COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

Monthly Case-Law Digest February 2024

I. CITIZENSHIP OF THE UNION

1. RIGHTS OF EU CITIZENS

Judgment of the Court of Justice (Second Chamber), 22 February 2024, Deutsche Rentenversicherung Bund, C-283/21

Link to the full text of the judgment

Reference for a preliminary ruling – Social security for migrant workers – Regulation (EC) No 987/2009 – Article 44(2) – Scope – Pension for total incapacity for work – Calculation – Taking into account of child-raising periods completed in another Member State – Applicability – Article 21 TFEU – Free movement of citizens – Sufficient link between those child-raising periods and the periods of insurance completed in the Member State responsible for payment of the pension

In response to a request for a preliminary ruling from the Landessozialgericht Nordrhein-Westfalen (Higher Social Court, North Rhine-Westphalia, Germany), the Court of Justice provides clarifications regarding the interpretation of Article 21 TFEU in a dispute in the main proceedings concerning the failure, by the pension insurance fund, to take into account, for the purposes of calculating the amount of the pension for total incapacity for work, the child-raising periods completed by the beneficiary of that pension in another Member State.

VA is a German national who, from 1962 to 2010, lived in the Netherlands, near the German border.

After taking a vocational training course in Germany, completed in July 1980, she did not pursue an occupational activity in Germany or the Netherlands.

Between 15 November 1986 and 31 March 1999, VA completed child-raising periods in the Netherlands without pursuing an occupational activity ('the periods at issue'). At that time, she had not paid contributions to the German statutory pension insurance scheme.

Between April 1999 and October 2012, she was employed in Germany in a job not subject to compulsory insurance. From October 2012, she was gainfully employed in Germany, where she had moved in 2010, and, in that context, paid contributions to the German statutory pension insurance scheme.

Since March 2018, VA has received a pension for total incapacity for work from the Deutsche Rentenversicherung Bund (Federal Pension Insurance Fund, Germany). For the purposes of calculating the amount of that pension, that fund took into account, in addition to the periods during which VA had contributed to the German statutory pension insurance scheme, the periods during which she had completed vocational training and a period of employment of two months in 1999.

VA brought proceedings before the courts challenging that refusal. Following the dismissal of her action at first instance, she brought an appeal before the referring court.

In that context, the referring court decided to stay the proceedings and to refer questions to the Court of Justice for a preliminary ruling seeking to ascertain, in essence, whether, in a situation where the beneficiary of the pension does not satisfy the condition of pursuing an activity as an employed or self-employed person imposed by Article 44(2) of Regulation No 987/2009, [1] Article 21 TFEU, read in

[1] Article 44 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1) governs the taking into account of child-raising periods.

the light of the case-law set out in the judgment in Reichel-Albert, [2] requires the Member State responsible for payment of that pension to take into account child-raising periods completed in another Member State in which the beneficiary resided for several years, even if that beneficiary did not pay contributions to the statutory pension insurance scheme of the first Member State before or immediately after those child-raising periods.

Findings of the Court

After confirming that Article 44(2) of Regulation No 987/2009 is not applicable to the dispute in the main proceedings, the Court finds that the case-law set out in the judgment in Reichel-Albert can be transposed to the present case.

The Court infers from this that Article 21 TFEU requires the Member State responsible for the payment of the pension in question to take into account, for the purposes of granting that pension, the child-raising periods completed by the person concerned in another Member State where it is established that there is a sufficient link between those child-raising periods and the periods of insurance completed by that person as a result of the pursuit of an occupational activity in the first Member State.

The existence of such a 'sufficient link' must be regarded as established where the person concerned has exclusively completed periods of insurance, by virtue of periods of training or occupational activity, in the Member State responsible for payment of his or her pension, both before and after the completion of the child-raising periods in another Member State.

The Court then concludes, on the basis of Article 1(t) of Regulation No 883/2004, [3] which is also relevant in the context of the interpretation of Article 21 TFEU, that the Member States may provide, in their national legislation, that certain periods of a person's life during which he or she did not pursue an activity as an employed or self-employed person subject to compulsory insurance and did not therefore pay contributions are to be treated as 'periods of insurance' completed in the Member State concerned.

In such a case, the fact that the person concerned did not pay contributions in that Member State during the periods thus treated, by its national legislation, as such periods of insurance cannot rule out the existence of a sufficient link between the child-raising periods completed by that person in another Member State and the periods of insurance completed in the first Member State.

