions governing limitation periods in criminal matters.

In the second place, the Court holds that, under Article 325(1) TFEU and Article 2(1) of the PFI Convention, the courts of a Member State are, however, required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex

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[111] That provision, which enshrines in EU law the principle that offences and penalties must be must be defined by law and the principle of the retroactive application of the more lenient criminal law (lex mitior), is worded as follows: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

mitior) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in cases relating to serious fraud offences affecting the financial interests of the European Union by procedural acts which took place before the finding of invalidity of a national legislative provision governing the grounds for interrupting the limitation period in criminal matters.

Contrary to the national standard of protection relating to the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law, which is limited to neutralising the interrupting effect of procedural acts which occurred during the period from 25 June 2018, the date of the publication of the judgment finding the national legislative provision in question invalid, to 30 May 2022, the date on which the provision replacing that provision entered into force, the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (lex mitior) permits the neutralisation of the interrupting effect of procedural acts which took place even before 25 June 2018. The application of such a national standard of protection is liable to exacerbate the systemic risk that serious fraud affecting the financial interests of the European Union will go unpunished, in breach of Article 325 TFEU and Article 2(1) of the PFI Convention.

In such circumstances, in view of the need to weigh the latter national standard of protection against the provisions of Article 325 TFEU and Article 2(1) of the PFI Convention, the application of that standard by a national court is liable to compromise the primacy, unity and effectiveness of EU law.

In the last place, the Court finds that the principle of primacy precludes national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect. The fact that a national court performs the tasks entrusted to it by the Treaties and fulfils its obligations under the Treaties, by giving effect – in accordance with the principle of the primacy of EU law – to a provision of EU law such as Article 325(1) TFEU or Article 2(1) of the PFI Convention and to the interpretation given to it by the Court, cannot, by definition, be regarded as a disciplinary offence on the part of judges sitting in that court without that provision and that principle being infringed ipso facto.