COURT OF JUSTICE
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I. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Grand Chamber), 5 December 2023, Nacionalinis visuomenės sveikatos centras, C-683/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Article 4(2) and (7) – Concepts of 'processing' and 'controller' – Development of a mobile IT application – Article 26 – Joint control – Article 83 – Imposition of administrative fines – Conditions – Requirement that the infringement be intentional or negligent – Responsibility and liability of the controller for the processing of personal data carried out by a processor

In 2020, in order better to manage the COVID-19 pandemic, the Lithuanian authorities decided to organise the acquisition of a mobile IT application. That application was to contribute to epidemiological follow-up by allowing for the registration and monitoring of the data of persons exposed to the COVID-19 virus.

To that end, the Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos (National Public Health Centre under the Ministry of Health, Lithuania; 'the NVSC'), which was entrusted with that acquisition, contacted the company UAB 'IT sprendimai sėkmei' ('the company ITSS'), asking it to create such a mobile application. Emails concerning, inter alia, the questions to be included in that application were subsequently sent to that company by employees of the NVSC.

During the period from April to May 2020, the mobile application created by the company ITSS was made available to the public. As a result, 3 802 persons used that application and provided various data relating to them, as requested by the application. However, due to a lack of funding, the NVSC did not award any public contract to the company ITSS for the official acquisition of its mobile application and terminated the procedure relating thereto.

In the meantime, the national supervisory authority initiated an investigation concerning the processing of personal data resulting from the use of that application. By decision of that authority, adopted following the investigation, administrative fines were imposed both on the NVSC and on the company ITSS, which was considered to be a joint controller.

The NVSC has challenged that decision before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania). Having doubts as to the interpretation of several provisions of the GDPR, [1] that court has made a request for a preliminary ruling to the Court of Justice.

In its judgment, the Court, sitting as the Grand Chamber, provides clarification as regards the concepts of 'controller', 'joint controllers' and 'processing', [2] and rules on the possibility of imposing an administrative fine on a controller [3] where the infringement of the provisions of the GDPR being penalised has not been committed intentionally or negligently.

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

2 Defined in Article 4(7), Article 26(1) and Article 4(2) of the GDPR respectively.

3 By virtue of Article 83 of the GDPR.

Findings of the Court

In the first place, the Court finds that an entity which has entrusted an undertaking with the development of a mobile IT application and which has, in that context, participated in the determination of the purposes and means of the processing of personal data carried out through that application may be regarded as a controller. [4] That finding cannot be called into question by the fact that that entity has not itself performed any processing operations in respect of such data, has not expressly agreed to the performance of specific operations for such processing or to that mobile application being made available to the public, and has not acquired the abovementioned mobile application, unless, prior to that application being made available to the public, that entity expressly objected to such making available and to the processing of personal data resulting therefrom.

In the second place, the Court observes that the classification of two entities as joint controllers does not require that there be an arrangement between those entities regarding the determination of the purposes and means of the processing of personal data; nor does it require that there be an arrangement laying down the terms of the joint control. It is true that, under the GDPR, [5] joint controllers must, by means of an arrangement between them, determine in a transparent manner their respective responsibilities for compliance with the obligations under that regulation. However, the existence of such an arrangement constitutes not a precondition for two or more entities to be classified as 'joint controllers', but rather an obligation which the GDPR imposes on joint controllers, once they have been classified as such, for the purposes of compliance with their obligations under that regulation. Thus, such classification arises solely from the fact that several entities have participated in the determination of the purposes and means of processing.

As regards the joint determination, by the entities concerned, of the purposes and means of processing, the Court states that their participation in that determination can take different forms and can result from a common decision taken by them or from converging decisions on their part. However, where the latter is the case, those decisions must complement each other in such a manner that they each have a tangible impact on the determination of the purposes and means of the processing.

In the third place, the Court states that the use of personal data for the purposes of the IT testing of a mobile application constitutes processing. [6] However, that is not the case where such data have been rendered anonymous in such a manner that the subject of those data is not or is no longer identifiable, or where it involves fictitious data which do not relate to an existing natural person.

First, the question whether personal data are used for the purposes of IT testing or for another purpose has no bearing on whether the operation is classified as 'processing'. Second, only processing which relates to personal data may be classified as 'processing' within the meaning of the GDPR. However, fictitious or anonymous data do not constitute personal data.

In the fourth and last place, the Court finds that, under Article 83 of the GDPR, an administrative fine may be imposed on a controller only where it is established that that controller has intentionally or negligently committed an infringement of the rules contained in that regulation. [7]

In that regard, the Court clarifies that the EU legislature did not leave the Member States a margin of discretion as regards the substantive conditions which must be satisfied by a supervisory authority where that authority decides to impose an administrative fine on a controller under that provision. The fact that the GDPR grants Member States the possibility to lay down exceptions in relation to

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4 Within the meaning of Article 4(7) of the GDPR.

5 Article 26(1) of the GDPR, read in the light of recital 79 thereof.

6 Within the meaning of Article 4(2) of the GDPR.

7 An infringement referred to in Article 83(4) to (6).

public authorities and bodies established in those Member States [8] and requirements concerning the procedure to be followed by supervisory authorities in order to impose an administrative fine [9] in no way means that they are also authorised to lay down such substantive conditions.

With regard to those conditions, the Court notes that the factors listed in the GDPR, in the light of which the supervisory authority may impose an administrative fine on the controller, include 'the intentional or negligent character of the infringement'. [10] By contrast, none of those factors refers to any possibility of rendering the controller liable in the absence of wrongful conduct on its part. Thus, only infringements of the provisions of the GDPR which are committed intentionally or negligently by the controller may result in an administrative fine being imposed on that controller pursuant to Article 83 of that regulation.

The Court adds that such an interpretation is supported by the general scheme and purpose of the GDPR. In that context, it states that the existence of a system of sanctions under the GDPR, which allows an administrative fine to be imposed where justified by the specific circumstances of each individual case, provides an incentive for controllers and processors to comply with that regulation, and that, through their dissuasive effect, administrative fines contribute to strengthening the protection of data subjects. However, the EU legislature did not deem it necessary to provide for the imposition of administrative fines in the absence of fault. Having regard to the fact that the GDPR aims to achieve a level of protection which is both equivalent and homogenous, and that, to that end, it must be applied consistently throughout the Union, it would be contrary to that purpose to allow the Member States to lay down such a regime for imposing a fine.

In addition, the Court concludes that such a fine may be imposed on a controller in respect of personal data processing operations performed by a processor on behalf of that controller, unless, in the context of those operations, that processor has carried out processing for its own purposes or has processed such data in a manner incompatible with the framework of, or detailed arrangements for, the processing as determined by the controller, or in such a manner that it cannot reasonably be considered that that controller consented to such processing. In such a situation, the processor must be considered to be a controller in respect of such processing.

Judgment of the Court of Justice (Grand Chamber), 5 December 2023, Deutsche Wohnen, C-807/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Article 4(7) – Concept of 'controller' – Article 58(2) – Powers of supervisory authorities to apply corrective measures – Article 83 – Imposition of administrative fines on a legal person – Conditions – Discretion of the Member States – Requirement that the infringement be intentional or negligent

Deutsche Wohnen SE ('DW') is a real estate company which holds, indirectly via participating interests in various companies, a large number of commercial and housing units. As part of its business activities, it processes personal data of tenants of those units.

8 By virtue of Article 83(7) of the GDPR which provides that '... each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State'.

9 By virtue of Article 83(8) of the GDPR, read in the light of recital 129 thereof.

10 Article 83(2)(b) of the GDPR.

Following two inspections carried out in 2017 and in 2019, le Berliner Beauftragte für den Datenschutz (Berlin Data Protection Authority, Germany) found that DW had committed a series of infringements of the GDPR. [11] By decision of 30 October 2019, that supervisory authority imposed administrative fines in respect of such infringements.

DW brought an action against that decision before the Landgericht Berlin (Regional Court, Berlin, Germany), which closed the proceedings without taking further action. That court observed that, under German law, [12] a finding of an administrative infringement can be made only against a natural person and not against a legal person. In addition, in a situation involving a legal person incurring liability, only the actions of representatives of the legal person or of members of bodies thereof can be attributed to that legal person. The Staatsanwaltschaft Berlin (Berlin Public Prosecutor's Office) brought an appeal against that decision before the Kammergericht Berlin (Higher Regional Court, Berlin, Germany). In that context, that court made a reference to the Court of Justice for a preliminary ruling on the interpretation of the GDPR. [13]

In its judgment, the Grand Chamber of the Court rules on the conditions for imposing administrative fines under the GDPR. In the first place, it examines the question whether the Member States may make the imposition of an administrative fine on a legal person subject to the condition that the infringement of that regulation must first be attributed to an identified natural person. In the second place, it addresses the question whether the infringement of the provisions of the GDPR in relation to which a penalty was imposed must be committed intentionally or negligently. [14]

Findings of the Court

As regards the imposition of an administrative fine under the GDPR on a legal person, the Court states, first of all, that the principles, prohibitions and obligations laid down by the GDPR are directed, in particular, at 'controllers', whose responsibility extends to any processing of personal data which they carry out themselves or which is carried out on their behalf. It is that liability which forms, in the event of infringement of the provisions of the GDPR, the basis for the imposition of an administrative fine on the controller pursuant to Article 83 of that regulation. However, the EU legislature did not distinguish, for the purposes of determining such liability, between natural persons and legal persons, that liability being subject to the sole condition that those persons, alone or jointly with others, determine the purposes and means of processing of personal data. [15] Consequently, as a rule, any person meeting that condition is responsible, inter alia, for any infringement of the GDPR which is committed by that person or on behalf of that person. That implies, first, that legal persons are liable not only for infringements committed by their representatives, directors or managers, but also by any other person acting in the course of the business of those legal persons and on their behalf. Second, the administrative fines provided for by the GDPR in respect of such infringements must be capable of being imposed directly on legal persons where they may be classified as controllers.

Next, the Court observes that no provision of the GDPR permits the inference that the imposition of an administrative fine on a legal person as a controller is subject to a previous finding that that infringement was committed by an identified natural person. In addition, the EU legislature did not provide the Member States with a margin of discretion in that regard. The fact that the GDPR provides

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

12 Gesetz über Ordnungswidrigkeiten (Law on administrative offences) of 24 May 1968 (BGBl. 1968 I, p. 481), in the version in the Communication of 19 February 1987 (BGBl. 1987 I, p. 602), as amended by the Law of 19 June 2020 (BGBl. 2020 I, p. 1350).

13 Article 58(2) and Article 83 of the GDPR.

14 In that regard, see also judgment of 5 December 2023, Nacionalinis visuomenės sveikatos centras (C-683/21, EU:C:2023:949), delivered on the same day.

15 In accordance with Article 4(7) of the GDPR.

them with the possibility to lay down requirements concerning the procedure to be followed by the supervisory authorities in order to impose an administrative fine [16] in no way means that they are also authorised to lay down substantive conditions over and above those set by the GDPR.

In that context, the Court clarifies that to allow Member States to make it a requirement, unilaterally and as a necessary condition for the imposition of an administrative fine pursuant to Article 83 of the GDPR on a controller who is a legal person, that the infringement in question is first attributed or attributable to an identified natural person, would be contrary to the purpose of the GDPR. In addition, such an additional requirement would, ultimately, risk weakening the effectiveness and deterrent effect of administrative fines imposed on legal persons as controllers.

Lastly, the Court points out that the concept of an 'undertaking', within the meaning of Articles 101 and 102 TFEU, [17] has no bearing on whether and under what conditions an administrative fine may be imposed pursuant to the GDPR on a controller who is a legal person and is relevant only for the purpose of determining the amount of such a fine.

Accordingly, the Court concludes that the GDPR [18] precludes national legislation under which an administrative fine may be imposed on a legal person in its capacity as controller in respect of an infringement of that regulation [19] only in so far as that infringement has previously been attributed to an identified natural person.

As regards the question whether the Member States may provide for an administrative fine to be imposed even where the infringement in respect of which a penalty has been imposed has not been committed intentionally or negligently, the Court recalls, first of all, that the substantive conditions which a supervisory authority must satisfy when it imposes such a fine on a controller are governed solely by EU law and that the Member States have no discretion in that regard.

As regards those conditions, the Court notes that the factors listed in the GDPR to which the supervisory authority is to have regard when imposing such a fine include 'the intentional or negligent character of the infringement'. [20] By contrast, none of those factors refers to any possibility of rendering the controller liable in the absence of wrongful conduct on its part. Thus, only infringements of the provisions of the GDPR which are committed intentionally or negligently by the controller may result in an administrative fine being imposed on that controller pursuant to Article 83 of that regulation.

The Court adds that such an interpretation is supported by the general scheme and purpose of the GDPR. In that context, it states that the existence of a system of sanctions under the GDPR, which allows an administrative fine to be imposed where justified by the specific circumstances of each individual case, provides an incentive for controllers and processors to comply with that regulation, and that, through their dissuasive effect, administrative fines contribute to strengthening the protection of data subjects. However, the EU legislature did not deem it necessary to provide for the imposition of administrative fines in the absence of fault. Having regard to the fact that the GDPR aims to achieve a level of protection which is both equivalent and homogenous, and that, to that end, it must be applied consistently throughout the Union, it would be contrary to that purpose to allow the Member States to lay down such a regime for imposing a fine.

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16 As is apparent from Article 58(4) and Article 83(8) of the GDPR, read in the light of recital 129 thereof.

17 To which reference is made in recital 150 of the GDPR.

18 See Article 58(2)(i) and Article 83(1) to (6) of the GDPR.

19 Referred to in Article 83(4) to (6) of the GDPR.

20 Article 83(2)(b) of the GDPR.

Therefore, the Court finds that, under Article 83 of the GDPR, an administrative fine may be imposed only where it is established that the controller, which is both a legal person and an undertaking, intentionally or negligently, committed an infringement of the rules contained in that regulation.

Judgment of the Court of Justice (First Chamber), 7 December 2023, SCHUFA Holding and Others (Scoring), C-634/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 22 – Automated individual decision-making – Credit information agencies – Automated establishment of a probability value concerning the ability of a person to meet payment commitments in the future ('scoring') – Use of that probability value by third parties

SCHUFA Holding AG, a private company under German law, provides its contractual partners with information on the creditworthiness of persons. To that end, it assigns to each person a score, which it establishes based on certain characteristics of that person, on the basis of mathematical and statistical procedures. Scoring seeks to predict the future behaviour of a person, such as the repayment of a loan, by assigning him or her to a group of other persons with comparable characteristics.

After having been the subject of negative information established by SCHUFA and transmitted to a credit institution, OQ was refused, by that institution, the granting of a loan. OQ applied for SCHUFA to give her access to the data concerning her and to erase the data which was allegedly incorrect. SCHUFA, however, only sent her score to her and, in broad terms, the methods for calculating that score, referring, for the remainder, to trade secrecy.

OQ then lodged a complaint against SCHUFA before the HBDI, [21] the German supervisory authority, which was rejected by the latter on the ground that SCHUFA's activity complied with the German legislation governing the terms of use of a probability value relating to creditworthiness. [22]

Hearing an appeal by OQ against the decision of the HBDI, the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) asked the Court of Justice for an interpretation of the provisions of the GDPR [23] covering the right of the data subject not to be subject to a decision based solely on automated processing, including profiling. [24]

In its judgment, the Court interprets, for the first time, the provisions of the GDPR relating to the sensitive area of decisions based solely on automated data processing. In this context, it decides on the question of whether the automated establishment by a credit information agency of a probability value concerning the ability of a person to meet payment constitutes automated individual decision-making and therefore falls within the scope of application of those provisions.

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21 Hessischer Beauftragter für Datenschutz und Informationsfreiheit (Data Protection and Freedom of Information Commissioner for the Federal State of Hesse, Germany).

22 Paragraph 31 of the Bundesdatenschutzgesetz (Federal Law on data protection) of 30 June 2017 (BGBl. I, p. 2097).

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

24 Article 22 of the GDPR.

Findings of the Court

First of all, the Court finds that the three cumulative conditions of applicability of the provisions of the GDPR which govern the right of the person not to be the subject of a decision based solely on automated processing, including profiling, are met in the present case.

As regards the first condition, relating to the existence of a decision, the Court specifies that the concept of 'decision' has a broad scope and may encompass the result of calculating a person's creditworthiness in the form of a probability value concerning that person's ability to meet payment commitments in the future.

Concerning the second condition, according to which the decision must be 'based solely on automated processing, including profiling', it is common ground, according to the Court, that the activity of the company in question meets the definition of 'profiling' [25] and therefore that that condition is met in the present case. In addition, the referring court explicitly refers to the automated establishment of a probability value based on personal data relating to a person and concerning that person's ability to repay a loan in the future.

As regards the third condition, according to which the decision must produce 'legal effects' concerning the person at issue or affect him or her 'similarly significantly', the Court notes that, in the present case, the action of the third party to whom the probability value is transmitted draws 'strongly' on that value. An insufficient probability value leads, in almost all cases, to the refusal of that bank to grant a loan. Thus, that value affects, at the very least, the data subject significantly.

The Court concludes that, in the event that the probability value established by a credit information agency and communicated to a bank plays a determining role in the granting of credit, the establishment of that value must be qualified in itself as a decision producing, vis-à-vis a data subject, 'legal effects concerning him or her or similarly significantly [affecting] him or her'. [26]

Next, the Court points out that that interpretation, and chiefly the broad scope of the concept of 'decision', reinforce the effective protection intended by the GDPR. On the other hand, a restrictive interpretation, according to which the establishment of the probability value must only be considered as a preparatory act and only the act adopted by the third party can, where appropriate, be classified as a 'decision', would lead to a lacuna in legal protection. In that situation, the establishment of such a value would escape the specific requirements provided for in the GDPR, [27] whereas that procedure is based on automated processing and produces effects significantly affecting the data subject to the extent that the action of the third party to whom that probability value is transmitted draws strongly on it.

Furthermore, first, the data subject would not be able to assert, from the credit information agency which establishes the probability value concerning him or her, his or her right of access to the specific information, [28] in the absence of automated decision-making by that company. Secondly, even assuming that the act adopted by the third party falls within the provisions of the GDPR which cover the right of the data subject not to be subject to a decision based solely on automated processing, that third party would not be able to provide that specific information because it generally does not have it.

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25 Within the meaning of Article 4(4) of the GDPR.

26 Within the meaning of Article 22(1) of the GDPR.

27 Referred to in Article 22(2) to (4) of the GDPR. It is apparent from those provisions that the prohibition of an individual decision solely based on automated processing is accompanied by three exceptions, surrounded by additional guarantees. Thus, such a decision is permitted where it is necessary for the conclusion or performance of a contract between the data subject and a data controller, where it is authorised by EU or Member State law to which the controller is subject or where it is based on the explicit consent of the data subject, provided that appropriate measures to safeguard the rights and freedoms and legitimate interests of the data subject are in place.