In that regard, it appears, subject to verification by the referring court, that, in the case in the main proceedings, there is a sufficient link between the child-raising periods completed by VA in the Netherlands and the periods of insurance which she completed exclusively in Germany, both before those child-raising periods – as regards the periods of training treated in German law as periods of insurance – and after those child-raising periods – as regards the periods of employment – despite the fact that she did not pay contributions in the latter Member State before or immediately after those child-raising periods.

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2 Judgment of 19 July 2012, Reichel-Albert (C-522/10, EU:C:2012:475). In that judgment, the Court held that, in a situation where a person temporarily established his or her residence in a Member State other than his or her Member State of origin, Article 21 TFEU requires the competent institution of the Member State of origin, for the purposes of granting an old-age pension, to take account of child-raising periods completed in another Member State as though those periods had been completed on its national territory by a person who pursued employed or self-employed activity only in that first Member State and who, at the time of the birth of his or her children, had temporarily stopped working and had, solely on family-related grounds, established his or her place of residence in the territory of the second Member State.

3 Article 1(t) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1) defines the concept of 'period of insurance' as consisting of periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance.

According to the Court, in a situation such as that at issue in the main proceedings, the length of the period of residence of the person concerned in the Member State in which that person has devoted himself or herself to bringing up his or her children is irrelevant.

Consequently, in such a situation, the Member State responsible for payment of the pension at issue in the main proceedings cannot, without placing its nationals who have exercised their freedom of movement at a disadvantage and thus infringing Article 21 TFEU, preclude child-raising periods from being taken into account solely on the ground that they were completed in another Member State. Accordingly, the Member State responsible for payment of that pension is required, under that provision, to take those child-raising periods into account for the purposes of calculating that pension, despite the fact that that person did not pay contributions in that Member State before or immediately after those child-raising periods.

2. RESTRICTION OF THE RIGHT OF RESIDENCE OF A UNION CITIZEN AND OF MEMBERS OF HIS OR HER FAMILY

Judgment of the Court of Justice (First Chamber), 22 February 2024, Direcţia pentru Evidenţa Persoanelor şi Administrarea Bazelor de Date, C-491/21

Link to the full text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Article 21(1) TFEU – Right to move and reside freely within the territory of the Member States – Article 45 of the Charter of Fundamental Rights of the European Union – Directive 2004/38/EC – Article 4 – Issuance of an identity card – Requirement of domicile in the Member State issuing the document – Refusal by the authorities of that Member State to issue an identity card to one of its nationals domiciled in another Member State – Equal treatment – Restrictions – Justification

In the context of a reference for a preliminary ruling, the Court states that the right to move and reside freely within the territory of the Member States, enshrined in Article 21 TFEU and Article 45(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and clarified – in the circumstances in which it is exercised – by Directive 2004/38, [4]precludes legislation of a Member State under which a citizen of the European Union, a national of that Member State who has exercised his or her right to freedom of movement and freedom to reside in another Member State, is refused an identity card that may serve as a travel document within the European Union, on the sole ground that he or she has established his or her domicile within the territory of that other Member State.

The applicant in the main proceedings is a Romanian national, domiciled in France since 2014, who carries out his professional activities as a lawyer both in France and in Romania. The Romanian authorities issued him with an electronic simple passport, which constitutes a travel document enabling him to travel abroad – stating that he is domiciled in France – and a temporary identity card. That identity card is issued to Romanian nationals domiciled in another Member State who are temporarily resident in Romania, and must be renewed annually. That temporary identity card does not constitute a travel document.

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4 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). That directive implements the fundamental right to freedom of movement enshrined in Article 21 TFEU and Article 45(1) of the Charter and lays down the conditions for its exercise.

In September 2017, the applicant in the main proceedings applied to be issued with an identity card, whether simple or electronic, constituting a travel document which would have enabled him to travel to France. That application was rejected essentially on the ground that he was domiciled abroad.

In December 2017, he then brought an appeal before the Curtea de Apel București (Court of Appeal, Bucharest, Romania), seeking an order from that court that the requested document be issued to him. By judgment delivered in March 2018, that court dismissed that appeal, on the ground that Romanian legislation did not provide for such issuance in the event of the person concerned being domiciled abroad, that legislation, moreover, not being contrary to EU law. In addition, that court considered that the applicant in the main proceedings had not suffered discrimination, since the Romanian authorities issued him with an electronic simple passport.

Hearing an appeal on a point of law against that judgment, the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania), which is the referring court, decided to ask the Court of Justice whether that refusal to issue to the applicant in the main proceedings that identity card, which may serve as a travel document within the European Union, on the ground that he had established his domicile in another Member State, was compatible with EU law.

Findings of the Court

As a preliminary point, the Court notes that the Romanian legislation on the issuance of travel documents establishes a difference in treatment between Romanian citizens domiciled in Romania and those domiciled abroad. The former may be issued with one or two travel documents enabling them to travel within the European Union, namely an identity card and/or a passport, while the latter may be issued only with a passport as a travel document.

Examining whether such a difference in treatment is compatible with EU law, in the first place, the Court notes, first, that Article 4(3) of Directive 2004/38 [5] leaves to the Member States the choice of the type of travel document, namely an identity card or a passport, which they are obliged to issue to their own nationals. Second, the Court nevertheless recalls that the purpose of Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU. Accordingly, the Member States, in exercising their competence to issue identity cards, must comply with EU law and, in particular, with the Treaty provisions on the freedom to move and reside within their territory as provided for by the latter provision.

In the second place, the Court finds that the legislation at issue, in so far as it requires Romanian nationals residing in other Member States who wish to obtain both a passport and an identity card to have established their domicile in Romania, gives rise to less favourable treatment for those nationals and places them at a disadvantage simply because they have exercised their freedom of movement and residence. Furthermore, assuming that the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State could be deterred from availing himself or herself of them, by obstacles resulting from his or her stay in another Member State, because of legislation of his or her Member State of origin penalising the mere fact that he or she has used them, the Court considers that the legislation at issue in the main proceedings is liable to deter Romanian nationals in a situation such as that of the applicant in the main proceedings from exercising their right to freedom of movement and residence within the European Union. Romanian citizens in such a situation are subject to more onerous administrative burdens than Romanian citizens domiciled in Romania as regards the procedure for issuing identity cards and/or passports. Consequently, the legislation at issue in the main proceedings constitutes a restriction on the right to move and reside freely provided for in both Article 21(1) TFEU and Article 45(1) of the Charter, the latter provision mirroring the former provision.

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5 Under that provision: 'Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.'

In the third place, the Court recalls that such a restriction can be justified in the light of EU law only if it is based on objective considerations of public interest, independent of the nationality of the persons concerned, and if it is proportionate to the legitimate objective of the provisions of national law. It follows from the case-law that a measure is proportionate when, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to achieve it. In that regard, the Romanian Government puts forward a justification for the national legislation at issue in the main proceedings based on the existence of certain administrative considerations, relating principally to the need to confer probative value on the address of domicile indicated on the identity card and to the effectiveness of the identification and checking of that address by the competent national authority. In examining those various arguments, the Court notes, first, that the Romanian Government has not demonstrated the link between the indication of an address on the identity card and the obligation to refuse to issue an identity card to Romanian nationals domiciled in another Member State. Second, it recalls that, according to settled case-law, considerations of an administrative nature cannot justify derogation by a Member State from the rules of EU law. Therefore, none of the arguments put forward by the Romanian Government supports the conclusion that the legislation at issue is based on objective considerations of public interest. Consequently, such legislation constitutes an unjustified restriction on the freedom to move and reside within the European Union, within the meaning of Article 4(3) of Directive 2004/38, read in the light of Article 21(1) TFEU and Article 45(1) of the Charter, in respect of Romanian nationals domiciled in another Member State.

II. INSTITUTIONAL PROVISIONS: PUBLIC PROCUREMENT

Judgment of the General Court (First Chamber, Extended Composition), 21 February 2024, Inivos and Inivos v Commission, T-38/21

Link to the full text of the judgment

Public procurement – Negotiated procedure without prior publication of a contract notice – Supply of disinfection robots to European hospitals – Extreme urgency – COVID-19 – Non-participation of the applicants in the tendering procedure – Action for annulment – Lack of individual concern – Contractual nature of the dispute – Inadmissibility – Liability

The General Court, ruling in the extended five-judge composition, dismisses as inadmissible the action brought by the applicants, Inivos Ltd and Inivos BV, seeking, inter alia, annulment of three decisions of the European Commission concerning the award of an EU public contract for the acquisition of disinfection robots. In its judgment, the Court clarifies the conditions governing the admissibility of an action brought by an economic operator which has not been invited to participate in a negotiated procedure without prior publication of a contract notice ('NPWPP'), seeking annulment of the decision taken in the course of that procedure to award the contract.

The Commission has decided, on the basis of the urgency arising from the COVID-19 crisis, to use the NPWPP to acquire 200 autonomous disinfection robots using UV rays in order to deploy them in

European hospitals. [6] A preliminary market consultation had identified six suppliers, other than the applicants, that met predefined criteria and were invited by the Commission to submit a bid under the NPWPP. The Commission adopted the decision to award that contract to two of them, with which the framework contracts for disinfection robots were therefore concluded.