28 Referred to in Article 15(1)(h) of the GDPR, which in the case of automated decision-making grants the data subject an extended right of access.

Lastly, the Court notes that the fact that the establishment of a probability value is covered by the provisions of the GDPR governing the right of the data subject not to be subject to a decision based solely on automated processing has the consequence that it is prohibited unless one of the exceptions is applicable and the specific requirements provided for in the GDPR are complied with.

Furthermore, any processing of personal data must, first, comply with the principles relating to the processing of data established by the GDPR and, secondly, in the light, in particular, of the principle of the lawfulness of processing, satisfy one of the conditions of lawfulness.

In this context, the Court notes that the referring court refers to the exception according to which the adoption of the decision based solely on automated processing may be authorised where this is provided for by the law of the Member State. In this respect, it states that it is for that court to verify whether the national legislation governing the terms of use of a probability value relating to creditworthiness can be classified as a legal basis authorising the adoption of such a decision and, if so, whether the conditions of that exception and those of the principles applicable to the processing, laid down in the GDPR, are fulfilled in this case.

Judgment of the Court of Justice (First Chamber), 7 December 2023, SCHUFA Holding (Discharge from remaining debts), C-26/22 and C-64/22

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 5(1)(a) – Principle of 'lawfulness' – Point (f) of the first subparagraph of Article 6(1) – Necessity of processing for the purposes of the legitimate interests pursued by the controller or by a third party – Article 17(1)(d) – Right to erasure where personal data have been unlawfully processed – Article 40 – Codes of conduct – Article 78(1) – Right to an effective judicial remedy against a supervisory authority – Decision taken by the supervisory authority on a complaint – Scope of judicial review of that decision – Credit information agencies – Storage of data from a public register relating to the discharge of remaining debts in favour of a person – Storage period

SCHUFA Holding AG, a private company incorporated under German law, records and stores information from public registers in its own databases, in particular information relating to the discharge from remaining debts, which it provides, where appropriate, to its contractual partners. It deletes that information three years after it was recorded, in accordance with the code of conduct drawn up in Germany by the association of agencies providing credit information.

After having benefited from decisions on the early discharge from remaining debts in the context of insolvency proceedings, UF and AB asked SCHUFA to erase the entries relating to those decisions. SCHUFA refused to accede to their requests, explaining that the six-month period for deleting the data from the public register, provided for under German law, [29] did not apply to it.

UF and AB each lodged a complaint against SCHUFA with the HBDI, [30] the competent supervisory authority, which rejected the complaint on the grounds that SCHUFA's data processing was lawful.

Following actions brought by UF and AB against the HBDI's decisions, the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) asked the Court of Justice to interpret a

29 Paragraph 3(1) of the Verordnung zu öffentlichen Bekanntmachungen in Insolvenzverfahren im Internet (Regulation on public notifications in insolvency proceedings on the internet) of 12 February 2002 (BGBl. I, p. 677).

30 Hessischer Beauftragter für Datenschutz und Informationsfreiheit (Data Protection and Freedom of Information Commissioner for the Federal State of Hesse, Germany).

number of provisions of the GDPR, [31] in particular those concerning the need to process data for the purposes of the interests pursued and the right to erasure. [32]

In its judgment, the Court finds that the GDPR [33] precludes a practice by credit information agencies, which consists in retaining, in their own databases, information from a public register relating to the granting of a discharge from remaining debts in favour of natural persons for a longer period than that provided for by national law for the retention of such data in such a register. It also rules on the right of the data subject to obtain from that company the erasure of data concerning him or her.

Findings of the Court

In the first place, the Court points out that, under the GDPR, processing of personal data may be regarded as lawful in particular where three cumulative conditions are met, namely, first, that the controller or a third party is pursuing a legitimate interest, secondly, that the processing is necessary to achieve the legitimate interest pursued and, thirdly, that the interests or fundamental rights and freedoms of the data subject do not override the legitimate interest of the controller or a third party. [34]

As regards the first condition, the Court points out that, while, in the present case, the processing of personal data serves the economic interests of a private company, it also serves to pursue the legitimate interests of that company's contractual partners, who are required to assess the solvency of the persons with whom they intend to conclude credit agreements, and thus the interests of the credit sector from a socio-economic point of view.

As regards the second condition, the Court points out that data processing may be regarded as 'necessary' only if it is carried out in so far as is strictly necessary for the purposes of a legitimate interest pursued by the controller or by a third party.

As regards the third condition, the Court finds that, in the present case, the examination of that condition merges with the examination of the second condition and requires a balancing of the opposing rights and interests in order to assess whether the legitimate interests pursued cannot reasonably be achieved by a shorter period for storing the data.

Thus, with regard to the balancing of the legitimate interests pursued, the Court notes that, in so far as the analysis provided by a credit information agency makes it possible to assess objectively and reliably the creditworthiness of the potential customers of that agency's contractual partners, it makes it possible to compensate for disparities in information and thus to reduce the risks of fraud and other uncertainties.

As regards, on the other hand, the rights and interests of the data subject, the Court considers that the processing by that company of data relating to the granting of a discharge from remaining debts, such as the storage, analysis and communication of those data to a third party, constitutes a serious interference with the fundamental rights of the data subject. [35] Such data is used as a negative factor when assessing the data subject's creditworthiness and therefore constitutes sensitive information about his or her private life, the processing of which is likely to be considerably detrimental to his or her interests. Furthermore, the longer such data is stored, the greater the impact on the interests and

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31 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1), and corrigendum OJ 2018, L 127, p.2, 'the GDPR').

32 Article 6(1)(f) and Article 17(1)(c) and (d) of that regulation respectively.

33 Article 5(1)(a), read in conjunction with point (f) of the first subparagraph of Article 6(1) of the GDPR.

34 Pursuant to point (f) of the first subparagraph of Article 6(1) of the GDPR, applicable in this case.

35 Rights enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, concerning respect for private life and the protection of personal data respectively.

private life of the data subject and the greater the requirements relating to the lawfulness of the storage of that information.

Furthermore, as regards the retention of data in the public insolvency registers, the Court points out that the Member States are responsible for the collection and storage of data in national databases [36] and, consequently, they must also set the time limit for the retention of such data. In this case, the national legislature took the view that, once the six-month period had expired, the rights and interests of the data subject take precedence over those of the public in obtaining that information.

In addition, the discharge from remaining debts is intended to allow the person who benefits from it to re-enter economic life and is generally of existential importance to that person. However, the attainment of that objective would be jeopardised if the information relating to it could be retained and used after it has been deleted from the public insolvency register.

Consequently, the Court concludes that the interests of the credit sector in having access to information on a discharge from remaining debts cannot justify the retention of data beyond the period for which it must be kept in the public insolvency register.

The Court adds that the retention of the data for the six-month period also constitutes an interference with the data subject's fundamental rights. In that regard, it is for the national court to assess whether the parallel storage of such data by private agencies can be regarded as being limited to what is strictly necessary.

Finally, as regards the existence of a code of conduct providing for the deletion of data after a period of three years, the Court notes that, while such a code is intended to contribute to the proper application of the GDPR, [37] the fact remains that the conditions of lawfulness of processing of personal data which it lays down cannot differ from the conditions laid down by the GDPR. Thus, a code of conduct that leads to an assessment different from that obtained pursuant to the GDPR cannot be taken into account.

In the second place, as regards the data controller's obligations to erase personal data, the Court notes, first, that the data controller must erase data which have been processed unlawfully, such as, in the present case, the processing of data carried out by the company concerned beyond the six-month retention period in the public register. [38] Secondly, even if the national court were to conclude that the processing of the data during the six-month period was lawful, the data subject would have the right to object to such processing [39] and to obtain the erasure of the data concerning him or her, if that company still fails to demonstrate the existence of overriding legitimate grounds which prevail over the interests and the rights and freedoms of that person. [40]

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36 Under Article 79(4) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (OJ 2015 L 141, p. 19). Article 79(5) of that regulation merely states that Member States are to inform data subjects of the accessibility period set for personal data stored in insolvency registers, without setting a time limit for the retention of such data.

37 Pursuant to Article 40(1) and (2) of the GDPR.

38 In accordance with Article 17(1)(d) of the GDPR.

39 Pursuant to Article 21(1) of the GDPR.

40 Under Article 17(1)(c) of the GDPR.

II. AGRICULTURE AND FISHERIES

Judgment of the General Court (Tenth Chamber), 6 December 2023, Czech Republic v Commission, T-48/22

Link to the full text of the judgment

EAGF and EAFRD – Expenditure excluded from financing – Conformity clearance procedure – Active farmer – Permanent grassland – Control sample – Undue payments – Late submission of application – Financial discipline – Obligation to state reasons – Legitimate expectations – Proportionality

In 2017, the European Commission initiated an audit mission [41] in relation to the Czech Republic in order to ascertain whether its check of the aid paid to farmers under the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) had been done in accordance with EU legislation in respect of the years 2015 to 2017 ('the audit mission').

The preliminary conclusions of that audit mission found that there was non-conformity of the systems of checks put in place to monitor the granting of area-related aid paid to farmers for the years concerned. The deficiencies found related to five key checks concerning the determination of the status of active farmer, the identification of permanent grassland, the selection of the sample of aid beneficiaries to be checked by it ('the selection of the control sample'), the recovery of undue payments and the late submission of the application.

In the final conclusions, communicated on 26 March 2021, the Commission confirmed its position that the Czech Republic had infringed five key checks and that, for all infringements found to have been committed, the Commission proposed excluding an amount of EUR 44 098 570.70 from EU financing. [42] A financial correction equal to that amount was imposed on the Czech Republic by Implementing Decision 2021/2020 ('the contested decision'). [43]

The Czech Republic sought annulment of that decision before the General Court. It contests, inter alia, the infringements relating to the status of active farmer, the selection of the control sample and the recovery of undue payments.

The Court upholds the action in part and, in that connection, rules on the interpretation of the concepts of 'active farmer' and 'group of natural or legal persons' within the meaning of Article 9(2) of Regulation No 1307/2013. [44] It also provides clarifications on the nature of the conditions laid down in

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41 On the basis of Article 52 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549), and Article 34 of Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59), in the version thereof in force at the time of the audit mission.

42 As a result of the application of a financial correction in accordance with Article 12(6) to (8) of Commission Delegated Regulation (EU) No 907/2014 of 11 March 2014 supplementing Regulation No 1306/2013 with regard to paying agencies and other bodies, financial management, clearance of accounts, securities and use of euro (OJ 2014 L 255, p. 18).

43 Commission Implementing Decision (EU) 2021/2020 of 17 November 2021 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2021 L 413, p. 10).

44 Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608).

Article 34(6) of Implementing Regulation No 908/2014 and elucidation on the arrangement for the selection of the control sample, undue payments and late submission of the application.

Findings of the Court

The Court rejects, first of all, the plea put forward by the Czech Republic by which it contested the infringement in relation to the status of active farmer.

Under that plea, the Czech Republic submitted that it did not infringe Article 9(2) of Regulation No 1307/2013 due to a failure to take related companies into account in the check of the aid applicant's status as an active farmer. Although the concepts of 'groups of natural or legal persons' and 'related companies' are not defined in either Regulation No 1307/2013 or Delegated Regulation No 639/2014, [45] the Commission nevertheless stated, in a presentation to the Member States, that Article 9(2) of Regulation No 1307/2013 must be interpreted as meaning that activities included in the exclusion list may be carried out by natural or legal persons or by groups thereof, directly or through a related company. It also stated, in a letter sent to the German Ministry of Food and Agriculture on 29 January 2016, which was then made available to the other Member States, that 'related company' meant any entity directly or indirectly related to the aid applicant through a relationship of control taking the form of whole or majority ownership.

In that context, the Court finds, first, that the inclusion of the related companies in the scope of Article 9(2) of Regulation No 1307/2013 is not contrary to the wording of that provision. In that regard, a group is, in essence, defined as a group of entities related to each other within a single organisation. Thus the term 'group' must be interpreted as being similar to the term 'grouping' and referring to any association of natural or legal persons related to each other within a more or less structured single organisation. It follows that a group of natural or legal persons includes related companies.

Consequently, the aid applicant, which may be a group of natural or legal persons, may carry out the activities included in the exclusion list directly or indirectly, or through a related company forming part of the same group. Similarly, if the aid applicant is not a group, but a natural or legal person forming part of a group, that applicant may carry out the activities included in the exclusion list directly or indirectly, or through a related company forming part of the same group.

In the second place, the inclusion of related companies in the scope of Article 9(2) of Regulation No 1307/2013 is not contrary to the definition of 'farmer' in Article 4(1)(a) of that regulation. The existence of a link between the concept of 'active farmer' and that of 'farmer' within the meaning of those two provisions is confirmed by the case-law, which has held that, in order to be eligible for the status of active farmer, a person must first satisfy the requirements referred to in Article 4(1)(a) of Regulation No 1307/2013 concerning the concept of 'farmer'. The existence of a link between that concept and that of 'active farmer' does not, however, call into question the finding to the effect that, under Article 9(2) of Regulation No 1307/2013, the aid applicant may carry out the activities included in the exclusion list directly or indirectly, or through a related company forming part of the same group. The wording of Article 4(1)(a) of Regulation No 1307/2013 does not suggest that, in order to be categorised as a farmer, a natural person, a legal person, or a group of natural or legal persons must carry out their activities directly.

In the third place, the inclusion of related companies in the scope of Article 9(2) of Regulation No 1307/2013 is not contrary to the purpose of that provision, which is to avoid the risk of fraudulent use of the EU budget and limit payments under the common agricultural policy to those farmers who genuinely carry out agricultural activity. If the related companies were not taken into account, the applicants could in fact distribute their activities across a number of related legal entities in order to circumvent the limits placed by that provision on the recognition of their status as active farmer. The check carried out by the competent authorities of the Member States would then be limited to

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45 Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation No 1307/2013 and amending Annex X to that Regulation (OJ 2014 L 181, p. 1).

agricultural activities exercised directly by the applicant, excluding those carried out through related companies.

The Czech Republic is, moreover, incorrect in stating that the risk that the applicant for aid will deliberately split its activities into different legal entities to circumvent the application of Article 9(2) of Regulation No 1307/2013 is countered by Article 60 of Regulation No 1306/2013. [46] Indeed, given the broad scope of that provision and the evidentiary constraints relating to a potential artificial creation of the conditions laid down for obtaining the advantages provided for by the sectoral agricultural legislation, it is possible that an abusive practice consisting in circumventing the application of the rules relating to the status of active farmer does not fall within the scope of Article 60 of Regulation No 1306/2013, but still constitutes an infringement of Article 9(2) of Regulation No 1307/2013. Thus, it cannot be argued that that provision alone suffices to avoid the risk that the applicant for aid will split its activities into different legal entities in order to circumvent the check of its status as an active farmer under Article 9(2) of Regulation No 1307/2013.

In the fourth and last place, the inclusion of related companies in the scope of Article 9(2) of Regulation No 1307/2013 is not contrary to the principle of legal certainty. That principle requires that legal rules be clear, precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law. In the present case, it is clearly and specifically apparent that a group of natural or legal persons or a natural or legal person forming part of a group may carry out the activities included in the exclusion list directly or indirectly, or through a related company forming part of the same group.

Next, the Court upholds, in part, the plea disputing the infringement relating to the selection of the control sample.

In that regard, it states that, by their object and purpose, standard checks are not the same thing as follow-up on-the-spot checks. Thus, whereas standard checks concern 5% of all beneficiaries applying for the basic payment scheme or the single area payment scheme and their purpose is to fix a minimum number of beneficiaries subject to a check in order to ensure efficient verification by the Commission of compliance with the provisions governing the different aid schemes and support measures, follow-up on-the-spot checks concern only beneficiaries who were subject to a reduced administrative penalty for having made, in the preceding year, an over-declaration of the areas eligible for aid. Follow-up checks have as their object to verify whether, following the application of a reduced administrative penalty for a first area over-declaration, the aid beneficiaries have committed a new infringement giving rise to the application of a full administrative penalty. The specific nature of follow-up on-the-spot checks is, moreover, confirmed by the title of Article 33a of Implementing Regulation No 809/2014, [47] which expressly categorises them as 'additional control[s]', which suggests that they are to be distinguished from standard checks inasmuch as they make the aid beneficiaries subject to an additional check. The Court accordingly finds that the Commission was correct to find that the beneficiaries who were subject to a reduced administrative penalty during the preceding year had to be distinguished from those who were subject to standard checks.

The Commission did, however, infringe Article 52(2) of Regulation No 1306/2013 and the principle of proportionality, since the amount of the financial correction applied for the infringement relating to the selection of the control sample relating to standard checks was not commensurate with the gravity of the alleged non-conformity.

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46 That provision provides: 'Without prejudice to specific provisions, no advantage provided for under sectoral agricultural legislation shall be granted in favour of a natural or legal person in respect of whom it is established that the criteria required for obtaining such advantages were created artificially, contrary to the objectives of that legislation.'

47 Commission Implementing Regulation (EU) No 809/2014 of 17 July 2014 laying down rules for the application of Regulation No 1306/2013 with regard to the integrated administration and control system, rural development measures and cross compliance (OJ 2014 L 227, p. 69), as amended by Commission Implementing Regulation (EU) 2016/1394 of 16 August 2016 (OJ 2016 L 225, p. 50).

The Commission has not adduced any evidence showing why the damage that occurred in 2017 could have also occurred in 2015 and 2016 and could have given rise to an obligation of retroactive recovery. The Court also observes that Article 3 of Regulation No 2988/95, [48] relied on by the Commission, is irrelevant in that regard. Lastly, it observes that the Commission may not rely on Article 63 of Regulation No 1306/2013 or on Article 7 of Implementing Regulation No 809/2014 either to justify the retroactive recovery of the undue payments, since it refers, for the first time in its statement in defence, to those provisions. In any event, even if the Commission could substantiate its allegations on the basis of those two provisions, they do not prove that the doubt it expressed constitutes a genuine and reasonable doubt. Consequently, the Court annuls the contested decision in so far as it concerns the imposition of the financial correction applied for the infringement relating to the selection of the sample of beneficiaries of aid subject to a standard check, in the amount of EUR 18 833.24.

Lastly, the plea contesting the recovery of the undue payments is also upheld. Article 63 of Regulation No 1306/2013 and Article 7 of Implementing Regulation No 809/2014 do not impose an obligation on the Member States to verify, retroactively, whether an area ineligible for the benefit of aid during one year was also ineligible during the preceding years. Nor does the Member States' alleged obligation to carry out a retroactive check of the ineligibility of an area come from Article 3 of Regulation No 2988/95 nor, moreover, from the General Court's case-law. [49] In that context, the Court annuls the contested decision in so far as it relates to the financial correction applied to the expenditure incurred by the Czech Republic in the context of the single area payment scheme, for the alleged infringement relating to the recovery of undue payments, in the amount of EUR 17 855 884.41.

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48 Article 3 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

49 Judgment of 7 September 2022, Slovakia v Commission (T-40/21, EU:T:2022:515, paragraphs 54 and 55).

III. FREEDOM OF MOVEMENT: MEASURES RESTRICTING THE FREEDOM OF MOVEMENT

Judgment of the Court of Justice (Grand Chamber), 5 December 2023, Nordic Info, C-128/22

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2004/38/EC – Articles 27 and 29 – Measures restricting the free movement of Union citizens on public health grounds – Measure of general application – National legislation providing for a ban on leaving the national territory in order to engage in non-essential travel to Member States classified as high-risk zones in the context of the COVID-19 pandemic and an obligation for every traveller entering the national territory from one of those Member States to undergo screening tests and to observe quarantine – Schengen Borders Code – Article 23 – Exercise of police powers in the field of public health – Equivalence with the exercise of border checks – Article 25 – Possibility of reintroducing border controls at internal borders in the context of the COVID-19 pandemic – Controls carried out in a Member State as part of measures prohibiting the crossing of borders for the purpose of engaging in non-essential travel from or to States in the Schengen area classified as high-risk zones in the context of the COVID-19 pandemic

In the context of the COVID-19 pandemic, in July 2020 a Belgian Ministerial Order prohibited non-essential travel between Belgium and the countries of the European Union, the countries of the Schengen area and the United Kingdom, provided that those countries were classified as high-risk zones ('red zones') in the light of their epidemiological situation or the level of the restrictive health measures taken by their authorities. The Belgian legislation also required every traveller entering national territory from one of those countries to undergo screening tests and to observe quarantine.

During that period, controls were carried out by the Belgian authorities to verify compliance with these measures.

From 12 to 15 July 2020, Sweden was one of the countries classified as a high-risk zone. Nordic Info BV, a travel agency specialising in travel to and from Scandinavia, cancelled all scheduled trips from Belgium to Sweden during the summer season in order to comply with the Belgian legislation.

That travel agency then brought an action before the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium), the referring court, seeking compensation for the damage which it claims to have suffered as a result of faults allegedly committed by the Belgian State in the drafting of the legislation at issue.

By its reference for a preliminary ruling, the referring court asks the Court of Justice first whether such general legislation of a Member State is compatible with the provisions of Directive 2004/38 [50] which govern measures restricting freedom of movement adopted on public health grounds. [51] It then asks the Court whether the prohibition on crossing the internal borders of that Member State for the purpose of engaging in non-essential travel to or from countries within the Schengen area classified

[50] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35).

[51] These are, in particular, Articles 27 and 29 of that directive.

as high-risk zones is compatible with the articles of the Schengen Borders Code [52] relating to the absence of internal border controls, their possible temporary reintroduction and the exercise of police powers. [53]

By its judgment, the Court answers those two questions in the affirmative, while specifying the conditions under which such national legislation must be applied.

Findings of the Court

As regards the legality, in the light of Directive 2004/38, of measures restricting freedom of movement laid down by a Member State in the context of a pandemic such as the COVID-19 pandemic, the Court states that the national legislation laying down those measures must comply with all the conditions and safeguards referred to in Articles 30 to 32 of that directive, the rights and principles enshrined in the Charter of Fundamental Rights of the European Union, in particular the principle of the prohibition of discrimination and the principle of proportionality.

In that regard, the Court states, in the first place, that, even though they appear in a chapter of Directive 2004/38 entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', Article 27(1) and Article 29(1) of Directive 2004/38 expressly refer to 'freedom of movement', so that they cover both components of that freedom, namely the right of entry and the right of exit, and thus allow Member States to adopt measures restricting each of those rights on public health grounds. The measures restricting free movement which a Member State may adopt on grounds of public health under those provisions may therefore consist not only of a prohibition on leaving the territory of a Member State in order, as in the present case, to engage in non-essential journeys, but also an obligation for travellers entering that territory to undergo screening tests and to observe quarantine.

In the second place, neither of those two provisions precludes the imposition of such restrictive measures in the form of an act of general application which applies without distinction to any person in a situation covered by that act. Such an interpretation is supported by the fact that diseases that may justify such measures – namely infectious diseases or contagious parasitic diseases such as COVID-19 – are liable, on account of their very characteristics, to affect entire populations irrespective of the behaviour of the individuals making up those populations.

In the third place, the Court points out that, despite their wording, which is, prima facie, designed for individual decisions, all the conditions and safeguards laid down in Articles 30 to 32 of Directive 2004/38 must also be complied with where the restrictive measures are adopted in the form of acts of general application. Thus, pursuant to Article 30(1) and (2) of that directive, any act of general application laying down measures restricting freedom of movement on public health grounds must be brought to the attention of the public by an official publication of the Member State which adopts it and by means of sufficient official media coverage so that the content and effects of that act can be understood, as well as the specific public health grounds relied on in support of that act. Furthermore, in order to comply with the safeguards laid down in Article 30(3) and Article 31 of that directive, the act of general application must be open to challenge in judicial and, where appropriate, administrative redress procedures, the methods for the exercise of which must be communicated to the public. Such restrictive measures must also comply with the principle of prohibition of discrimination laid down in the Charter.

In the fourth and last place, in accordance with the provisions of Article 31(1) and (3) of Directive 2004/38, any measure restricting freedom of movement laid down on grounds of public health must be proportionate in the light of the objective of protection of public health pursued, and the

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52 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), as amended by Regulation (EU) 2017/2225 of the European Parliament and of the Council of 30 November 2017 (OJ 2017 L 327, p. 1).

53 More specifically, Articles 22, 23 and 25 of that code are referred to.

proportionality of such a measure must be assessed having regard also to the precautionary principle. The requirement of the principle of proportionality specifically requires verification, first, that such measures are appropriate for attaining the objective of general interest pursued, in this case the protection of public health, second, are limited to what is strictly necessary, which means that that objective must not reasonably be capable of being achieved in an equally effective manner by other means less prejudicial to the rights and freedoms guaranteed to the persons concerned, and, third, are not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference with those rights and freedoms.

As regards the controls designed to ensure compliance with the legislation at issue, the Court holds that such controls are possible within the national territory only on condition that they fall within the exercise of police powers, within the meaning of Article 23(a) of the Schengen Borders Code. Where those controls are carried out directly at internal borders, it is necessary for the Member State to comply with all the conditions referred to in Articles 25 to 28 of that code relating to the temporary reintroduction of border controls at internal borders, given that the threat posed by a pandemic such as the COVID-19 pandemic corresponds to a serious threat to public policy or internal security within the meaning of Article 25(1) of that code.

As regards, in the first place, Article 23(a) of the Schengen Borders Code, the Court recalls that that provision guarantees Member States the right to carry out, within the national territory, including in border areas, controls justified by the exercise of police powers, provided that that exercise does not have an effect equivalent to a border check, which it is for the referring court to ascertain.

To that end, the second sentence of Article 23(a), items (i) to (iv), of that code provides indicia to guide the Member States in implementing such police powers.

In that regard, as regards, first, the indicator in the second sentence of Article 23(a), item (i), of that code, the objectives pursued by the controls must be distinguished from those pursued by border checks, namely those of ensuring that persons may be authorised to enter the territory of the Member State or authorised to leave it. The Court considers that that appears to be the case here, in so far as the main objective of the controls to ensure compliance with the Belgian legislation at issue was to limit, as a matter of urgency, the spread of COVID-19 within the Belgian population.

As regards, second, the indicator in the second sentence of Article 23(a), item (ii), of the Schengen Borders Code, it is sufficient that the controls were decided on and implemented in the light of circumstances objectively giving rise to a risk of grave and serious harm to public health, which may be relied on by a Member State under that provision, and on the basis of the authorities' general knowledge of the areas of entry to and exit from the national territory through which a large number of travellers targeted by that prohibition were likely to transit.

As regards, third, the indicators set out in the second sentence of Article 23(a), items (iii) and (iv), of the Schengen Borders Code, all the controls at issue in the main proceedings must have been carried out randomly and, therefore, '[on the spot]' and must moreover have been devised and executed in a manner clearly distinct from systematic checks on persons at the external borders of the European Union. In that latter regard, the Court specifies that, in the context of a pandemic such as that of COVID-19, the Member States have some measure of discretion as regards the intensity, frequency and selectivity of the controls.

In the second place, if it is established that the controls at issue were carried out at internal borders, the referring court will have to ascertain whether the Kingdom of Belgium complied with all the conditions referred to in Articles 25 to 28 of the Schengen Borders Code for the temporary reintroduction of border controls at internal borders where there is a serious threat to public policy and/or internal security. The Court states in that regard that a pandemic of a scale such as that of COVID-19 may be classified as a serious threat to public policy and/or internal security within the meaning of Article 25(1) of that code, in so far as it is liable to affect one of the fundamental interests of society, namely that of ensuring the lives of citizens, and in so far as it affects the very survival of a part of the population, in particular the most vulnerable.

IV. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN ARREST WARRANT

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, GN (Reason for refusal based on the best interests of the child), C-261/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Article 15(2) – Surrender procedure between Member States – Grounds for non-execution – Charter of Fundamental Rights of the European Union – Article 7 – Respect for private and family life – Article 24(2) and (3) – Taking into consideration the best interests of the child – Right of every child to maintain on a regular basis a personal relationship and direct contact with both parents – Mother of young children living with her

In June 2020, the Belgian authorities issued a European arrest warrant (EAW) in respect of GN for the purpose of enforcing a custodial sentence handed down for the offences of trafficking in human beings and facilitating illegal immigration, committed in 2016 and 2017.

On 2 September 2021, GN was arrested in Bologna (Italy). At the time of her arrest, she was pregnant and in the company of her son who was under three years of age and who lived with her. In the light of her situation, the Corte d'appello di Bologna (Court of Appeal, Bologna, Italy) unsuccessfully requested the Belgian authorities to provide it with information concerning, inter alia, the detailed arrangements for enforcement, in Belgium, of sentences imposed on mothers living with minor children and concerning the measures envisaged in relation to those children.

By judgment of 15 October 2021, that court refused to surrender GN on the ground that, in the absence of a satisfactory response to that request for information, it was uncertain that Belgian law makes provision for custodial arrangements protecting the rights of mothers and their young children to an extent that is comparable to the law in force in Italy.

Hearing an appeal on a point of law against that refusal decision, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), the referring court, states that neither the provisions of the Italian law in force [54] nor Framework Decision 2002/584 [55] refers, as a ground for refusing to execute an EAW, to the situation where the requested person is the mother of young children living with her. It is nevertheless uncertain whether it may refuse to execute an EAW on the ground that the surrender of the mother of young children to the issuing Member State would risk undermining her right to

54 Legge n. 69 – Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (Law No 69 laying down provisions to bring domestic law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) of 22 April 2005 (GURI No 98 of 29 April 2005, p. 6), in the version resulting from decreto legislativo n. 10 (Legislative Decree No 10) of 2 February 2021 (GURI No 30 of 5 February 2021), and applicable to the facts of the main proceedings.

55 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584').

respect for private and family life and the best interests of her children, as protected, respectively, by Articles 7 and 24 of the Charter of Fundamental Rights of the European Union ('the Charter'). [56]

In its judgment, the Court of Justice, sitting as the Grand Chamber, rules that Framework Decision 2002/584, [57] read in the light of the Charter, [58] precludes the executing judicial authority from refusing to surrender the person who is the subject of an EAW on the ground that that person is the mother of young children living with her, unless, first, that authority has available to it information demonstrating that there is a real risk of breach of that person's fundamental right to respect for her private and family life and of disregard for the best interests of her children on account of systemic or generalised deficiencies in the conditions of detention of mothers of young children and of the care of those children in the issuing Member State, and second, there are substantial grounds for believing that, in the light of their personal situation, the persons concerned will run that risk on account of those conditions.

Findings of the Court

First of all, the Court states that Framework Decision 2002/584 does not provide for the possibility of refusing to execute an EAW on the sole ground that the requested person is the mother of young children living with her. Having regard to the principle of mutual trust between the Member States, there is a presumption that the conditions of detention of the mother of young children and of the care of those children in the Member State issuing the EAW are appropriate to such a situation.

Nevertheless, Framework Decision 2002/584 [59] is not to have the effect of modifying the obligation to respect the fundamental rights guaranteed by the Charter, and, in the present case, more specifically, those enshrined in Article 7 and Article 24(2) and (3) thereof. Thus, first, the obligation to take account of the best interests of the child applies also in the context of an EAW issued in respect of the mother of young children, which, while not addressed to those children, has significant consequences for them. Second, every child has the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests, those interests having to be assessed by taking into account all the specific circumstances. Moreover, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.

It follows that the executing judicial authority may refrain, exceptionally, from giving effect to the EAW if there is a real risk that the execution of that warrant would result in a breach of the abovementioned fundamental rights. However, a lack of certainty on the part of that authority as regards the existence, in the issuing Member State, of conditions comparable to those existing in the executing Member State concerning the detention of mothers of young children and the care of those children cannot permit the inference that that risk has been established. That authority is required to ascertain, in the context of a two-step examination, first, whether there are systemic or generalised deficiencies in those conditions in the issuing Member State, or deficiencies in those conditions affecting more specifically an objectively identifiable group of persons, and second, whether there are substantial grounds for believing that, on account of those conditions and in the light of their personal situation, the persons concerned by an EAW will run a real risk of breach of their fundamental rights.

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56 Article 7 of the Charter concerns the right to respect for private and family life, while Article 24(2) provides that, 'in all actions relating to children, … the child's best interests must be a primary consideration'. Article 24(3) provides that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

57 Article 1(2) and (3) of that framework decision.

58 Article 7 and Article 24(2) and (3) of the Charter.

59 Article 1(3) of that framework decision.

If the executing judicial authority considers that it does not have available to it all the information necessary to take a decision on the surrender, it must request the issuing judicial authority to furnish supplementary information and the issuing judicial authority is required to furnish those. In order not to bring the operation of the EAW to a standstill, those authorities must engage in sincere cooperation. [60]

Consequently, it is only where the executing judicial authority considers, having regard to all the information available to it, including the possible absence of assurances provided by the issuing judicial authority, that the execution of the EAW is liable to give rise to a real risk of breach of the fundamental rights at issue of the persons concerned that that authority must refrain from giving effect to that EAW.

V. COMPETITION

1. AGREEMENTS, DECISIONS AND CONCERTED PRACTICES (ARTICLE 101 TFEU)

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, International Skating Union v Commission, C-124/21 P

Link to the full text of the judgment

Appeal – Competition – Rules introduced by an international sports association – Skating – Private law entity vested with regulatory, control and decision-making powers, and the power to impose sanctions – Rules on the prior approval of competitions, the participation of athletes in those competitions and the arbitration rules governing conflicts – Parallel pursuit of economic activities – Organisation and marketing of competitions – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive 'object' and 'effect' – Possible justification – Conditions

The International Skating Union ('ISU'), an association governed by private law with its headquarters in Switzerland, describes itself as the sole international sports federation recognised by the International Olympic Committee (IOC) in the field of figure skating and speed skating. Overseeing the national associations in charge of those two disciplines, which are its members, the ISU set itself the objective, according to its statutes, of regulating, administering, governing and promoting those disciplines worldwide. The ISU also carries out a commercial activity that entails the organisation of various speed skating and figure skating events in the context of international competitions, such as the European and World Championships and the Olympic Winter Games.

In accordance with its objective set out in its statutes, the ISU adopted and published a set of acts establishing its regulations, which include, inter alia, the prior authorisation rules and the eligibility rules. Those rules determine the conditions for the organisation of international skating competitions and the conditions for the participation of athletes in such competitions, respectively. In order to ensure compliance with those rules, the regulations set out by the ISU include, in addition, a set of rules governing sanctions. Lastly, the ISU also adopted rules establishing a mechanism for arbitral

60 The principle of sincere cooperation is laid down in the first subparagraph of Article 4(3) TEU.

dispute settlement ('the arbitration rules'), which confers on the Court of Arbitration for Sport, located in Lausanne (Switzerland), exclusive jurisdiction to hear those disputes.

Following a complaint lodged by two professional skaters, the European Commission found, by decision of 8 December 2017 [61] ('the decision at issue'), that the ISU's prior authorisation and eligibility rules were incompatible with Article 101 TFEU in so far as they had as their object the restriction of competition. By preventing professional speed skaters from taking part freely in international events organised by third parties, they deprived those third parties of the services of athletes which were necessary in order to organise those events. The Commission, consequently, ordered the ISU, on pain of a periodic penalty payment, to put an end to the infringement thus found, without, however, imposing a fine on it. Moreover, that institution found that the arbitration rules reinforced that infringement, in so far as they did not enable the persons concerned to obtain effective judicial review, with regard to the EU competition rules, of decisions adopted by the ISU.

Ruling, by its judgment of 16 December 2020 [62] ('the judgment under appeal'), on the action for annulment brought by the ISU against the decision at issue, the General Court held, in essence, that the decision at issue was not vitiated by illegality in so far as it related to the ISU's prior authorisation and eligibility rules, but that it was unlawful in so far as it related to the arbitration rules.

In that context, the ISU lodged an appeal against the judgment under appeal, seeking that it be set aside in so far as it held that the Commission had correctly classified the prior authorisation and eligibility rules at issue as having as their 'object' the restriction of competition, within the meaning of Article 101(1) TFEU. The two professional skaters who made the abovementioned complaint and the European Elite Athletes Association, for their part, lodged a cross-appeal against that judgment seeking annulment thereof in part, in so far as it annulled the aspects of the decision at issue relating to the arbitration rules.

By its judgment, delivered on the same day as two other judgments [63] concerning the application of EU economic law to the rules established by international or national sports federations, the Court of Justice, sitting as the Grand Chamber, dismisses the main appeal but upholds the cross-appeal and, consequently, sets aside the judgment under appeal in so far as concerns the arbitration rules. Finally, ruling definitively on the part corresponding to the ISU's action before the General Court, the Court of Justice holds that none of the complaints made by the ISU seeking to contest the analysis of those rules on the part of the Commission is successful, with the result that its action must also be dismissed in that regard.

The present case allows the Court of Justice to provide clarification as to the obligations imposed on sports federations in the light of Article 101(1) TFEU, where they have established, in the exercise of the powers they hold under their statutes, rules governing authorisation and control, subject to sanctions, relating to the organisation of sporting competitions, while in parallel pursuing an economic activity in the field. On this occasion, the Court specifies in particular that the fundamental requirement that such rules must be capable of being subject to effective judicial review entails, in a situation involving provisions that confer mandatory and exclusive jurisdiction on an arbitration body for the purpose of settling disputes concerning the application of the rules at issue, ensuring that the court called upon to review the awards made by that body are capable, first, of ensuring compliance with the public policy provisions of EU law, which include the competition rules and, second, of referring questions, if necessary, to the Court of Justice for a preliminary ruling under Article 267 TFEU.

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61 Commission Decision C(2017) 8230 final of 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40208 – International Skating Union's Eligibility rules).

62 Judgment of 16 December 2020, International Skating Union v Commission (T-93/18, EU:T:2020:610).

63 Judgments of 21 December 2023, European Superleague Company (C-333/21), and of 21 December 2023, Royal Antwerp Football Club (C-680/21).