Following the contract award notice of 9 December 2020, according to which the framework contracts at issue had been concluded on 19 November 2020, the applicants brought an action for annulment of the decision to use an NPWPP, the decision to award that contract ('the contested award decision') and the decision to conclude the framework contracts with the two selected operators, as well as an action for damages.

Findings of the Court

In the assessment of the admissibility of the head of claim seeking annulment of the contested award decision, the Court rules, inter alia, on the question of the standing of the applicants to bring proceedings. [7]

In the first place, the Court examines whether the contested award decision is of direct concern to the applicants. It finds, first, that the effect of that decision was to deprive them definitively of the opportunity to participate in – and thereby to exclude them from – the NPWPP. Accordingly, that decision directly produced effects on their legal situation. Stressing that the applicants must prove that they are operators active on the market concerned, the Court considers that they have sufficiently demonstrated that they were active on the market for autonomous disinfection robots using UV rays.

Secondly, the contested award decision definitively identified two operators as successful tenderers for the contract at issue with immediate and binding effect. Since that decision produces its legal effects without any additional measure being required, it leaves no discretion to the addressees who are entrusted with the task of implementing it. The Court concludes from the foregoing that the contested award decision directly affected the applicants.

In the second place, the Court examines whether the contested award decision is of individual concern to the applicants. In the specific circumstances of an NPWPP, an operator which has not been invited to participate in that procedure, even though it was able to fulfil the criteria applied by the contracting authority to select the undertakings to be invited to tender, must be regarded as belonging to a limited class of competitors which, had they been invited to submit a tender, would have been in a position to do so.

In that regard, the Commission explained that the criteria used in the procedure in question were the CE marking, a production capacity of at least 20 units per month and experience in deploying at least 10 robots in hospitals. Those criteria were brought to the attention of the applicants in the context of the judicial proceedings.

First, as regards the criterion relating to the CE marking, the Court considers that the applicants have demonstrated that their robot fulfilled that criterion.

Secondly, as regards the criterion relating to production capacity, although the applicants stated at the hearing that they fulfilled that criterion and were even able to increase their production capacity, the Court notes that they have not adduced any evidence establishing that their production capacity could reach 20 robots per month.

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

7 Pursuant to the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them.

Thirdly, as regards the criterion relating to the experience required in the deployment of robots in hospitals, the Court finds that the evidence produced by the applicants does not make it possible to determine the exact number of robots deployed.

The Court infers from the foregoing that the applicants have not proved that they were in a position to fulfil the criteria used by the Commission to select the operators invited to tender in the context of the NPWPP. Consequently, they have not proved that they formed part of a limited class of operators in a position to be invited to tender and to submit a tender. They are therefore not individually concerned by the contested award decision.

Accordingly, the Court finds that the head of claim seeking annulment of the contested award decision is inadmissible. After dismissing as inadmissible the heads of claim directed against the other two contested decisions, the Court dismisses the action for annulment in its entirety. Furthermore, the Court also dismisses the action for damages brought by the applicants.

III. PROCEEDINGS OF THE EUROPEAN UNION: COSTS

Order of the General Court (Second Chamber, Extended Composition), 29 February 2024, Qualcomm v Commission (Qualcomm – exclusivity payments), T-235/18 DEP

Link to the full text of the order

Procedure – Taxation of costs

Hearing an application for taxation of costs, the General Court summarises the case-law relating to the reimbursement of costs relating to main proceedings brought before it, from the perspective of competition law.

The applicant, Qualcomm Inc., had brought an action seeking the annulment of the Commission's decision imposing a fine on it of almost EUR 1 billion for having abused its dominant position on the worldwide chipsets market.

By its judgment of 15 June 2022, [8] the Court annulled the contested decision in its entirety and ordered the Commission to pay the costs incurred by the applicant. As there was no agreement between the parties on the amount of recoverable costs, the applicant submitted an application for taxation of costs to the Court, by which it sought reimbursement, first, of the fees relating to the services of legal and economic advisory services and, second, of disbursements for the purpose of attending the hearing, totalling more than EUR 12 million.

Findings of the Court

As a preliminary point, examining the question of the confidentiality of the application for taxation of costs and its annexes, the Court states that the mere presence of the word 'confidential', placed on those documents by the applicant, cannot be interpreted as constituting an application for the omission of certain information vis-à-vis the public, in the absence of an application to that effect

8 Judgment of 15 June 2022, Qualcomm v Commission (Qualcomm – exclusivity payments) (T-235/18, EU:T:2022:358).

made by means of a separate document, [9] since the Court cannot proceed by assumptions or remedy any shortcomings in such an application.

Continuing its substantive analysis, the Court rejects, in the first place, the application for reimbursement of the lawyers' fees incurred in the proceedings conducted in the United States. In that regard, the Court recalls that the concept of 'recoverable costs' is limited to expenses necessarily incurred by the parties for the purpose of the proceedings before it and cannot cover costs relating to other judicial or administrative proceedings before other national or international courts or authorities, even where such proceedings seek, as in the present case, to obtain information or documents intended to substantiate the pleas in law of an action before the Court.

In the second place, in relation to the reimbursement of lawyers' fees incurred for the purpose of the proceedings, the Court must take into account the subject matter and nature of the dispute, its importance from the point of view of EU law and also the difficulties presented by the case, the amount of work which the contentious proceedings generated for the agents or advisers involved and the economic interest which the dispute presented for the parties.

Accordingly, in assessing the amount of work which the proceedings generated for the applicant's representatives, the primary consideration of the EU Courts is the total number of hours of work which may appear to be objectively necessary for the purpose of those proceedings, irrespective of the number of lawyers who may have provided the services in question. Although, in principle, only payment of the fees of a single lawyer is recoverable, it may be that, depending on the specific circumstances of each case, most notably its complexity, the fees of more than one lawyer may be found to be necessarily incurred. In that case, the Court must examine the extent to which the services supplied by all the lawyers concerned were necessary for the conduct of the legal proceedings and satisfy itself that there was no unnecessary duplication of costs. In that regard, where lawyers have already assisted a party during proceedings or procedures prior to the action, one must also consider the point that they are aware of relevant matters, which is likely to have facilitated their work and reduced the preparation time required for the judicial proceedings. However, the costs of coordination between lawyers for the same party cannot be regarded as necessary.

In the present case, while the dispute in the main proceedings could indeed have demanded significant work in view of the complexity of the legal issues raised and the economic interests at stake, the evidence produced by the applicant does not enable an assessment to be made of the number of hours corresponding to the various tasks performed by its lawyers, whether those hours worked were for the purposes of the proceedings before the Court or whether they were necessarily incurred for that purpose. The mere fact that documents with numerous pages and numerous annexes were lodged by the applicant's representatives before the Court in no way demonstrates that the hours of work, and therefore the sums claimed relating thereto, were necessary.

Furthermore, the documents adduced do not enable a precise determination to be made of the hourly rate corresponding to the various tasks performed. In that regard, while it is true that a party is free to use lawyers charging very high hourly rates, the fact of using their services cannot be regarded as necessary, particularly where, as in the present case, those rates are not presented, in the application, in relation to specific, clearly identified tasks.

Therefore, in the absence of any information on the costs actually incurred, the Court makes an equitable, but necessarily strict, assessment of the lawyers' fees which are recoverable. In the present case, in order to assess the working time objectively necessary for the purpose of the proceedings, the General Court takes into account the number of pleas raised, the difficulty of the legal and factual issues raised, the number and linked nature of the procedural documents, the evidence produced in

9 Pursuant to Article 66 or 66a of the Rules of Procedure of the General Court.

annex thereto and submitted to the Court and the progressively more targeted and detailed nature of the argument developed. As regards the hourly rate, in the absence, in EU law, of a relevant scale, it is only where the average hourly rate invoiced appears, as in the present case, manifestly excessive that the Court may depart from it and fix ex aequo et bono the amount of the lawyers' fees recoverable.

In the third place, the Court also makes an equitable, but strict, assessment of the costs recoverable in respect of fees relating to the advice of economic experts, whose involvement was objectively necessary for the purpose of the proceedings, in the absence of any specific information on the volume of work carried out by them and the hourly rate relating to such advice.

In the fourth place, as regards the travel and subsistence expenses incurred for the purposes of the hearing, only the travel expenses and expenses relating to the overnight accommodation of the lawyers who represented the applicant and made oral submissions before the Court may be regarded as recoverable. By contrast, reimbursement of the travel and subsistence expenses of an employee of the applicant is rejected, since the applicant has not provided justification that the presence of that employee was necessary for the purposes of the proceedings, the mere fact that that employee was following the case within the undertaking being manifestly insufficient in that regard.

Similarly, while the hire of a meeting room in the applicant's lawyers' hotel may be regarded as actually necessary, having regard to the duration of the hearing and the number of lawyers involved, hiring it for three full days appears to be excessive in the absence of details provided in that regard.

In view of all the foregoing, the Court fixes the total amount of costs recoverable by the applicant at almost EUR 800 000.