Findings of the Court

The main appeal

Before examining the ISU's complaints challenging the interpretation and application of the concept of restriction of competition by 'object' referred to in Article 101(1) TFEU in respect of the prior authorisation and eligibility rules at issue, the Court defines the subject matter of the appeal before it. In that regard, it observes that it is not disputed that the ISU must be classified, in the light of Article 101 TFEU, as 'an association of undertakings' pursuing, moreover, an economic activity consisting in organising and marketing international skating competitions. Furthermore, it is not disputed that those prior authorisation and eligibility rules constitute 'a decision by an association of undertakings' which may 'affect trade between Member States', within the meaning of that article. Lastly, nor has any challenge on appeal been made to the findings to the effect that that decision by an association of undertakings, on the assumption that it is caught by the prohibition laid down in Article 101(1) TFEU, does not satisfy the various conditions required in order to benefit from an exemption under Article 101(3) TFEU.

Having specified the above, the Court points out, first, that, in so far as the practice of sport constitutes an economic activity, it is subject to the provisions of EU law applicable to such activity, except for certain specific rules adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. Apart from those specific rules, the rules issued by sporting associations and, more broadly, the conduct of the associations which adopted them therefore come within the scope of the FEU Treaty provisions on competition law where the conditions of application of those provisions are met. That is particularly true of the rules establishing a system of prior authorisation for sporting competitions, on the one hand, and rules governing the participation of athletes in such competitions, on the other hand, since the organisation and marketing of sporting competitions and the practice of sport as a professional or semi-professional constitute economic activities.

That being so, in so far as the sporting activity, even when pursued as an economic activity, undeniably has specific characteristics, the Court of Justice points out that, when applying Article 101 TFEU, the categorisation of the existence of conduct having as its 'object' the prevention, restriction or distortion of competition may involve taking into account, along with other elements and provided that they are relevant, characteristics such as, for example, those connected with the nature, organisation or functioning of the sport concerned, in accordance with how professionalised it is.

Next, the Court recalls the elements categorising the existence of conduct having as its 'object' the prevention, restriction or distortion of competition, and stresses, at the outset, the strict interpretation that must be given to that concept, taking into account the particular legal and evidentiary rules applicable to it. Accordingly, that concept must be understood as referring exclusively to certain types of coordination between undertakings or decisions by associations of undertakings that reveal, by their very nature, a sufficient degree of harm to competition so as to exclude the need to examine their effects. In order to determine, in a given case, whether the conduct at issue reveals such a degree of harm, it is necessary to examine, first, the content of the agreement, decision or practice in question, second, the legal and economic context of which it forms a part and, third, its objectives, in the context of an assessment based on taking into consideration all of the abovementioned elements. By contrast, no analysis of its effects is required, not even of potential positive effects on competition.

Furthermore, the Court notes that it follows from settled case-law that certain specific types of conduct such as ethical or principled rules adopted by that association are liable not to be caught by the prohibition laid down in Article 101(1) TFEU even if they have the inherent effects of restricting competition, provided that they are justified by the pursuit of legitimate objectives which are not per se anticompetitive in nature and that the necessity and proportionate nature of the means used for that purpose have been duly established. It states however that that case-law does not apply in situations involving a degree of harm that justifies the view that they have as their very 'object' the prevention, restriction or distortion of competition.

It is in the light of all those considerations that the Court of Justice examines the ISU's arguments seeking to challenge the classification made in the present case.

In the first place, the Court of Justice holds that the General Court can in no way be criticised for having found, as did the Commission, that, given the type of conduct at issue in the present case, the examination of its object should be carried out in the light of the case-law arising from the judgments in MOTOE [64] and Ordem dos Técnicos Oficiais de Contas [65] relating to the exercise at the same time, by the same entity, of an economic activity and of the powers likely to be used to prevent entities or undertakings currently or potentially in competition with it from entering the relevant market.

In that regard, it states that, given the conflict of interests inherent in such a situation, such a power, irrespective of its origin, may be conferred on a given undertaking only on condition that it is subject to restrictions, obligations and review, or that power, where it is conferred on an undertaking in a dominant position in any way, would infringe, by its very existence, Article 102 TFEU, read, as appropriate, in combination with Article 106 TFEU. Likewise, such a power may be regarded as having as its 'object' the prevention, restriction or distortion of competition, within the meaning of Article 101(1) TFEU.

In this instance, having found that the type of conduct at issue in the present case consisted in a decision by an association of undertakings conferring on the ISU regulatory, control and sanctioning powers allowing it to authorise or prevent access by potentially competing undertakings to the market for the organisation and marketing of international speed skating competitions, in which the ISU also pursues an economic activity, the General Court inferred, correctly, that the examination of that conduct should be made in the light of the principles arising from the judgments in MOTOE and Ordem dos Técnicos Oficiais de Contas.

In the second place, as regards the classification of the conduct at issue in the present case, it follows from the case-law referred to above that it is necessary to check whether the power at issue is circumscribed by substantive criteria which are transparent, clear and precise making it possible to avoid any arbitrary use, and which must have been set out in an accessible form, prior to any implementation of that power. In the field of sport, this may concern, for example, criteria that promote, in an appropriate and effective manner, the holding of competitions based on equality of opportunity and merit. That said, even where the appropriate criteria are present, they must be such as to ensure that such a power is exercised without discrimination and that any sanctions that may be imposed are objective and proportionate. Finally, those criteria must be capable of being subject to effective review. Furthermore, the power in question must be subject to transparent and non-discriminatory detailed procedural rules, such as those relating to the applicable time limits for submitting a prior authorisation request and the adoption of a decision on that request, which must not be liable to undermine potentially competing undertakings by preventing them from effectively accessing the market.

The General Court did not therefore err in law, in its examination of the objective of the prior authorisation and eligibility rules, by referring to the question whether those rules were designed in a manner such as to make it possible to prevent the powers of prior authorisation and control and the power to impose sanctions that they confer on the ISU from being used in an arbitrary, discriminatory or disproportionate manner.

In the third place, as regards the General Court's assessment following its examination of the rules at issue in the light of the abovementioned criteria, the Court of Justice holds that the General Court did not err in law in finding that those rules were not justified, in a verifiable manner, by any specific objective and that they granted a discretionary power to the ISU to decide on planned competitions subject to its authorisation, in the absence of transparent, objective, non-discriminatory and, consequently, reviewable criteria. The General Court also correctly held that the sanctions liable to be

64 Judgment of 1 July 2008, MOTOE (C-49/07, EU:C:2008:376).

65 Judgment of 28 February 2013, Ordem dos Técnicos Oficiais de Contas (C-1/12, EU:C:2013:127).

imposed by the ISU on athletes taking part in competitions that had not received prior authorisation were not subject to criteria such as to ensure that they were objective and proportionate.

In those circumstances, it is apparent that those rules are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, those rules also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them, for example on account of an innovative format, while observing all the principles, values and rules underlying the sporting discipline concerned. Lastly, they are ultimately such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof. Thus, the General Court did not commit any error of law or of legal characterisation of the facts in finding that the Commission had correctly classified the prior authorisation and eligibility rules as having as their 'object' the restriction of competition, within the meaning of Article 101(1) TFEU.

The cross-appeal

In the cross-appeal, the Court of Justice examines the complaints concerning the findings based on which the General Court invalidated the Commission's analysis concerning the arbitration rules, that is to say, whether to admit their justification in respect of the existence of legitimate interests linked to the specific nature of the sport.

In that regard, the Court of Justice stresses at the outset that the arbitration rules at issue apply to disputes likely to arise in relation to the exercise of a sport as an economic activity in EU territory. It follows that those rules fall within EU competition law, with the result that they must comply with it, in so far as they are implemented in the territory in which the EU and FEU Treaties apply, irrespective of the place where the entities that adopted them are established.

Furthermore, since Articles 101 and 102 TFEU are provisions having direct effect which create rights for individuals which national courts must protect and which are a matter of EU public policy, the Court, while acknowledging the possibility for individuals to submit their disputes to an arbitration body whose awards are capable of giving rise to limited judicial review, recalls that that review must nevertheless, in any event, be able to cover the question whether those awards comply with those articles. Such a requirement applies, more especially, in a situation involving an arbitration mechanism imposed by one individual on another for the purpose of conferring mandatory and exclusive jurisdiction on an arbitration body.

Given that the rules adopted by sports associations cannot limit the exercise of rights and freedoms conferred on individuals by EU law, prior authorisation and eligibility rules must be subject to effective judicial review. That requirement itself means that the court having jurisdiction to review awards made by an arbitration body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, that court must satisfy all the requirements under Article 267 TFEU so that it is entitled, or, as the case may be, required to satisfy the obligation to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it.

In the present case, the Court of Justice holds that the General Court merely found, in an undifferentiated and abstract manner, that the arbitration rules 'may be justified by legitimate interests linked to the specific nature of the sport', in so far as they confer on 'a specialised court' the power to review disputes relating to the prior authorisation and eligibility rules. The General Court did not therefore seek to ensure that the arbitration rules complied with all the requirements referred to above and thus allowed for an effective review of compliance with Article 101 TFEU, even though the Commission correctly relied on those requirements in concluding that those rules reinforced the anticompetitive nature of the ISU's prior authorisation and eligibility rules. In doing so, the General Court committed errors of law.

Moreover, the General Court erred in law in holding that, despite that lack of effective judicial review, the effectiveness of EU competition law was ensured in full given, first, the existence of remedies allowing recipients of a decision refusing to allow them to participate in a competition or of an ineligibility decision to seek damages for the harm caused to them by that decision before the relevant national courts and, second, the possibility of lodging a complaint with the Commission or a

national competition authority. Those mechanisms may supplement such review but cannot compensate for its absence.

Consequently, the Court of Justice sets aside the judgment under appeal, in so far as it upheld in part the ISU's claims for annulment.

The action in Case T-93/18

Considering that the part of the action for annulment that remained to be examined following the setting aside in part of the judgment under appeal permits final judgment, the Court decides to give final judgment on that part. In that regard, it points out in particular that, where the Commission finds the existence of an infringement of Article 101 or Article 102 TFEU, it has the power to require, by means of a decision, the undertakings or associations of undertakings concerned to bring an end to that infringement and, to that end, impose on them a corrective measure that is proportionate to that infringement and necessary to bring it to an immediate end. In the present case, given the scope of the requirement of effective judicial review set out above, the Court holds that the Commission was correct in concluding that the arbitration rules reinforced the infringement identified by making judicial review, in the light of EU competition law, of awards of the Court of Arbitration for Sport delivered after the decisions adopted by the ISU by virtue of the discretion conferred on it by the prior authorisation and eligibility rules more difficult. Furthermore, the Commission was correct in requiring the ISU to put an end to that situation.

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Royal Antwerp Football Club, C-680/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Internal market – Rules introduced by international and national sports associations – Professional football – Private law entities vested with regulatory, control and sanctioning powers – Rules requiring professional football clubs to use a minimum number of 'home-grown' players – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive 'object' and 'effect' – Exemption under Article 101(3) TFEU – Conditions – Article 45 TFEU – Indirect discrimination on the basis of nationality – Restriction on the freedom of movement for workers – Possible justification – Conditions – Burden of proof

The Union of European Football Associations (UEFA) is an association governed by Swiss law whose principal missions consist in monitoring and controlling the development of every type of football in Europe. It oversees the various European national football associations responsible for the organisation of football in their State – including the Union royale belge des sociétés de football association ASBL (Royal Belgian Football Association; URBSFA) for Belgium. Those associations, as UEFA members, are required to comply with the statutes, regulations and decisions of UEFA and to ensure observance of them, in their State, by the professional leagues subject to them and by clubs and players.

In 2005, UEFA adopted rules stipulating that professional football clubs participating in its international interclub football competitions must include a maximum number of 25 players on the match sheet, of whom a minimum of 8 must be 'home-grown players', defined as players who, regardless of their nationality, have been trained by their club or by a club affiliated to the same national football association for at least three years ('the rules on "home-grown players"'). Out of eight players, at least four must have been trained by the club which lists them. In 2011, the URBSFA introduced into its regulations rules relating to 'home-grown players', defined as players who, regardless of their nationality, have been trained for at least three years by a Belgian club.

UL is a football player who has the nationality of a third country, in addition to Belgian nationality. He is engaged in a professional activity in Belgium where he played for Royal Antwerp, a professional football club based in Belgium, and then for another professional football club in Belgium.

Claiming that the rules relating to 'home-grown players' are contrary to the provisions of the FEU Treaty, UL and Royal Antwerp brought an action before the Cour Belge d'Arbitrage pour le Sport (Belgian Court of Arbitration for Sport; CBAS) for compensation for the damage caused by those rules. Those claims were rejected by the CBAS, whereupon UL and Royal Antwerp brought an action before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium), the referring court, for annulment of the arbitration award.

It was against that background that the national court decided to refer a number of questions to the Court of Justice for a preliminary ruling, in essence, on whether the rules on 'home-grown players' adopted by UEFA and the URBSFA may be categorised as 'agreements between undertakings', 'decisions by associations of undertakings' or 'concerted practices' within the meaning of Article 101 TFEU. It also questions whether the rules adopted by the URBSFA are compatible with the freedom of movement for workers guaranteed by Article 45 TFEU.

By its judgment, delivered the same day as two other judgments [66] concerning the application of EU economic law to rules introduced by international sports federations, the Court, sitting in Grand Chamber, provides clarification on the application of Articles 45 and 101 TFEU to the rules adopted by sports federations with regard to the composition of teams, the participation of players in those teams and the training of those players.

Findings of the Court

As a preliminary point, the Court observes, in the first place, that the rules on 'home-grown players' fall within the scope of Articles 45 and 101 TFEU. In that regard, it points out that, to the extent that the pursuit of a sport constitutes an economic activity, it comes under the provisions of EU law that are applicable to that activity, with the exception of certain specific rules which (i) were adopted exclusively for reasons of a non-economic nature and (ii) relate to questions of interest solely to sport per se. As it is, the rules at issue in the main proceedings, whether they originate from UEFA or the URBSFA, do not come under such an exception. They concern economic activities. Moreover, although those rules do not formally govern the players' working conditions, they must be regarded as having a direct impact on that work in that they impose certain conditions, which are backed with sanctions, on the composition of the teams able to participate in interclub football competitions and, accordingly, the participation of the players themselves in those competitions.

Addressing, in the second place, the inferences liable to be attached to Article 165 TFEU – which sets out both the objectives assigned to the Union action in the area of sport and the means which may be used to contribute to the attainment of those objectives – the Court observes that that provision does not constitute a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application. It also points out that the undeniable specific characteristics of sporting activities may be taken into account along with other elements and provided they are relevant in the application of Articles 45 and 101 TFEU, although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those provisions.

In the light of those observations, the Court examines, as a first step, whether the UEFA and the URBSFA rules on 'home-grown players' are compatible with Article 101 TFEU.

In that regard, it states, first of all, that the rules at issue in the main proceedings must be categorised as a 'decision by an association of undertakings' in that (i) they originate from UEFA and the URBSFA, which are associations of undertakings, and (ii) they have a direct impact on the conditions for engaging in the economic activity of the undertakings who are directly or indirectly their members.

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66 Judgments of 21 December 2023, International Skating Union v Commission (C-124/21), and of 21 December 2023, European Superleague Company (C-333/21).

Next, as to whether those rules have an anticompetitive object, the Court states, in the first place, that, by their content, they appear to require professional football clubs participating in interclub football competitions under those associations to include on the match sheet, subject to sanctions, a minimum number of 'home-grown players'. In doing so, those rules appear to limit, by their very nature, the possibility for those clubs to include on that sheet players who do not meet those requirements. In the second place, with regard to the economic and legal context of which those rules form part, it is apparent from the specific characteristics of professional football, in particular its social, cultural and media importance, together with the fact that that sport is based on openness and sporting merit, that it is legitimate for associations such as UEFA and the URBSFA to adopt rules relating, inter alia, to the organisation of competitions in that discipline, their proper functioning and the participation of sportspersons in those competitions and, more particularly, to regulate the conditions in which professional football clubs may put together teams participating in interclub competitions within their territorial jurisdiction. In the third place, as regards the outcome which the rules at issue in the main proceedings seek to attain, they appear to limit or control one of the essential parameters of competition, namely the recruitment of talented players, whatever the club or place where they were trained, which could enable their team to win in the encounter with the opposing team. That limitation is likely to have an impact on the competition in which the clubs may engage, not only in the 'upstream or supply market', which, from an economic point of view, is constituted by the recruitment of players, but also in the 'downstream market', which, from the same point of view, is constituted by interclub football competitions.

Notwithstanding that, it is for the referring court to determine, in the light of those clarifications and having regard to all the arguments and evidence submitted by the parties, whether the rules at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition to be able to be regarded as having as their 'object' the restriction of competition. If that is not the case, that court will then have to determine whether those rules can be regarded as having, as their actual or potential effect, the restriction of competition on the market concerned.

Finally, with regard to the question whether those rules can be justified or exempted, the Court recalls that certain specific conduct, such as ethical or professional conduct rules adopted by an association, may not fall within the prohibition laid down in Article 101(1) TFEU even if they have the inherent effects of restricting competition, provided that they are justified by the pursuit of legitimate objectives in the public interest which are not per se anticompetitive in nature and that the necessity and proportionality of the means used for that purpose have been duly established.

It points out, however, that that case-law cannot be applied in relation to conduct that presents a degree of harm which justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition, without prejudice to any possible exemption under Article 101(3) TFEU, provided that the conditions required for that purpose are met, which is for the party relying on that exemption to demonstrate.

The Court recalls that, in order to be eligible for that exemption, the conduct under consideration must allow, with a sufficient degree of probability, the achievement of efficiency gains while reserving for users an equitable part of the profit resulting from those gains, without imposing restrictions that are not indispensable for achieving those gains and without eliminating all effective competition for a substantial part of the products or services concerned. It will be for the referring court, if it considers that the rules on home-grown players have as their object or effect the restriction of competition, to assess whether those conditions are met in the present case.

As a second step, in relation to the question whether the URBSFA rules on 'home-grown players' are compatible with Article 45 TFEU, the Court states that those rules prima facie infringe the freedom of movement for workers. They are based on a connection of a 'national' character in that, first, they define 'home-grown players' as those who were trained within a 'Belgian' club. Second, they require professional football clubs wishing to participate in interclub football competitions under the URBSFA to enter in the list of their players and to include on the match sheet a minimum number of players who satisfy the conditions to be eligible in that way. It follows that such rules are likely to place at a disadvantage professional football players who wish to pursue an economic activity in the territory of a Member State, namely Belgium, other than their Member State of origin, and who do not satisfy the conditions required by those rules. To that extent, those rules are likely to give rise to indirect

discrimination at the expense of players coming from another Member State, in that they risk operating mainly to the detriment of those players.