IV. AGRICULTURE AND FISHERIES

Judgment of the Court of Justice (First Chamber), 29 February 2024, Eesti Vabariik (Põllumajanduse Registrite ja Informatsiooni Amet), C-437/22

Link to the full text of the judgment

Reference for a preliminary ruling – Agriculture – Common agricultural policy – Support for rural development by the European Agricultural Fund for Rural Development (EAFRD) – Protection of the financial interests of the European Union – Regulation (EC, Euratom) No 2988/95 – Article 7 – Administrative measures and penalties – Regulation No 1306/2013 – Articles 54 and 56 – Delegated Regulation No 640/2014 – Article 35 – Recovery of sums unduly paid to persons who have taken part in the irregularity – Concept of 'beneficiary'

Ruling on a request for a preliminary ruling from the Riigikohus (Supreme Court, Estonia), the Court of Justice confirms the possibility for a Member State to request repayment of aid financed by the European Agricultural Fund for Rural Development (EAFRD) and wrongly paid to a beneficiary company, directly to the natural persons who are its legal representatives where they have committed fraudulent acts in order to obtain that aid, even if they cannot themselves be regarded as beneficiaries of the aid.

Company X OÜ, which merged with Company Y OÜ, had obtained aid under Estonia's rural development programmes for the years 2007 to 2013 and 2014 to 2020.

R.M. and, after him, E.M., his spouse, were representatives of that company.

In criminal proceedings brought against R.M. and E.M., the Viru Maakohus (Court of First Instance, Viru, Estonia), then the Tartu Ringkonnakohus (Court of Appeal, Tartu, Estonia) convicted R.M. on three counts of subsidy fraud for the benefit of company X and E.M. of being an accomplice for two of

those counts, for having intentionally made false statements to the responsible Estonian authority in order to obtain the aid at issue.

Moreover, those courts ordered R.M. and E.M. to pay the Republic of Estonia the amount of that aid wrongly received by company X.

R.M. and E.M. brought appeals on a point of law before the Supreme Court, the referring court, submitting that aid wrongly received can be legitimately recovered only from the beneficiary of that aid, namely company Y, which succeeded company X in its rights and obligations following the merger of those two companies.

The referring court upholds the conviction of R.M. and E.M. for subsidy fraud, but expresses doubts as to the possibility to request that they repay the aid at issue.

In particular, the referring court asks, first, whether the relevant provisions of EU law [10] allow for seeking recovery of aid financed by the EAFRD and wrongly received as a result of fraud not only from the beneficiary of that aid, but also from persons who, although they cannot be regarded as beneficiaries of that aid, took part in the irregularity which led to the undue payment thereof.

Secondly, that court is uncertain, in essence, whether, where a legal person has obtained agricultural aid as a result of fraud attributable to its representatives, those representatives may, in so far as, in reality, they receive the profits generated by that legal person, be regarded as being 'beneficiaries' of that aid within the meaning of EU law. [11]

Findings of the Court

In order to answer those questions, the Court analyses, in particular, the context and objectives of the relevant provisions of EU law.

First, recital 39 of Regulation No 1306/2013 emphasises the need for Member States to prevent, detect and deal effectively with any irregularities and that, to that end, they should apply Regulation No 2988/95. Furthermore, Article 54(3)(b) of that regulation, which permits Member States not to pursue recovery of aid wrongly received where that recovery proves impossible owing to the insolvency of, inter alia, 'the persons legally responsible for the irregularity', would be deprived of its effectiveness if it was not possible to seek recovery of the aid concerned from those persons.

Secondly, the possibility of seeking recovery of wrongly received aid from not only the beneficiary thereof, but also from persons who intentionally made false statements in order to obtain it contributes to the objective of protecting the financial interests of the Union, [12] in particular where the beneficiary is a legal person which no longer exists or does not have sufficient resources to repay that aid.

Furthermore, requesting those persons to repay such wrongly received aid does not breach the principle of legal certainty in so far as the relevant rules in the present case are sufficiently clear in that regard.

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10 They include the first paragraph of Article 56 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 corrigendum OJ 2016 L 130, p. 6), read, first, in conjunction with Article 54 of that regulation and the first sentence of Article 35(6) of Commission Delegated Regulation (EU) No 640/2014 of 11 March 2014 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to the integrated administration and control system and conditions for refusal or withdrawal of payments and administrative penalties applicable to direct payments, rural development support and cross compliance (OJ 2014 L 181, p. 48), and, secondly, in the light of Article 7 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 and corrigendum OJ 1998 L 36, p. 16).