As regards any possible justification, the Court recalls that measures of non-State origin may be permitted even though they impede a freedom of movement enshrined in the FEU Treaty, if two cumulative conditions are fulfilled, which is for the party who introduced those measures to demonstrate. Thus, first, the adoption of those measures must pursue a legitimate objective in the public interest that is compatible with the Treaty and, therefore other than of a purely economic nature and, second, those measures must observe the principle of proportionality, which entails that they are suitable for ensuring the achievement of that objective and do not go beyond what is necessary for that purpose.

In the present case, the objective of encouraging the recruitment and training of young professional football players constitutes such a legitimate objective in the public interest. As regards the suitability of those rules for ensuring the attainment of that objective, that must be assessed, in particular, having regard to the fact that, by placing on the same level all young players who have been trained by any club affiliated to the national football association in question, those rules might not constitute real and significant incentives for some of those clubs, in particular those with significant financial resources, to recruit young players with a view to training them themselves. On the contrary, such a recruitment and training policy is placed on the same level as the recruitment of young players already trained by any other club also affiliated to that association, regardless of the location of that other club within the territorial jurisdiction of that association. However, it is precisely local investment in the training of young players, in particular when it is carried out by small clubs, where appropriate in partnership with other clubs in the same region and possibly with a cross-border dimension, which contributes to fulfilling the social and educational function of sport.

That being said, the Court points out that it will ultimately be for the referring court alone to assess whether the URBSFA rules meet the conditions set out above, in the light of the arguments and evidence produced by the parties.

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

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, European Superleague Company, C-333/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Internal market – Rules introduced by international sports associations – Professional football – Private law entities vested with regulatory, control and decision-making powers, and the power to impose sanctions – Rules on prior approval of competitions, on the participation of football clubs and players in those competitions, and also on the exploitation of commercial and media rights related to those competitions – Parallel pursuit of economic activities – Organisation and marketing of competitions – Exploitation of related commercial and media rights – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive 'object' and 'effect' – Exemption under Article 101(3) TFEU – Conditions – Article 102 TFEU – Abuse of dominant position – Justification – Conditions – Article 56 TFEU – Restrictions on the freedom to provide services – Justification – Conditions – Burden of proof

The Fédération internationale de football association (FIFA) is an association governed by Swiss law whose objectives include, inter alia, to draw up regulations and provisions governing the game of football and related matters, and to control every type of football at world level, but also to organise its own international competitions. FIFA is made up of national football associations which are members of six continental confederations recognised by it – which includes the Union of European Football Associations (UEFA), an association governed by Swiss law whose principal missions consist in monitoring and controlling the development of every type of football in Europe. As members of

FIFA and UEFA, those national associations have the obligation, inter alia, to cause their own members or affiliates to comply with the statutes, regulations, directives and decisions of FIFA and UEFA, and to ensure that they are observed by all stakeholders in football, in particular by the professional leagues, clubs and players.

In accordance with their respective Statutes, FIFA and UEFA have the power to approve the holding of international professional football competitions, including competitions between football clubs affiliated to a national association ('interclub football competitions'). They may also organise such competitions and exploit the rights related thereto.

European Superleague Company SL ('ESLC') is a company governed by Spanish law established on the initiative of a number of professional football clubs with the objective of organising a new European interclub football competition known as the 'Super League'.

The shareholder and investment agreement signed by the project promoters makes the establishment of the Super League subject to approval by FIFA and UEFA as a new competition compatible with their Statutes.

Following the announcement of the creation of the Super League, FIFA and UEFA issued a joint statement on 21 January 2021, setting out their refusal to recognise that new competition and warning that any player or club taking part in that new competition would be expelled from competitions organised by FIFA and UEFA. In another announcement, UEFA and a number of national associations reiterated the possibility of adopting disciplinary measures in respect of participants in the Super League, notably excluding them from certain major European and world competitions.

In those circumstances, ESLC brought an action before the Juzgado de lo Mercantil nº 17 de Madrid (Commercial Court No 17, Madrid, Spain), seeking, in essence, a declaration that those announcements, and also conduct by which FIFA and UEFA and their member national associations might put them into action, were unlawful and harmful.

According to that court, FIFA and UEFA hold a monopoly or, at least, a dominant position in the market for the organisation and marketing of international interclub football competitions, and that of the exploitation of the various rights related to those competitions. In that context, it is uncertain as to the compatibility of certain provisions of FIFA's and UEFA's Statutes with EU law, most notably Articles 101 and 102 TFEU, and also the provisions relating to the various fundamental freedoms guaranteed by the FEU Treaty.

By its judgment, delivered the same day as two other judgments [67] concerning the application of EU economic law to rules adopted by international or national sporting federations, the Court of Justice, sitting as a Grand Chamber, states that the conditions in which the rules put in place by FIFA and UEFA, concerning, on the one hand, prior approval of international interclub football competitions, the participation of football clubs and players therein, and also the sanctions provided for to accompany those rules, and, on the other, the exploitation of the various rights related to those competitions, may be viewed as constituting abuse of a dominant position under Article 102 TFEU, as well as an anticompetitive agreement under Article 101 TFEU. The Court also rules on the compatibility of those rules on prior approval, participation and sanctions with the freedom to provide services guaranteed by Article 56 TFEU.

Findings of the Court

The Court begins by setting out three sets of observations.

First of all, it observes that the questions submitted by the referring court concern solely a set of rules adopted by FIFA and UEFA on the prior approval of international interclub football competitions and

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67 Judgments of 21 December 2023, International Skating Union v Commission (C-124/21), and of 21 December 2023, Royal Antwerp Football Club (C-680/21).

the participation therein of professional football clubs and their players, on the one hand, and the exploitation of the various rights related to those competitions, on the other. Accordingly, the Court is not called upon to rule on the very existence of FIFA and UEFA or on the well-foundedness of other rules adopted by those two federations or, lastly, on the existence or characteristics of the Super League project itself, either in the light of the competition rules or the economic freedoms enshrined in the FEU Treaty.

Next, the Court observes that all of the rules about which questions have been referred to it come within the scope of provisions of the Treaty relating to competition law and also those relating to the freedoms of movement. It observes in that regard that, in so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law applicable to such activity, apart from certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. The rules at issue in the main proceedings, however, irrespective of whether they originate from FIFA or UEFA, do not come within that exception, since they relate to the pursuit of football as an economic activity.

Lastly, as regards the consequences that may be inferred from Article 165 TFEU – which specifies both the objectives assigned to Union action in the field of sport and the means which may be used to contribute to the attainment of those objectives – the Court observes that that provision is not a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application. It further recalls that the undeniable specific characteristics of sporting activity may be taken into account along with other elements and provided they are relevant in the application of the provisions of the FEU Treaty relating to competition law and the freedoms of movement, although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those provisions.

In the light of those observations and after having noted that FIFA and UEFA must be categorised as 'undertakings' for the purposes of EU competition law in so far as they pursue economic activities such as organising football competitions and exploiting the rights related thereto, the Court turns first to the question whether the adoption by FIFA and UEFA of rules on prior approval of interclub football competitions and participation therein, on pain of sanctions, may be held to be abuse of a dominant position under Article 102 TFEU, on the one hand, and an anticompetitive agreement under Article 101 TFEU, on the other.

In that regard, the Court observes that the specific characteristics of professional football, including its considerable social and cultural importance and the fact that it generates great media interest, together with the fact that it is based on openness and sporting merit, support a finding that it is legitimate to subject the organisation and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as to promote the holding of sporting competitions based on equal opportunities and merit. It is also legitimate to ensure compliance with those common rules through rules such as those put in place by FIFA and UEFA on prior approval of those competitions and the participation of clubs and players therein. It follows that, in the specific context of professional football and the economic activities to which the practice of that sport gives rise, neither the adoption of those rules nor their implementation may be categorised, in terms of their principle or generally, as an 'abuse of a dominant position' under Article 102 TFEU. The same holds true for sanctions introduced as an adjunct to those rules, since such sanctions are legitimate, in terms of their principle, as a means of guaranteeing the effectiveness of those rules.

Be that as it may, none of those specific attributes makes it possible to consider as legitimate the adoption or the implementation of rules and sanctions provided for by way of adjunct thereto, where there is no framework for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate. More specifically, it is necessary, in particular, that those criteria and those detailed rules should have been laid down in an accessible form prior to any implementation of the rules at issue. Moreover, in order for those criteria and detailed rules to be regarded as being non-discriminatory, they must not make the organisation and marketing of third-party competitions and the participation of clubs and players therein subject to requirements which are either different from those applicable to competitions organised and marketed by the decision-making entity, or are identical or similar to them but are impossible or

excessively difficult to fulfil in practice for an undertaking that does not have the same status as an association or the same powers at its disposal as that entity and which, accordingly, is in a different situation to that entity. Lastly, in order for the sanctions introduced as an adjunct to those rules not to be discretionary, they must be governed by criteria that must not only also be transparent, objective, precise and non-discriminatory, but must also guarantee that those sanctions are determined, in each specific case, in accordance with the principle of proportionality, in the light of, inter alia, the nature, duration and seriousness of the infringement found.

It follows that the adoption and implementation of rules on prior approval, participation and sanctions, where there is no framework for those rules providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, constitute abuse of a dominant position under Article 102 TFEU.

As regards the application of Article 101 TFEU to those rules, the Court observes that, although the stated reasons for the adoption of rules on prior approval for interclub football competitions may include the pursuit of legitimate objectives, such as ensuring observance of the principles, values and rules of the game underpinning professional football, they do confer on FIFA and UEFA the power to authorise, control and set the conditions of access to the market concerned for any potentially competing undertaking, and therefore to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised.

Moreover, the rules on the participation of clubs and players in those competitions are liable to reinforce the anticompetitive object inherent in any prior approval mechanism that is not subject to restrictions, obligations and review suitable for ensuring that it is transparent, objective, precise and non-discriminatory, by preventing any undertaking organising a potentially competing competition from calling, in a meaningful way, on the resources available in the market, namely clubs and players, the latter being vulnerable – if they participate in a competition that has not had the prior approval of FIFA and UEFA – to sanctions for which there is no framework providing for substantive criteria or detailed procedural rules capable of ensuring that they are transparent, objective, precise, non-discriminatory and proportionate.

It follows that, where there is no framework providing for such substantive criteria or detailed procedural rules, the rules at issue reveal, by their very nature, a sufficient degree of harm to competition and must, as a result, be held to have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects.

In the second place, the Court turns to the question whether the rules on prior approval, participation and sanctions at issue may benefit from an exemption or be held to be justified. In that regard, the Court recalls, first, that certain specific conduct, such as ethical or principled rules adopted by an association, are liable to fall outside the scope of the prohibition laid down in Article 101(1) TFEU, even if they have an inherent effect of restricting competition, provided that they are justified by the pursuit of legitimate objectives in the public interest which are not per se anticompetitive in nature and the specific means used to pursue those objectives are genuinely necessary and proportionate for that purpose. It states, however, that that case-law does not apply in situations involving conduct that by its very nature infringes Article 102 TFEU or reveals a sufficient degree of harm as to justify a finding that it has as its 'object' the prevention, restriction or distortion of competition within the meaning of Article 101 TFEU.

Second, as regards the exemption provide for in Article 101(3) TFEU, it is for the party relying on such an exemption to demonstrate that all four of the cumulative conditions required for the exemption are satisfied. Thus, the conduct being examined must, with a sufficient degree of probability, make it possible to achieve efficiency gains, whilst reserving for the users an equitable share of the profits generated by those gains and without imposing restrictions which are not indispensable for the achievement of those gains and without eliminating all effective competition for a substantial part of the products or services concerned.

It is for the referring court to determine, on the basis of the evidence adduced by the parties to the main proceedings, whether those conditions are satisfied in the specific case. That being said, as regards the last condition, concerning the maintenance of effective competition, the Court observes that the referring court will have to take account of the fact that there is no framework for the rules

on prior approval, participation and sanctions providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise and non-discriminatory, and that such a situation is liable to enable entities having adopted those rules to prevent any and all competition on the market for the organisation and marketing of interclub football competitions on European Union territory.

Consistently with the Court's case-law on Article 102 TFEU, abusive conduct by an undertaking holding a dominant position may escape the prohibition laid down in that provision if the undertaking concerned establishes that its conduct was either objectively justified by circumstances extraneous to the undertaking and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency which also benefit the consumer.

In the present case, as regards, first, possible objective justification, the rules put in place by FIFA and UEFA have the aim of reserving the organisation of any such competition to those entities, at the risk of eliminating any and all competition from third-party undertakings, meaning that such conduct constitutes an abuse of a dominant position prohibited by Article 102 TFEU, one not justified, moreover, by technical and commercial necessities. Second, as regards the advantages in terms of efficiency, it will be for those two sporting associations to demonstrate, before the referring court, that efficiency gains can be achieved through their conduct, that those efficiency gains counteract the likely harmful effects of that conduct on competition and consumer welfare on the markets concerned, that that conduct is necessary for the achievement of such gains in efficiency, and that it does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

In the third place, as regards the FIFA and UEFA rules relating to the rights emanating from professional interclub football competitions organised by those entities, the Court observes that, given their content, what they objectively aim to achieve in terms of competition and the economic and legal context of which they form a part, those rules are liable not only to prevent any and all competition between the professional football clubs affiliated to the national football associations which are FIFA and UEFA members in the marketing of the various rights related to the matches in which they participate, but also to affect the functioning of competition, to the detriment of third-party undertakings operating across a range of media markets for services situated downstream from that marketing, to the detriment of consumers and television viewers.

It follows that such rules have as their 'object' the prevention or restriction of competition on the different markets concerned within the meaning of Article 101(1) TFEU, and constitute 'abuse' of a dominant position within the meaning of Article 102 TFEU, unless it can be proven that they are justified, inter alia in the light of the achievement of efficiency gains and the profit reserved for users. Thus, it will be for the referring court to determine, first, whether the negotiation for the purchase of those rights with two exclusive vendors enables actual and potential buyers to bring down their transaction costs and reduce the uncertainty they would face if they had to negotiate on a case-by-case basis with the participating clubs and, second, whether the profit derived from the centralised sale of those rights demonstrably enables a certain form of 'solidarity redistribution' within football for the benefit of all users.

In the fourth and last place, the Court holds that the rules on prior approval, participation and sanctions constitute an obstacle to the freedom to provide services enshrined in Article 56 TFEU. By enabling FIFA and UEFA to exercise discretionary control over the possibility for any third-party undertaking to organise and market interclub football competitions on European Union territory, the possibility for any professional football club to participate in those competitions as well as, by way of corollary, the possibility for any other undertaking to provide services related to the organisation or marketing of those competitions, those rules tend not only to impede or make less attractive the various economic activities concerned, but to prevent them outright, by limiting access for any newcomer. Moreover, the absence of a framework for those rules containing objective, non-discriminatory criteria known in advance does not enable a finding that their adoption is justified by a legitimate objective in the public interest.

3. STATE AID

Judgment of the Court of Justice (Grand Chamber), 5 December 2023, Luxembourg and Others v Commission, C-451/21 P and C-454/21 P

Link to the full text of the judgment

Appeal – State aid – Article 107(1) TFEU – Tax rulings adopted by a Member State – Aid declared incompatible with the internal market – Obligation to recover that aid – Concept of 'advantage' – Determination of the reference framework – 'Normal' taxation under national law – Review by the Court of Justice of the interpretation and application of national law by the General Court of the European Union – Direct taxation – Strict interpretation – Powers of the European Commission – Obligation to state reasons – Legal classification of the facts – Concept of 'abuse of law' – Ex ante assessment by the tax authorities of the Member State concerned – Principle of legal certainty

Between 2008 and 2014, the Luxembourg tax authorities issued two sets of tax rulings concerning two restructuring operations carried out by several Luxembourg companies in the Engie group.

The restructuring operations in question, which have a similar economic and legal structure, are both centred on the transfer, within the Engie group, of the assets of one company to a subsidiary company. In order to finance that purchase, the subsidiary company issues to an intermediary company a zero-interest bond that is mandatorily convertible into shares at maturity, known as a zéro-intérêts obligation remboursable en actions (zero-interest bond repayable in shares (ZORA)). When the bond matures, the subsidiary company must repay, by issuing shares, the nominal amount of the bond plus a 'premium' consisting of all the profit made by the subsidiary company during the term of the bond, referred to as 'ZORA accretions'.

In order to finance the bond that it has acquired, the intermediary company, for its part, uses a prepaid forward sale contract entered into with a holding company in the Engie group, which is the sole shareholder of both the subsidiary company and the intermediary company. On entering into that contract, the holding company pays to the intermediary company an amount corresponding to the nominal amount of the ZORA, in consideration for which the intermediary company transfers to the holding company the rights to the shares that will be issued at the end of the ZORA, including those corresponding, where applicable, to the cumulative value of the ZORA accretions.

After requesting information from the Luxembourg authorities concerning the tax rulings adopted with regard to the Engie group, the European Commission initiated the formal investigation procedure. At the end of that procedure, the Commission found, by decision of 20 June 2018, [68] that the Grand Duchy of Luxembourg had granted, through its tax authorities, in breach of Article 107(1) and Article 108(3) TFEU, a selective advantage to the Engie group. It ordered the recovery of that advantage from the beneficiaries. In its decision, the Commission found, in essence, that, as a result of the tax rulings at issue, almost all of the profit made by the Engie subsidiaries in Luxembourg had not been taxed.

The Grand Duchy of Luxembourg and the Engie group companies brought actions for annulment of that decision, which were dismissed by the General Court. [69]

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68 Commission Decision (EU) 2019/421 of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of Engie (OJ 2019 L 78, p. 1; 'the decision at issue').

69 Judgment of 12 May 2021, Luxembourg and Others v Commission (T-516/18 and T-525/18, EU:T:2021:251).

Following appeals brought by the Grand Duchy of Luxembourg and the Engie group companies, the Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court and then, giving final judgment in the dispute, also annuls the decision at issue. In that context, it clarifies its case-law concerning the definition and the analysis of the reference framework in the light of which the selectivity of tax measures must be assessed in order to determine whether they constitute State aid for the purposes of Article 107(1) TFEU.

Findings of the Court

First of all, the Court declares admissible the grounds of the appeals challenging the General Court's findings with regard to the reference framework under Luxembourg law that the Commission determined for the purpose of examining whether the tax rulings at issue granted a selective advantage to the Engie group.

In that regard, the Court notes that the question whether the General Court adequately defined the reference system under Luxembourg law and, by extension, correctly interpreted the national provisions making up that system is a question of law which can be reviewed by the Court on appeal. Thus, the appellants' arguments aimed at calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law.

After declaring those grounds admissible, the Court recalls, as to the substance, that, in order to classify a national tax measure as 'selective' for the purpose of applying Article 107(1) TFEU, the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation.

On that point, the Court also observes that, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime. This includes, in particular, the determination of the basis of assessment, the taxable event and any exemptions to which the tax is subject. It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify that reference system. That conclusion is, however, without prejudice to the possibility of finding that the reference framework itself, as it results from national law, is incompatible with EU law on State aid, since the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law.