11 In particular within the meaning of Article 35(6) of Delegated Regulation No 640/2014 read in conjunction with point 1 of the second subparagraph of Article 2(1) of that delegated regulation.

12 As provided for in Article 58(1)(e) of Regulation No 1306/2013. See also the objective of effectively combating fraud, referred to in the fourth recital of Regulation No 2988/95.

Even though Article 56 of Regulation No 1306/2013 does not expressly lay down an obligation to repay the aid for those persons, that article must be read in the light of recital 39 of that regulation. Furthermore, Article 2(1)(g) of that regulation refers expressly to Regulation No 2988/95 as regards the definition of the term 'irregularity'. Moreover, under Article 7 of Regulation No 2988/95, the repayment of the aid may be imposed on persons who have taken part in the irregularity at issue.

The Court adds, lastly, that it cannot be inferred from such an analysis that the representatives of a legal person who have committed fraud in order to allow that legal person to obtain agricultural aid may not themselves be categorised as 'beneficiaries' of the aid. They cannot be regarded as being 'beneficiaries' of that aid, within the meaning of Delegated Regulation No 640/2014, if they are not covered by any of the three categories of person referred to by point 1 of the second subparagraph of Article 2(1) thereof, [13] even if, in reality, they receive the profits generated by that legal person.

Judgment of the General Court (Tenth Chamber), 7 February 2024, Austria v Commission, T-501/22

Link to the judgment as published in extract form

EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Austria – Reduction coefficient – Article 24(6) of Regulation (EU) No 1307/2013 – Article 30(7)(b) of Regulation No 1307/2013 – Article 52(4)(a) of Regulation (EU) No 1306/2013 – Obligation to state reasons

Ruling on an action for annulment brought by the Republic of Austria, the General Court annuls in part Decision 2022/908 [14] of the European Commission, in so far as it excludes from EU financing expenditure incurred by that Member State under the European Agricultural Guarantee Fund (EAGF) prior to 27 November 2016. In that context, it rules, for the first time, on the interpretation of Article 24(6) of Regulation No 1307/2013 [15] and on the concept of 'specific disadvantages' within the meaning of Article 30(7)(b) of that regulation.

In the context of the basic payment scheme, the Republic of Austria decided to apply a reduction coefficient to parcels classified, under Austrian law, as 'pastures' and as 'alpine pastures'. In 2016, the Commission opened an investigation against the Republic of Austria so as to verify whether, for the years 2015 and 2016, the management and control of area-related schemes as regards aid paid to farmers under the EAGF had been carried out in accordance with EU law. Taking the view, at the end of that investigation, that the Austrian authorities had incorrectly applied Article 24(6) of Regulation

13 That is to say a farmer as defined in Article 4(1)(a) of 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), the beneficiary subject to cross-compliance within the meaning of Article 92 of Regulation No 1306/2013 and/or the beneficiary receiving rural development support as referred to in Article 2(10) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

14 Commission Implementing Decision (EU) 2022/908 of 8 June 2022 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 2022 L 157, p. 15).

15 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).

No 1307/2013 as regards 'pastures', the Commission imposed a financial correction [16] on the Republic of Austria. Consequently, the Republic of Austria, by way of a corrective measure, allocated to the farmers concerned additional payment entitlements for each eligible hectare of 'pastures', doing so from the national reserve which it is for the Member States to establish pursuant to that regulation, [17] with effect from 2017.

In 2018, the Commission opened a new investigation against the Republic of Austria. It is apparent from its summary report, first, that the Austrian authorities had, as regards 'alpine pastures', applied Article 24(6) of Regulation No 1307/2013 incorrectly, which, according to the Commission, had led to unjustified differences in treatment in so far as, within the same area, the reduction coefficient had not been applied to all parcels subject to the same climate conditions. Second, that report finds that the Republic of Austria unlawfully used the national reserve to finance the corrective measure relating to 'pastures'. Consequently, by the contested decision, the Commission excluded from EU financing, in respect of the two instances of alleged non-compliance on the part of the Republic of Austria, expenditure declared under the EAGF by that Member State in the amount of EUR 68 146 449.98.

Findings of the Court

In the first place, the Court rejects the plea in law alleging infringement of Article 52(1) of Regulation No 1306/2013 [18] resulting from a financial correction based on a misinterpretation of Article 24(6) of Regulation No 1307/2013.