In the light of those principles, the Court finds that, in order to prove the selectivity of the tax rulings at issue, the Commission relied on four lines of reasoning, the second of which was endorsed by the General Court in the judgment under appeal. In connection with that second line of reasoning, the Commission argued that the exemption of income corresponding to the ZORA accretions, granted under the tax rulings at the level of the holding companies, derogated from the 'normal' application of Articles 164 and 166 of the Luxembourg Law on income tax ('the LIR'), [70] relating respectively to the taxation of profit distributions and the exemption of income from participations.

The Grand Duchy of Luxembourg having challenged the Commission's interpretation of Articles 164 and 166 of the LIR, the Court notes that, where the interpretation of the 'normal' tax regime given by the Member State concerned is compatible with the wording of the provisions in question, the Commission may depart from that interpretation only if it is able to establish, on the basis of reliable

[70] Loi du 4 décembre 1967, concernant l'impôt sur le revenu (Law of 4 December 1967 on income tax) (Mémorial A 1967, p. 1228), as amended.

and consistent evidence that has been the subject of an exchange of arguments, that another interpretation prevails in the case-law or the administrative practice of that Member State.

However, the elements on which the General Court relied did not permit it validly to find that the Commission had been able to establish to the requisite legal standard that, with regard to the interpretation of Articles 164 and 166 of the LIR, an interpretation prevailed in Luxembourg law other than that put forward by the Grand Duchy of Luxembourg, that interpretation being compatible with the wording of those provisions. Thus, the Court finds that it was following an analysis vitiated by an error of law and a distortion of the facts that the General Court upheld as well founded the second line of reasoning put forward by the Commission for the purpose of establishing the selectivity of the tax rulings.

The Court also examines the appellants' arguments relating to the fourth line of reasoning put forward in the alternative by the Commission for the purpose of establishing the selectivity of the tax rulings at issue, according to which the selective advantage resulted from the non-application by the Luxembourg tax authorities of Article 6 of the Law on tax adjustment, [71] on abuse of law. On that point, the appellants challenge the General Court's analysis that the Commission could establish the selective nature of the tax rulings in the light of that article without taking into account the national administrative practice relating to that provision, on the ground that that provision did not give rise to any difficulties of interpretation.

In that regard, the Court recalls that classifying a tax measure as 'selective' presupposes not only familiarity with the content of the provisions of relevant law but also requires examination of their scope on the basis, inter alia, of the administrative and judicial practice of the Member State concerned. It also emphasises that Article 6 of the Law on tax adjustment, on abuse of law, is inherently particularly general in nature. The choice to lay down such a provision and to define the manner in which it is to be implemented falls within the Member States' own competence in the matter of direct taxation in areas that have not been harmonised under EU law and, therefore, within their fiscal autonomy.

In those circumstances, the Commission could not conclude that the non-application of Article 6 of the Law on tax adjustment by the Luxembourg tax authorities in order to refuse the tax treatment sought by a taxpayer in a tax ruling request led to the grant of a selective advantage unless that non-application departs from the national case-law or administrative practice relating to that provision. If that were not the case, the Commission would itself be able to define what does or does not constitute a correct application of such a provision, which would exceed the limits of the powers conferred on it by the Treaties in the field of State aid review.

Accordingly, the Court concludes that the General Court also erred in law in finding that the Commission was not required to take into account the administrative practice of the Luxembourg tax authorities relating to Article 6 of the Law on tax adjustment, on the ground that that provision did not give rise to any difficulties of interpretation.

In the light of the foregoing, the Court sets aside the judgment under appeal. Taking the view, moreover, that the state of the proceedings permits final judgment to be given in the matter, the Court then itself examines the actions for annulment of the decision at issue brought by the Grand Duchy of Luxembourg and the Engie group companies.

In support of their actions for annulment, those parties dispute, in essence, the four lines of reasoning on which the Commission relied in order to establish the selectivity of the tax rulings at issue.

As regards the second line of reasoning put forward by the Commission, according to which the exemption of income corresponding to the ZORA accretions, granted under the tax rulings at the level

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71 Steueranpassungsgesetz (Law on tax adjustment) of 16 October 1934 (Mémorial A 1934, p. 9001).

of the holding companies, derogated from the 'normal' application of Articles 164 and 166 of the LIR, the Court points out, first, that it follows from its analysis of the grounds of the appeals that the General Court's assessment is vitiated by a distortion of the facts. Second, the Court confirms that, in the contested decision, the Commission departed from the interpretation of Articles 164 and 166 of the LIR given by the Grand Duchy of Luxembourg without establishing that that interpretation was incompatible with the wording of those provisions or that another interpretation prevailed in the case-law or administrative practice of Luxembourg, which constitutes an error of law.

After finding that it follows from its analysis of the grounds of the appeals that the fourth line of reasoning was also legally flawed, the Court examines the grounds for annulment relating to the first and third lines of reasoning, in which the Commission relied on a reference framework encompassing the Luxembourg corporate income tax system for the purpose of establishing the selectivity of the tax rulings.

In that regard, the Court observes, in particular, that the reference system or the 'normal' tax regime must include the provisions laying down the exemptions which the national tax authorities considered to be applicable to the present case, where, as in the present case, those provisions do not, in themselves, confer a selective advantage for the purposes of Article 107(1) TFEU. In such a situation, in the light of the Member States' own competence in the matter of direct taxation and the regard to be had for their fiscal autonomy, the Commission cannot establish a derogation from a reference framework merely by finding that a measure departs from a general objective of taxing all companies resident in the Member State concerned, without taking account of provisions of national law specifying the manner in which that objective is to be implemented. In the present case, the Commission did not include Article 166 of the LIR in the reference framework encompassing the Luxembourg corporate income tax system, even though that provision constitutes the legal basis for the tax rulings at issue. Thus, the Court concludes that that error necessarily vitiated the whole of the selectivity analysis carried out by the Commission on the basis of the reference framework encompassing the Luxembourg corporate income tax system.

In the light of the foregoing, the Court upholds the pleas for annulment of the decision at issue alleging errors of assessment and of law in the identification of a selective advantage and, consequently, annuls that decision.

Judgment of the Court of Justice (Fourth Chamber), 7 December 2023, RegioJet and STUDENT AGENCY, C-700/22

Link to the full text of the judgment

Reference for a preliminary ruling – Regulation (EU) 2015/1589 – Existing aid and new aid – Aid granted in disregard of the procedural rules laid down in Article 108(3) TFEU – Expiry of the limitation period provided for in Article 17 of Regulation (EU) 2015/1589 – Obligation on the national court to order the recovery of the aid

On 26 June 2008, České dráhy a.s., a railway undertaking established in the Czech Republic, concluded a contract with the National Railway Administration, under which the former transferred part of its undertaking to the latter.

RegioJet a.s. and STUDENT AGENCY k.s., competitors of České dráhy, claim that the price obtained by the latter in the context of that transaction constitutes State aid within the meaning of Article 107(1) TFEU and that it is unlawful since it was neither notified to, nor authorised by, the European Commission, in accordance with Article 108(3) TFEU.

The dispute which arose before the Czech courts on the subject was brought before the Nejvyšší soud (Supreme Court, Czech Republic).

That dispute raises, in particular, the question of whether the expiry of the 10-year limitation period laid down in Article 17(1) of Regulation 2015/1589, [72] as a result of which aid which has been put into effect unlawfully becomes existing aid, prevents the national court hearing an application for recovery of unlawful aid from ordering the repayment of such aid by the recipient undertaking. Asked on this point by the Czech Supreme Court, the Court of Justice answers the question in the negative.

Findings of the Court

First, the Court recalls that the national courts and the Commission fulfil complementary and separate roles in the enforcement of the Treaty State aid rules. Whilst assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the EU Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) TFEU is infringed.

In respect of the effect of the expiry of the 10-year time limit provided for in Article 17(1) of Regulation 2015/1589 as regards national procedures for the recovery of unlawful aid, the Court notes, next, that that regulation does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty. Thus, it is only the powers of the Commission to recover State aid that are referred to in Article 17(1) of Regulation 2015/1589.

In those circumstances, where there is no EU legislation on the subject, the unlawful aid must be recovered by the national authorities in accordance with the rules for implementation laid down by the applicable national law. In that context, the limitation rules that might be applicable are, therefore, those of national law, subject to the principles of effectiveness and equivalence.

Last, the Court states that the recipient undertaking, České dráhy, cannot base an argument on the fact that the national courts do not have the power to order the repayment of existing aid which falls under Article 108(1) TFEU. Although, under Article 1(b)(iv) and Article 17(3) of Regulation 2015/1589, aid which has been put into effect in breach of Article 108(3) TFEU becomes existing aid on the expiry of the limitation period laid down in Article 17(1) of that regulation, the fact remains that that provision does not have the effect of retroactively regularising State aid vitiated by illegality merely because it becomes existing aid.

In the light of the foregoing, the Court finds that Article 108(3) TFEU must be interpreted as meaning that national courts may order the repayment of State aid granted in breach of the obligation of prior notification laid down in that provision, even though the limitation period laid down in Article 17(1) of Regulation 2015/1589 has expired in respect of that aid, such that that aid must be regarded as existing aid.

Judgment of the Court of Justice (Second Chamber), 14 December 2023, Commission v Amazon.com and Others, C-457/21 P

Link to the full text of the judgment

Appeal – State aid – Article 107(1) TFEU – Tax ruling adopted by a Member State – Aid declared incompatible with the internal market – Concept of 'advantage' – Determination of the reference

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

framework – 'Normal' taxation according to national law – Arm's length principle – Review by the Court of Justice of the interpretation and application of national law by the General Court

From 2006, the Amazon group pursued its commercial activities in Europe through two companies established in Luxembourg, namely Amazon Europe Holding Technologies SCS ('LuxSCS') and Amazon EU Sàrl ('LuxOpCo'), a wholly owned subsidiary of LuxSCS.

In that context, LuxSCS obtained, by various agreements concluded with American entities of the Amazon group, the right to use certain intellectual property rights concerning, essentially, technology, client data and the marks of that group, as well as the right to sub-license the intangible assets covered. On that basis, LuxSCS concluded, inter alia, a licence agreement with LuxOpCo, as the principle operator of the Amazon group's business in Europe. Under that agreement, LuxOpCo undertook to pay a royalty to LuxSCS in return for the use of the intangible assets.

In 2014, the Amazon group underwent a new restructuring and the contractual arrangement between LuxSCS and LuxOpCo was no longer applicable.

In preparation for the 2006 restructuring, the Luxembourg tax authorities granted the Amazon group, following the request by the latter, a tax ruling confirming the treatment of LuxOpCo and LuxSCS for the purposes of Luxembourg corporate income tax. That tax ruling, first, confirmed that LuxSCS was not subject to Luxembourg corporate income tax because of its legal form and, secondly, endorsed the method of calculating the annual royalty to be paid by LuxOpCo to LuxSCS under the abovementioned licence agreement.

By decision of 4 October 2017 [73] ('the decision at issue'), the European Commission found that that tax ruling, as well as its annual implementation from 2006 to 2014, constituted an aid to the Amazon group that was incompatible with the internal market within the meaning of Article 107 TFEU. In that regard, the Commission found that the method of calculating the annual royalty to be paid by LuxOpCo to LuxSCS, as confirmed in the tax ruling, did not allow an arm's length outcome to be reached. According to the Commission, the annual royalty calculated using that method was too high, which artificially reduced the tax base of LuxOpCo.

Seised of two actions for annulment brought by the Grand Duchy of Luxembourg and the Amazon group against the decision at issue, the General Court annulled that decision by a judgment of 12 May 2021, [74] on the ground, in essence, that the Commission had not succeeded in demonstrating the existence of an advantage within the meaning of Article 107(1) TFEU.

The appeal brought by the Commission is dismissed by the Court of Justice, which holds, by a substitution of grounds and in an extension of its judgment in Fiat Chrysler Finance Europe v Commission, [75] that by applying, in the decision at issue, the arm's length principle, even though that principle was not incorporated into Luxembourg tax law at the time the tax ruling was made, the Commission committed an error in the identification of the reference framework with regard to which that tax ruling had to be assessed, which vitiated all of its reasoning as to the existence of a selective advantage.

Findings of the Court

As a first step, the Court declares admissible the grounds of the appeal challenging the interpretation and application of the arm's length principle made by the General Court in support of its conclusion

73 Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (OJ 2018 L 153, p. 1).

74 Judgment of 12 May 2021, Luxembourg and Amazon v Commission (T-816/17 and T-318/18, EU:T:2021:252).

75 Judgment of 8 November 2022, Fiat Chrysler Finance Europe v Commission (C-885/19 P and C-898/19 P, EU:C:2022:859; 'the judgment in Fiat').

that the Commission had not succeeded in demonstrating the existence of an advantage within the meaning of Article 107(1) TFEU.

The Commission having included the arm's length principle in the reference framework used for the purposes of its examination of whether there was a selective advantage, the Court finds that the question whether, in the judgment under appeal, the General Court adequately defined the relevant reference system and, by extension, correctly interpreted and applied its constituent provisions, is a question of law which can be reviewed by the Court of Justice on appeal.

It follows that the Commission's arguments seeking to put at issue the interpretation and application of the arm's length principle made by the General Court in order to rule that the reference system used in the decision at issue was incorrect and, therefore, that the existence of an advantage for the benefit of the Amazon group was not established.

On the substance, the Court recalls, as a second step, that, as EU law currently stands, the arm's length principle cannot be applied for the purposes of examining tax measures in the context of Article 107(1) TFEU unless it is recognised by the national law concerned and in accordance with the rules defined by the latter. Therefore, the General Court erred in law in finding that the Commission could, in a general manner, apply the arm's length principle in the context of implementing Article 107(1) TFEU, without stating that that institution was required, as a preliminary step, to satisfy itself that that principle was incorporated into Luxembourg tax law and that express reference was made to it as such in that law.

Furthermore, by referring to the Organisation for Economic Cooperation and Development (OECD) Guidelines as having a 'certain practical significance' in the assessment of whether the arm's length principle has been observed despite those guidelines not being binding on the member States of the OECD, the General Court committed another error of law in that it took for granted that those guidelines applied, without reviewing whether the Commission had satisfied itself that Luxembourg tax law had made express reference to them.

Accordingly, the Court concludes that the analysis by the General Court as regards the condition that there is a selective advantage, for the purposes of Article 107(1) TFEU, is vitiated in law since it rests on an incorrect determination of the relevant reference system.

As a third step, the Court decides, nevertheless, to dismiss the appeal in its entirety, by a substitution of grounds.

In that regard the Court finds, first, that, in order to establish the existence of an advantage for the benefit of the Amazon group, the Commission applied the arm's length principle as if it had been recognised as such in EU law, even though it is clear from the judgment in Fiat that as EU law currently stands, there is no autonomous arm's length principle that applies irrespective of the incorporation of that principle into the national law.

Secondly, the Commission considered that the Luxembourg law on income tax was interpreted by the tax administration as enshrining the arm's length principle in Luxembourg tax law. However, as is clear from the judgment in Fiat, only the incorporation of that principle as such into national law, which as a minimum requires that that law refer explicitly to that principle, would permit the Commission to apply it in the determination of the existence of a selective advantage within the meaning of Article 107(1) TFEU. As the Commission itself recognised in the decision at issue, that requirement was not satisfied at the time the tax ruling at issue was made, such that that institution could not apply that principle retroactively in that decision.

Thirdly, the Court finds that, by applying, in the decision at issue, the OECD Guidelines on transfer pricing without having demonstrated that they had been, wholly or in part, explicitly adopted in Luxembourg law, the Commission breached the prohibition, recalled in the judgment in Fiat, on taking into account, in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) TFEU and for the purposes of establishing the tax burden that should normally be borne by an undertaking, parameters and rules external to the national tax system at issue, such as those guidelines, unless that national tax system makes explicit reference to them.

Having regard to the foregoing, the Court concludes that General Court was fully entitled to find that the Commission had not established the existence of an advantage for the benefit of the Amazon

group, within the meaning of Article 107(1) TFEU, and to annul, therefore, the decision at issue. Accordingly, it dismisses the appeal brought by the Commission in its entirety.

VI. APPROXIMATION OF LAWS: EUROPEAN UNION TRADEMARK

Judgment of the General Court (Sixth Chamber), 6 December 2023, BB Services v EUIPO – Lego Juris (Shape of a toy figure with a protrusion on its head), T-297/22

Link to the full text of the judgment

EU trade mark – Invalidity proceedings – Three-dimensional EU trade mark – Shape of a toy figure with a protrusion on its head – Absolute grounds for invalidity – Sign consisting exclusively of the shape which results from the nature of the goods themselves – Sign consisting exclusively of the shape of goods which is necessary to obtain a technical result – Article 7(1)(e)(i) and (ii) of Regulation (EC) No 40/94 (now Article 7(1)(e)(i) and (ii) of Regulation (EU) 2017/1001)

Lego Juris A/S, intervener in the present case, is the proprietor of the three-dimensional EU trade mark representing a toy figure with a protrusion on its head, registered with the European Union Intellectual Property Office (EUIPO). [76]

BB Services GmbH, the applicant, filed with EUIPO an application for a declaration of invalidity of that mark on the ground that it consists exclusively, first, of a shape which results from the nature of the goods themselves and, second, of a shape which is necessary to obtain a technical result. [77]

EUIPO rejected the application for a declaration of invalidity.

By its judgment, the General Court dismisses the applicant's action. It specifies the criteria for assessment as to signs which consist exclusively of the natural or functional shape of the goods for the purposes of Article 7(1)(e)(i) and (ii) of Regulation No 40/94, applying the relevant case-law of the Court of Justice.

Findings of the Court

As regards the first plea, alleging infringement of Article 7(1)(e)(i) of Regulation No 40/94, which prohibits the registration of signs consisting exclusively of the shape which results from the nature of the goods themselves, the General Court applies, by analogy, the case-law relating to paragraph 1(e)(ii) of that Article. [78] It follows that, in order to identify the essential characteristics of the sign at issue, information other than the graphic representation alone, such as the perception of the relevant public, may be used. The ground for refusal set out in Article 7(1)(e)(i) of Regulation No 40/94 cannot apply where there is at least one essential characteristic of the shape which does not result from the nature of the goods themselves, with the result that the trade mark does not consist 'exclusively' of the shape which results from the nature of the goods themselves.

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76 The trade mark was registered for goods in Classes 9, 25 and 28.

77 Within the meaning of Article 7(1)(e)(i) and (ii) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended, read in conjunction with Article 51(1)(a) of that regulation.

78 See, inter alia, judgments of 6 March 2014, Pi-Design and Others v Yoshida Metal Industry (C-337/12 P to C-340/12 P, EU:C:2014:129), and of 23 April 2020, Gömböc (C-237/19, EU:C:2020:296).

In order to determine whether the goods concerned fall within that category of signs, the Court observes, first of all, that the goods consist of an 'interlocking toy figure' with two purposes, namely playing, which is of a non-technical nature, and enabling assembly or combination, which is of a technical nature. EUIPO was therefore right to find that the nature of those goods fell within the category of toy figures. On the other hand, it failed to find that their nature also fell within the category of interlocking building figures.

Next, the Court endorses EUIPO's claim that the essential characteristics of the trade mark consist of the shape of the figure, which has a human appearance, and its decorative and imaginative elements, namely the cylindrical shape of the head, the short and rectangular shape of the neck and the trapezoidal shape of the torso ('the decorative and imaginative characteristics'). Nevertheless, EUIPO failed to regard as essential the 'technical' characteristics, namely the protrusion on the head, the hands equipped with hooks and the holes at the back of the legs and under the feet ('the technical characteristics'). In so doing, EUIPO took into consideration only the graphic representation of the trade mark and failed to take into account other useful information relating to the nature of the actual goods, in particular the public's knowledge of the intervener's modular building system.

Lastly, the Court notes that EUIPO was right to find that the decorative and imaginative characteristics may be modified and configured with, in principle, a 'wide freedom of design', with the result that at least one essential characteristic of the goods in question is not inherent to its generic function of toy figure or that of interlocking building figure. The Court therefore concludes that, notwithstanding the errors of assessment referred to above, EUIPO was right to confirm that the contested trade mark was eligible for registration under Article 7(1)(e)(i) of Regulation No 40/94.

As regards the second plea, alleging infringement of Article 7(1)(e)(ii) of Regulation No 40/94, prohibiting the registration of signs which consist exclusively of the shape of goods which is necessary to obtain a technical result, the Court points out that that article does not apply where there is a major non-functional element, such as a decorative or imaginative element which constitutes an essential characteristic of the sign at issue, but which is not necessary to obtain a technical result for which the goods concerned are intended.

In the present case, the Court finds, first of all, that EUIPO was right to find that the non-technical result of the goods consisted of the capacity for play and the evocation of a 'manikin' by human traits. However, it failed to consider that the technical result of the product also included its interlocking nature and modularity.

Next, although EUIPO did indeed take the view that the 'non-technical' characteristics of the contested trade mark were essential, by contrast, it failed to consider as essential the technical characteristics.

Lastly, although the technical purpose linked to the trade mark's interlocking nature and modularity is achieved by certain essential characteristics, there are also other essential characteristics which, in view of their decorative and imaginative nature resulting from the designer's freedom, are not necessary to achieve a technical purpose. Accordingly, the Court concludes that, notwithstanding the errors of assessment found, EUIPO was right to confirm that the contested trade mark was also eligible for registration under Article 7(1)(e)(ii) of Regulation No 40/94.

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

Judgment of the Court of Justice (First Chamber), 21 December 2023, Cofidis, C-340/22

Link to the full text of the judgment

Reference for a preliminary ruling – Direct taxation – Article 49 TFEU – Freedom of establishment – Introduction of a tax on the liabilities of credit institutions for the purpose of funding the national social security system – Alleged discrimination against branches of foreign credit institutions – Directive 2014/59/EU – Framework for the recovery and resolution of credit institutions and investment firms – Scope

Cofidis is a Portuguese branch of a credit institution that has its registered office in France. As such, it is subject to the adicional de solidariedade sobre o sector bancário (additional solidarity tax on the banking sector; 'the ASSB'), a tax on the banking sector levied on the liabilities [79] of credit institutions. That tax was introduced by the Portuguese Republic in order to financially support the national social security system and to restore the balance between the tax burden borne by that sector, which benefits from a value added tax (VAT) exemption on most financial services, and that borne by all other sectors of the Portuguese economy.

The following are liable to the ASSB: credit institutions that have their registered office in Portugal, Portuguese subsidiaries of credit institutions that have their registered office in the territory of another State, and Portuguese branches of non-resident credit institutions.

On 11 December 2020, Cofidis carried out a self-assessment for the ASSB in respect of the first half of 2020. However, being of the view that the ASSB is contrary to Directive 2014/59 [80] and Article 49 TFEU, Cofidis challenged its liability to that tax before the referring court. [81]

By its judgment, the Court of Justice finds that Directive 2014/59 does not preclude a national law introducing a tax such as the ASSB, the method of calculation of which is allegedly similar to the method of calculating the contributions paid by credit institutions under that directive, where the revenue received from that tax is not allocated to national financing arrangements for resolution measures, unlike the contributions provided for by that directive. By contrast, the Court finds that the freedom of establishment guaranteed by Articles 49 and 54 TFEU precludes such national legislation.

Findings of the Court

First, the Court finds that the contributions paid pursuant to Directive 2014/59 do not constitute a tax but, rather, are based on an insurance-based logic. Therefore, since Directive 2014/59 does not have the objective of harmonising the taxation of credit institutions active in the European Union, it cannot constitute a barrier to the establishment of a national tax such as the ASSB. The fact that the method of calculation of such a tax has some similarities with the method of calculation of the contributions paid under Directive 2014/59 is entirely irrelevant in that regard.

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79 The ASSB is payable inter alia on liabilities calculated and approved by taxable persons after deduction.

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

81 In the present case, the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa – CAAD) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal).

Second, the Court notes that the freedom of establishment allows economic operators to choose freely the appropriate legal form in which to pursue their activities in another Member State and, inter alia, to exercise their activity through a branch under the same conditions as those which apply to subsidiaries, without that freedom of choice being limited by tax provisions that are directly or indirectly discriminatory.

In particular, a compulsory levy which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU.

In the present case, the national legislation at issue in the main proceedings applies without distinction to resident credit institutions and to Portuguese subsidiaries and branches of non-resident credit institutions. The basis of assessment for the ASSB is the liabilities of those entities, namely all items entered in the balance sheet which, irrespective of their form and type, represent a debt to third parties, with the exception, inter alia, of items which, in accordance with the applicable accounting rules, are treated as own funds.

The Court notes that such national legislation is liable to make pursuing their activity in Portugal by means of a branch less attractive for non-resident companies. Unlike resident credit institutions and subsidiaries of non-resident credit institutions, branches of non-resident credit institutions are unable, because they do not have legal personality, to deduct own funds from their ASSB tax base and are unable to issue debt instruments that are comparable to own funds. That difference in treatment, which is capable of restricting the freedom to choose the appropriate legal form, is liable to constitute a restriction on the freedom of establishment guaranteed by Articles 49 and 54 TFEU.

In order for such a difference in treatment to be compatible with the provisions of the FEU Treaty on the freedom of establishment, it must relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest.

In the present case, nothing seems to indicate that the situation of a non-resident credit institution pursuing its activity through a branch is not objectively comparable to that of a resident credit institution or a resident subsidiary of a non-resident credit institution.

Moreover, the Court finds that the restriction of freedom of establishment at issue cannot be justified by the need to preserve the coherence of the national tax system, invoked by the Portuguese Government, or by the need to maintain a balanced allocation of the power to impose taxes between the Member States, claimed by the European Commission. In that regard, where a Member State has chosen not to tax entities established in its territory, [82] it cannot rely on the argument that there is a need to safeguard the balanced apportionment of the power to tax between the Member States in order to justify the taxation of entities established in another Member State.

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82 In the present case, the Portuguese Republic chose not to tax resident credit institutions and subsidiaries of non-resident credit institutions in so far as concerns debt instruments comparable to own funds.

VIII. SOCIAL POLICY

1. EQUAL TREATMENT IN EMPLOYMENT AND SOCIAL SECURITY

Judgment of the Court of Justice (Second Chamber), 7 December 2023, AP Assistenzprofis, C-518/22

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 2(5) – Prohibition of discrimination on grounds of age – United Nations Convention on the Rights of Persons with Disabilities – Article 19 – Living independently and being included in the community – Charter of Fundamental Rights of the European Union – Article 26 – Social and occupational integration of persons with disabilities – Personal assistance service for persons with disabilities – Job offer stating a minimum age and maximum age of the person to be hired – Account taken of the wishes and interests of the disabled person – Justification

In July 2018, AP Assistenzprofis GmbH, a provider of assistance and advisory services to persons with disabilities, published a job offer stating that A., a 28yearold female student, was looking for female personal assistants, who should be 'preferably between 18 and 30 years old', to help her in all areas of everyday life.

J.M.P., who was born in 1968, applied for that job and received a rejection from AP Assistenzprofis.

Claiming that she had been discriminated against on grounds of age, J.M.P. brought an action against AP Assistenzprofis before the Arbeitsgericht Köln (Labour Court, Cologne, Germany) seeking compensation for the resulting damage. That court upheld that action.

Following the judgment of the Landesarbeitsgericht Köln (Higher Labour Court, Cologne, Germany), by which the appeal brought by AP Assistenzprofis was upheld, J.M.P. brought an appeal on a point of law (Revision) against that judgment before the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany).

Since it was uncertain regarding the justification, under Directive 2000/78, [83] of the direct discrimination on grounds of age suffered by J.M.P., and sought clarification on the balance to be struck, having regard to that directive, between the right to effective protection against discrimination on grounds of age and the disabled person's right to effective protection against discrimination on the basis of her disability, the referring court decided to make a reference for a preliminary ruling to the Court of Justice.

By its judgment, the Court answers that Directive 2000/78, read in the light of Article 26 of the Charter of Fundamental Rights of the European Union, concerning the integration of persons with disabilities, and Article 19 of the United Nations Convention on the Rights of Persons with Disabilities, [84] entitled 'Living independently and being included in the community', does not preclude the recruitment of a person providing personal assistance from being subject to an age requirement pursuant to the national legislation in the case at hand, if such a measure is necessary for the protection of the rights and freedoms of others.

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

84 Approved on behalf of the European Union by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35; 'the UN Convention').

Findings of the Court

The Court analyses the difference of treatment on grounds of age at issue in the main proceedings in order to determine whether it is justified having regard to Article 2(5) of Directive 2000/78. [85]

First of all, it finds that that difference of treatment is the result of a measure laid down by national law, [86] in accordance with Article 2(5) of that directive.

Next, it examines whether that measure pursues the objective of 'the protection of the rights and freedoms of others', laid down by that provision.

In that regard, according to the Court, the national legislation in question pursues an objective of protecting the self-determination of persons with disabilities, by guaranteeing those persons' right to express their wishes and to make choices freely as regards decisions on the personal assistance services and their provision, since those services concern all areas of life and extend considerably into the private and intimate areas of the life of the person in receipt of them, an objective which comes within the scope of Article 2(5) of Directive 2000/78.

That right to express wishes and to choose freely gives specific expression to the right to integration of persons with disabilities enshrined in Article 26 of the Charter of Fundamental Rights. Furthermore, respect for the self-determination of persons with disabilities is an objective enshrined in Article 19 of the UN Convention, the provisions of which may be relied on for the purpose of interpreting Directive 2000/78.

Lastly, the Court ascertains whether the difference of treatment at issue in the main proceedings is the result of a measure that is necessary for the protection of that right to self-determination.

The Court states, in that regard, that, in a situation such as that at issue in the main proceedings, taking account of the preference for a certain age range expressed by the disabled person is likely to promote respect for that person's right to self-determination in the provision of those personal assistance services, inasmuch as it appears reasonable to expect that a person within the same age range as the disabled person will fit more easily in that person's personal, social and university circle.

Thus, the Court concludes that, subject to verifications which it is for the referring court to carry out, having regard to all the facts of the main proceedings, the difference of treatment on grounds of age in the case at hand is the result of a measure that is necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of Directive 2000/78, and could, consequently, be justified having regard to that provision.

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85 Pursuant to that provision, the directive is to be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

86 Namely Paragraph 8(1) of the Sozialgesetzbuch, Neuntes Buch (IX) (Book IX of the Social Security Code), of 23 December 2016 (BGBl. 2016 I, p. 3234; 'the SGB IX'), read in conjunction with Paragraph 33 of the Sozialgesetzbuch, Erstes Buch (I) (Book I of the Social Security Code), of 11 December 1975 (BGBl. 1975 I, p. 3015; 'the SGB I'), which provides that, when deciding on personal assistance services and in the performance of those services intended to promote the disabled person's participation in the community, the legitimate wishes of the persons entitled to receive those services are to be respected, in so far as those wishes are reasonable and by taking account of those persons' personal circumstances, age, sex, family and religious and philosophical needs.

2. ORGANISATION OF WORKING TIME

Judgment of the Court of Justice (First Chamber), 14 December 2023, Sparkasse Südpfalz, C-206/22

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Article 31(2) of the Charter of Fundamental Rights of the European Union – Directive 2003/88/EC– Article 7 – Right to paid annual leave – SARS-Cov-2 virus – Quarantine measure – Impossible to carry over the paid annual leave granted for a period coinciding with a period of quarantine

TF, who has been employed by the Sparkasse Südpfalz since 2003, was granted paid annual leave for the period from 3 to 11 December 2020.

A day before that leave started, the competent German authority ordered TF to quarantine, in accordance with the national health measures intended to prevent the spread of the SARS-CoV-2 virus, for the period from 2 to 11 December 2020, on the ground that he had been in contact with an individual infected with that virus.

Thus, on 4 March 2021, TF requested his employer to carry over the days of paid annual leave granted for the period coinciding with the period of enforced quarantine.

After that carry-over was refused, TF brought an action before the Arbeitsgericht Ludwigshafen am Rhein (Labour Court, Ludwigshafen am Rhein, Germany), the referring court.

In the context of that dispute, that court is uncertain whether the case-law of the German courts, according to which mere quarantine does not amount to incapacity for work obliging the employer to carry over the days of leave granted, is compatible with the right to paid annual leave guaranteed by EU law.

Ruling on a question referred by the national court for a preliminary ruling, the Court of Justice finds that such a national practice, which does not permit the carry-over of days of paid annual leave that were granted to a worker who is not sick, coinciding with a period of quarantine, is compatible with the right to paid annual leave enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union and given concrete expression in Article 7(1) of Directive 2003/88. [87]

Findings of the Court

First, after recalling the dual purpose of paid annual leave, that is to say, enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure, the Court states that the purpose of the quarantine measure, provided for by the German law, is different. That measure is intended to prevent the spread of a contagious illness by way of isolation on the part of persons likely to develop symptoms.

Second, the Court confirms that such a measure is, like the occurrence of incapacity for work on account of an illness, an unforeseeable event beyond the control of the person subject to it.

Having said that, a worker who is placed under quarantine on the ground that he or she has been in contact with an individual infected with the SARS-Cov-2 virus but who is not in a situation of incapacity for work as evidenced by a medical certificate is in a situation that is different from that of a worker on sick leave, who is subject to physical or psychological constraints caused by the illness. Therefore,

87 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

the purpose of quarantine is not, as a matter of principle, comparable to that of sick leave. Accordingly, a period of quarantine cannot, in itself, present an obstacle to the attainment of the purposes of paid annual leave.

Third, according to the Court, although quarantine is likely to affect the conditions under which workers enjoy their free time, it does not, in itself, undermine those workers' right to have the actual benefit of their paid annual leave. During the period of paid annual leave, workers must not be subject to any obligation vis-à-vis their employers which may prevent them from pursuing freely and without interruption their own interests in order to neutralise the effects of work on their safety or health.

Therefore, the employer cannot be required to compensate for the disadvantages arising from an unforeseeable event, such as quarantine ordered by a public authority, that would prevent its employees from taking full advantage of their right to paid annual leave. Directive 2003/88 is not intended to ensure that any event capable of preventing workers from enjoying fully and in the manner they wish a period of rest or relaxation is a reason for granting workers additional leave so as to ensure that the purpose of annual leave is attained.

IX. INTERNATIONAL AGREEMENTS: INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court of Justice (Second Chamber), 21 December 2023, Scuola europea di Varese, C-431/22

Link to the full text of the judgment

Reference for a preliminary ruling – Convention defining the Statute of the European Schools – Article 27(2) – General Rules of the European Schools – Articles 62, 66 and 67 – Challenge to the decision of a Class Council not to authorise a pupil to be promoted to the year above in the secondary school – Lack of jurisdiction of the national courts – Sole jurisdiction of the Complaints Board of the European Schools – Effective judicial protection

Parents acting as legal representatives of their son, a minor, then a fifth-year secondary-school pupil at the Scuola europea di Varese (European School, Varese, Italy), were notified of a decision of the relevant Class Council not to authorise their son to be promoted to the year above. Those parents brought an action before the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Court, Lombardy, Italy) for annulment of that decision. That court declared that it had jurisdiction to hear that action.

The European School, Varese, submitted an application to the Combined Chambers of the Corte suprema di cassazione (Supreme Court of Cassation, Italy), [88] the referring court in the present case, for a preliminary ruling on the question of jurisdiction, seeking a declaration that the Italian courts had no jurisdiction to hear and determine the present dispute. According to that school, such a

88 On the basis of Article 41 of the Italian Code of Civil Procedure, according to which: 'While the case has not been determined as to its substance at first instance, any party may request the Combined Chambers of the [Corte suprema di cassazione (Supreme Court of Cassation, Italy)] to settle questions of jurisdiction …'.

dispute falls within the sole jurisdiction of the Complaints Board of the European Schools ('the Complaints Board'), pursuant to the combined provisions of Article 27 of the Convention defining the Statute of the European Schools ('the CSEE') [89] and Article 67(1) of the General Rules of the European Schools in the version applicable to the facts of the dispute in the main proceedings ('the 2014 Rules'). [90] The parents, as well as the public prosecutor, contend, by contrast, that the Italian courts have jurisdiction to hear and determine that dispute on the grounds, inter alia, that, under Article 27(2) of the CSEE, the sole jurisdiction of the Complaints Board is limited to acts having an adverse effect adopted by the Board of Governors or by the Administrative Board of the school.

Called upon to rule on that preliminary issue relating to the jurisdiction of the Italian courts, the referring court states that it has already ruled in favour of such jurisdiction, in circumstances comparable to those of the present case. [91] Thus, it held that the sole jurisdiction of the Complaints Board covers acts having an adverse effect adopted by the Board of Governors or the Administrative Board of a European School, but not acts adopted by a Class Council of such a school. [92] The referring court observes, however, that, at the time when it ruled to that effect, the Rules then in force provided only for a limited appeal, internal to the European Schools and of a purely administrative nature, against decisions of a Class Council not to authorise a pupil to be promoted to the year above, and did not yet provide for the possibility of lodging a contentious appeal before the Complaints Board in respect of such decisions.

According to the referring court, the fact that the possibility of such a judicial appeal has in the meantime been established by the 2005 Rules and subsequently confirmed in Article 67 of the 2014 Rules might be such as to justify the Complaints Board now being recognised as having sole jurisdiction to hear and determine disputes of that type. According to that court, such a solution may find support, inter alia, in the lessons drawn from the judgment in Oberto and O'Leary, [93] in which the Court of Justice already accepted, relying on the rules of the Vienna Convention, [94] that the Complaints Board had been entitled to confer on itself sole jurisdiction to hear and determine appeals against an act of the Headteacher of a European School that adversely affected a teacher at that school. Various documents produced by the European School, Varese, and, in particular, the many decisions by which the Complaints Board has ruled in disputes relating to decisions of Class Councils not to authorise a pupil to be promoted to the year above, thus developing a consistent judicial practice since jurisdiction to determine such disputes was conferred on it by the 2005 Rules, might also be relevant in that regard.

Observing, however, that the factual differences between the judgment in Oberto and O'Leary and the present case do not permit the conclusion that an interpretation of Article 27(2) of the CSEE is so

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89 Convention defining the Statute of the European Schools, concluded in Luxembourg on 21 June 1994 between the Member States and the European Communities (OJ 1994 L 212, p. 3). Under the first subparagraph of Article 27(2) of the CSEE, 'the Complaints Board shall have sole jurisdiction in the first and final instance, once all administrative channels have been exhausted, in any dispute concerning the application of this Convention to all persons covered by it with the exception of administrative and ancillary staff, and regarding the legality of any act based on the Convention or rules made under it, adversely affecting such persons on the part of the Board of Governors [or] the Administrative Board of a school in the exercise of their powers as specified by this Convention'. The second subparagraph of Article 27(2) of the CSEE states that the conditions and the detailed rules relative to these proceedings are to be laid down, as appropriate, by the Service Regulations for the teaching staff or by the conditions of employment for part-time teachers, or by the General Rules of the European Schools.

90 General Rules of the European Schools, in version No 2014-03-D-14-en-11. Under Article 67(1) of the 2014 Rules, 'explicit or implicit administrative decisions taken on the appeals referred to in the previous article may be the subject of a contentious appeal by pupils' legal representatives, directly affected by the disputed decision, before the Complaints Board provided for in Article 27 of the [CSEE]'.

91 Corte suprema di cassazione (Supreme Court of Cassation, Italy), judgment of 15 March 1999, ECLI:IT:CASS:1999:138CIV.

92 Under the combined provisions of the second paragraph of Article 6 and Article 27(1), (2) and (7) of the CSEE.

93 Judgment of 11 March 2015, Oberto and O'Leary (C-464/13 and C-465/13, EU:C:2015:163), 'the judgment in Oberto and O'Leary'.

94 Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, Vol. 1155, p. 331). 1155 I, p. 331).

obvious as to leave no room for any reasonable doubt, the referring court made a request to the Court for a preliminary ruling.

By its judgment, the Court considers that the Complaints Board is to have sole jurisdiction in the first and final instance, once all administrative channels provided for in the 2014 Rules have been exhausted, in any dispute concerning the legality of the decision of a Class Council of a European School not to authorise a pupil to be promoted to the year above in the secondary school. [95]

Findings of the Court

First of all, the Court recalls that the European Schools system is a sui generis system, which achieves, by means of an international agreement, a form of cooperation between the Member States and between those States and the European Union. The European Schools are an international organisation which, despite the functional links which it has with the European Union, remains formally distinct from it and from its Member States. Therefore, although the CSEE constitutes, as far as the European Union is concerned, an act of one of the institutions of the European Union within the meaning of point (b) of the first paragraph of Article 267 TFEU, it is also governed by international law, and more specifically, as regards its interpretation, by the international law of treaties. That law was consolidated, essentially, in the Vienna Convention, the rules of which apply to an agreement concluded between the Member States and an international organisation, such as the CSEE, in so far as those rules are an expression of general international customary law. The CSEE must therefore be interpreted in accordance with those rules and particularly in accordance with those laid down in Article 31 of the Vienna Convention, which expresses customary international law.

After recalling the wording of Article 27(2) of the CSEE and the content and scope of the relevant provisions of the 2014 Rules, [96] the Court determines whether, by analogy with its ruling in the judgment in Oberto and O'Leary with regard to decisions of the Headteacher of a European School, the rules set out in Article 31 of the Vienna Convention allow the first subparagraph of Article 27(2) of the CSEE to be interpreted as not precluding the Complaints Board from having, pursuant to the provisions of the 2014 Rules, sole jurisdiction to rule on decisions not to authorise a pupil in a European School to be promoted to the year above, even though those decisions are not adopted by the Board of Governors or the Administrative Board of that school but by a Class Council.

In that regard, as regards Article 31(1) of the Vienna Convention, the Court recalls that, according to that provision, a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, the Court considers that, even though the acts adopted by the Class Councils are not expressly referred to in the first subparagraph of Article 27(2) of the CSEE, the legislative context of that provision and the objectives pursued by the CSEE support the conclusion that the extension of jurisdiction introduced in favour of the Complaints Board by means of the provisions of the 2014 Rules does not infringe that provision of the CSEE.

As regards Article 31(3)(a) and (b) of the Vienna Convention, the Court points out that it follows that, for the purpose of interpreting a treaty, there must be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of that treaty which establishes the agreement of the parties regarding its interpretation.

In that context, the Court considers that the Board of Governors' adoption of Articles 62, 66 and 67 of the 2014 Rules and, before that, of the analogous provisions contained in the 2005 Rules, and the uninterrupted application of those provisions since then by both the Secretary-General and the Complaints Board, without any challenge raised by the Contracting Parties to the CSEE in respect of

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95 Pursuant to the combined provisions of Article 27(2) of the CSEE and Articles 61, 62, 66 and 67 of the 2014 Rules.

96 Article 61(A)(1), Article 62(1) and (2), Article 66(1) and (5), and Article 67(1) of the 2014 Rules.

the adoption or the application of those provisions, are such as to demonstrate the existence – if not of a subsequent agreement between those parties regarding the interpretation of the CSEE or the application of its provisions within the meaning of Article 31(3)(a) of the Vienna Convention – at least of a practice which establishes the agreement of the parties regarding such an interpretation within the meaning of Article 31(3)(b) of the Vienna Convention. The absence of any challenge by the parties to the CSEE regarding such uninterrupted application must be regarded as conduct of those parties reflecting their tacit agreement to that application and therefore as such a practice. Such an agreement and/or such practice are liable to override the wording of the first sentence of the first subparagraph of Article 27(2) of the CSEE. It follows that that provision must be read as not precluding decisions of the Class Councils of the European Schools not to authorise a pupil to be promoted to the year above from, in principle, being regarded as being covered by that provision.

The Court infers therefrom that, under Article 67(1) of the 2014 Rules, the Complaints Board is to have sole jurisdiction in the first and final instance, once all administrative channels provided for in Article 62(1) of those rules have been exhausted, in any dispute concerning the decision of the Class Council of a European School not to authorise a pupil to be promoted to the year above in the secondary school and that such sole jurisdiction does not infringe Article 27(2) of the CSEE.

Furthermore, the Court states that such an interpretation of the relevant provisions of the CSEE and the 2014 Rules does not undermine the right of the persons concerned to effective judicial protection.

As regards the CSEE, the general principles of EU law must both govern the interpretation of that convention and be duly taken into account and observed by the bodies established by that convention when those bodies exercise the powers arising from the rules laid down by that convention and adopt acts in accordance with the terms of that convention. As is apparent from the decisions of the Complaints Board produced by the European School, Varese, the provisions of Article 62(1) of the 2014 Rules, although dedicated to the administrative appeal that may be lodged before the Secretary-General, consequently also determine the extent of that board's jurisdiction in the event of an appeal brought by the pupil's legal representatives against a decision of the Secretary-General rejecting the administrative appeal initially brought before him or her.

Even a judicial appeal thus delimited does not infringe the principle of effective judicial protection, provided that 'infringement of a rule of law pertaining to the procedure to be followed for promotion to the year above', within the meaning of Article 62(1) of the 2014 Rules, is understood, in the broad sense, to mean infringement of any rule, whether strictly procedural or substantive, which must necessarily govern the deliberations of the Class Councils. Such rules include the general principles of EU law the observance of which must, consequently, be ensured by the Complaints Board when an appeal is brought before it relating to a decision of the Class Council not to authorise a pupil to be promoted to the year above.

As regards the extent of the review carried out by the Complaints Board in relation to the statement of reasons for such a decision of the Class Council, the principle of effective judicial protection thus requires, inter alia, that, without prejudice to the broad discretion inherent in the deliberative function assigned to the Class Council, such a review must cover, at the very least, an examination of whether there was no ultra vires or improper exercise of authority, error of law or manifest error of assessment.

X. JUDGMENT PREVIOUSLY DELIVERED

1. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (First Chamber, Extended Composition) of 15 November 2021, OT v Council, T-193/22

Common foreign and security policy – Restrictive measures taken in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to freezing of funds and economic resources – Inclusion and maintenance of the applicant's name on the lists – Notion of 'leading businessperson' – Article 2(1)(g) of Decision 2014/145/CFSP – Plea of illegality – Obligation to state reasons – Error of assessment – Right to be heard – Right to property – Freedom to conduct a business – Proportionality – Misuse of powers

Following the military aggression perpetrated by the Russian Federation ('Russia') against Ukraine on 24 February 2022, the Council of the European Union adopted, on 15 March 2022, Decision (CFSP) 2022/429 [97] and Regulation 2022/427, [98] by which the applicant's name was added to the lists of persons, entities and bodies adopted by the Council since 2014 [99] on grounds of supporting actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

The applicant, a businessman who is a Russian national, had his funds and banking assets frozen by the Council pursuant to Article 2(1)(d) and (g) of Decision 2014/145 on the ground that, as a major shareholder of a large Russian conglomerate which is one of Russia's largest taxpayers, he is believed to be one of the most influential persons in Russia with ties to the Russian President, who has not failed to reward that conglomerate for its loyalty to the Russian authorities. Those measures were extended in respect of the applicant by Decision (CFSP) 2022/1530 [100] and Regulation 2022/1529 [101] of 14 September 2022 for the same reasons.

The applicant brought an action for annulment of the Council acts before the General Court of the European Union.

The Court, which dismisses the action for annulment brought by the applicant in its entirety, rules inter alia, in the examination of a plea of illegality, on the legality of the listing criteria adopted by the Council, which are based in particular on the applicant's material and financial support of the Russian Government and the benefit he obtains in return, and on his status as a leading businessperson involved in economic sectors providing a substantial source of revenue to the Russian Government.

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97 Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 87I, p. 44).

98 Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 87I, p. 1).

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

100 Council Decision (CFSP) 2022/1530 of 14 September 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 239, p. 149).

101 Council Implementing Regulation (EU) 2022/1529 of 14 September 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 239, p. 1).

Findings of the Court

With regard to the plea of illegality raised by the applicant concerning Article 1(d) and (g) of Regulation 2022/330 [102] ('criterion (d)' and 'criterion (g)'), which, in his view, breach inter alia the principle of legal certainty and have recourse to criteria which are inappropriate having regard to the objectives of those measures, the Court notes that it is absolutely clear from its wording that criterion (d) applies in a targeted and selective manner to persons who, even if they do not, as such, have any link with the destabilisation of Ukraine, support, materially or financially, or benefit from Russian decision-makers responsible for that destabilisation. In addition, that criterion does not require that the persons or entities concerned benefit personally from the annexation of Crimea or the destabilisation of Ukraine.

In respect of criterion (g), the Court holds that its wording refers sufficiently clearly and precisely to leading businesspersons involved in sectors providing a substantial source of revenue to the Russian Government. It follows that the persons referred to may be considered to be influential on account of their importance in the sector in which they are involved and the importance of that sector for the Russian economy. Furthermore, there is a rational connection between their targeting and the objective of the restrictive measures at issue, which is to increase pressure on Russia and the costs of Russia's actions to undermine the territorial integrity, sovereignty and independence of Ukraine. The Court also states that those criteria, as interpreted in the light of the legislative and historical content in which they were adopted, are not manifestly inappropriate having regard to the objective of the restrictive measures and the prime importance of maintaining peace. Accordingly, it rejects the complaint alleging breach of the principle of legal certainty, the complaint disputing that those criteria are necessary and appropriate and, therefore, the plea of illegality.

With regard, further, to the manifest error of assessment relied on by the applicant, alleging, first, the purported absence of probative value of the evidence produced in support of criterion (g), the Court recalls that the activity of the EU Courts is governed by the principle of the unfettered assessment of the evidence. The evidence must be assessed according to its credibility, having regard to the reliability of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable. In the absence of investigative powers in third countries, the assessment of the EU authorities may, moreover, rely on publicly available sources of information. In that regard, the Court notes that the conflict situation involving Russia and Ukraine can make it particularly different to access the primary source of some information and to collect testimonies from persons who agree to be identified and states that ensuing investigation difficulties can prevent specific evidence and objective information from being provided. In the light of those considerations, the Court concludes that in the case at issue the probative value of the items in the evidence file provided by the Council cannot be discounted.

Second, as regards the second part of the plea in law, the Court points out that that plea in law must be regarded as alleging an error of assessment of the facts having regard to criterion (g) and not a 'manifestly' incorrect assessment of the facts, as the EU Courts must ensure the review, in principle the full review, of the lawfulness of all EU acts. It also states that the judicial review [103] must be

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[102] Council Regulation (EU) 2022/330 of 25 February 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 51, p. 1). Under Article 1 thereof:

'... Annex I shall include: ...

(d) natural or legal persons, entities or bodies supporting, materially or financially, or benefiting from Russian decision-makers responsible for the annexation of Crimea or the destabilisation of Ukraine;

...

(g) leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine, '

[103] Article 47 of the Charter of Fundamental Rights of the European Union.

effective and is based, in particular, on a verification of the factual allegations in the summary of reasons underpinning the decision at issue. Furthermore, the assessment whether the reasons relied on against the person concerned are well founded must be carried out by examining the evidence and information in its context. The Council thus discharges the burden of proof borne by it if it presents to the EU Courts a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person concerned and the regime or the situations being combated.

With regard, in the first place, to the initial inclusion of the applicant on the lists based on criterion (g), the Court notes that that criterion has recourse to the notion of 'leading businesspersons' in connection with involvement in 'economic sectors providing a substantial source of revenue to the [Russian] Government', without any other condition concerning a link, whether direct or indirect, with that government. In that respect, there is a rational connection between the targeting of that category of persons and the objective of the restrictive measures in question, which is to increase pressure on Russia and the costs of its actions against Ukraine. The Court states that an interpretation to the contrary would run counter to both the wording of criterion (g) and the objective pursued. Having regard to the wording, the persons referred to must be considered to be 'leading' on account of their importance in the sector in which they are involved and the importance of that sector for the Russian economy. As for the objective of the restrictive measures at issue, the Court notes that it is not to penalise certain persons or entities because of their links with the situation in Ukraine or with the Russian Government, but to impose economic sanctions on Russia in order to increase pressure on it and the costs of its actions against Ukraine. It concludes that criterion (g) does not require the Council to demonstrate the existence of close links or a relationship of interdependence with the Russian Government nor is it dependent on the imputability to the applicant of the decisions to continue the conflict in Ukraine or a direct or indirect link with the destabilisation of that country.

In this regard, the Court observes that the Council did not commit an error of assessment by considering the applicant to be a leading businessperson, describing him, inter alia, as a 'major shareholder of the Alfa Group conglomerate', even though he sold his shares in that company. In view of criterion (g), the notion of 'leading businesspersons' refers to facts occurring both in the past and over time with the result that the grounds for listing the applicant may refer to a factual situation which existed before the adoption of the initial acts and which has been modified, without, however, necessarily meaning that the restrictive measures adopted against him on that basis are obsolete.

With regard, in the second place, to the maintenance of the applicant's name on the lists based on that criterion, the Court points out that it is for the Council, in the course of the periodic review of restrictive measures, to conduct an updated assessment of the situation and to appraise the impact of the previously adopted measures in the light of their objective in respect of the persons concerned. In order to justify such maintenance, the Council may base its decision on the same evidence justifying the initial inclusion, provided that the grounds for inclusion remain unchanged and the context has not changed in such a way that that evidence is now out of date. In the present case, the Court notes that the purported sale of the applicant's shares in ABH Holdings has not been established by sufficiently convincing evidence. Consequently, the Council was fully entitled to take the view that the applicant's individual situation had not really changed since his initial inclusion on the lists at issue. The Council did not therefore commit an error of assessment in maintaining the restrictive measures at issue.

Lastly, as regards the breaches of the principle of proportionality, the right to property, the freedom to conduct a business and the right to pursue a profession alleged by the applicant, the Court holds that the disadvantages suffered by the applicant in that regard are not disproportionate in view of the importance of the objective pursued by the contested acts.

Accordingly, the Court dismisses the action in its entirety.

Nota bene:

The résumés of the following cases are currently being finalised and will be published in a forthcoming edition of the Monthly Case-Law Digest:

- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, BMW Bank, C-38/21, C-47/21 and C-232/21, EU:C:2023:1014
- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Chief Appeals Officer and Others, C-488/21, EU:C:2023:1013
- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Krajowa Rada Sądownictwa (Continued holding of a judicial office), C-718/21, EU:C:2023:1015
- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias, C-66/22, EU:C:2023:1016
- Judgment of the Court of Justice (Second Chamber), 21 December 2023, Commission v Denmark (Maximum parking time), C-167/22, EU:C:2023:1020
- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, G. K. and Others (European Public Prosecutor's Office), C-281/22, EU:C:2023:1018
- Judgment of the Court of Justice (Fifth Chamber), 21 December 2023, DOBELES AUTOBUSU PARKS and Others, C-421/22, EU:C:2023:1028
- Order of the General Court (Tenth Chamber), 15 December 2023, Stan v European Public Prosecutor's Office, T-103/23, EU:T:2023:871
- Judgment of the General Court (Tenth Chamber, Extended Composition), 20 December 2023, JPMorgan Chase and Others v Commission, T-106/17, EU:T:2023:832
- Judgment of the General Court (Tenth Chamber, Extended Composition), 20 December 2023, Crédit agricole and Crédit agricole Corporate and Investment Bank v Commission, T-113/17, EU:T:2023:847
- Judgment of the General Court (Fifth Chamber, Extended Composition), 20 December 2023, EVH v Commission, T-53/21, EU:T:2023:834
- Judgment of the General Court, 20 December 2023, Autorità di sistema portuale del Mar Ligure occidentale and Others v Commission, T-166/21, EU:T:2023:862
- Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Ryanair and Malta Air v Commission (Air France; COVID-19), T-216/21, EU:T:2023:822
- Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Banque postale v SRB, T-383/21, EU:T:2023:845
- Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Landesbank Baden-Württemberg v SRB, T-389/21, EU:T:2023:827
- Judgment of the General Court (Fourth Chamber, Extended Composition), 20 December 2023, Banca Popolare di Bari v Commission, T-415/21, EU:T:2023:833
- Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Ryanair and Malta Air v Commission (Air France-KLM and Air France; COVID-19), T-494/21, EU:T:2023:831
- Judgment of the General Court (First Chamber, Extended Composition), 20 December 2023, Islentyeva v Council, T-233/22, EU:T:2023:828
- Judgment of the General Court (First Chamber, Extended Composition), 20 December 2023, Abramovich v Council, T-313/22, EU:T:2023:830