In that regard, the fact that the reduction coefficient was applied to 'alpine pastures' and not to neighbouring parcels does not necessarily show an incorrect application of Article 24(6) of Regulation No 1307/2013. That provision does not contain any details as to the extent of the areas in respect of which it is necessary to assess whether the criterion of difficult climate conditions is satisfied. Nevertheless, the Austrian authorities' approach, consisting in applying the reduction coefficient only to parcels classified as 'alpine pastures', without it being shown in the present case that the competent authorities had carried out that classification specifically and systematically on the basis of the fact that those parcels are subject to particular climatic conditions specific to them, does not make it possible to ensure that that coefficient was applied to all parcels located in areas with difficult climate conditions or to ensure that that coefficient was applied only to parcels which actually meet that criterion.

In the second place, the Court holds that the Commission was entitled to consider that the allocation of additional payment entitlements to farmers working 'pastures', in order to remedy the incorrect application of the reduction coefficient, could not be financed from the national reserve on the basis of Article 30(7)(b) of Regulation No 1307/2013.

To arrive at that conclusion, the General Court interprets Article 30(7)(b) of Regulation No 1307/2013, to which the Republic of Austria refers as the legal basis for its use of the national reserve, taking into account its wording, the context in which it occurs and the objectives of the rules of which that provision forms part.

As regards the wording of that provision, the Court finds that the adjective 'specific' supports an interpretation according to which the disadvantages in question concern certain categories of farmers, who are distinguished from others by virtue of characteristics that are inherent in their situation. The fact that farmers suffer the consequences of an error committed by a Member State in

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16 Commission Implementing Decision (EU) 2019/265 of 12 February 2019 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 2019 L 44, p. 14).

17 Article 30(1) of Regulation (EU) No 1307/2013.

18 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).

the application of EU law does not appear sufficient to support the conclusion that those farmers fall within a particular category and that the disadvantage which they suffer as a result of that error should, for that reason, be regarded as being specific to them. That interpretation is borne out by the context in which the provision at issue occurs, in particular by Article 31(2) of Regulation No 639/2014. [19]

As regards the objectives of the legislation at issue, the implementation of the reserve is intended to enable Member States to provide support to farmers in specific situations, as a matter of priority young farmers and those commencing their agricultural activity.

In the present case, the disadvantage suffered by the farmers working 'pastures' was not inherent in their situation or linked to a characteristic specific to them, but resulted from the fact that the Austrian authorities, by incorrectly applying Article 24(6) of Regulation No 1307/2013, had deprived them of payment entitlements which should have been allocated to them from the outset.

Accordingly, the fact, relied on by the Republic of Austria, that the incorrect application of EU law affected only the holders of 'pastures' – which is, moreover, disputable given the impact of that error on the value of the payment entitlements of all Austrian farmers – cannot lead to the conclusion that the holders of 'pastures' were in a situation constituting a specific disadvantage allowing the Republic of Austria to allocate additional payment entitlements to them from the national reserve on the basis of Article 30(7)(b) of Regulation No 1307/2013.

Lastly, the Court upholds the third plea in law, alleging infringement of Article 52(4)(a) of Regulation No 1306/2013.

In that regard, the communication referred to in the first subparagraph of Article 34(2) of Implementing Regulation No 908/2014 [20] constitutes the reference point for calculation of the period of 24 months laid down in Article 52(4)(a) of Regulation No 1306/2013, in so far as it identifies with sufficient precision the purpose of the investigation carried out by the Commission and the deficiencies found by it during the investigation. The limitation of the period during which the Commission may exclude certain expenditure from EU financing is intended to protect Member States against the absence of legal certainty which would exist if the Commission were able to call into question expenditure incurred several years before the adoption of a conformity clearance decision.

Given that it identified, for the first time, with sufficient precision the non-compliance found by the Commission as regards the incorrect application of the reduction coefficient to 'alpine pastures', the communication of 27 November 2018 constituted, in the present case, the reference point for calculation of the period of 24 months laid down in Article 52(4)(a) of Regulation No 1306/2013. Consequently, the Commission could not exclude from EU financing expenditure incurred before 27 November 2016.

In the light of the foregoing, the Court concludes that the contested decision must be annulled in so far as, as regards the first financial correction at issue, it excluded from EU financing expenditure incurred prior to 27 November 2016.

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19 Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation (OJ 2014 L 181, p. 1).

20 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).

V. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court of Justice (Grand Chamber), 8 February 2024, Bundesrepublik Deutschland (Admissibility of a subsequent application), C-216/22

Link to the full text of the judgment

Reference for a preliminary ruling – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2)(d) and Article 40(2) and (3) – Subsequent application – Conditions for rejecting such an application as inadmissible – Concept of 'new elements or findings' – Judgment of the Court on a question of interpretation of EU law – Article 46 – Right to an effective remedy – Jurisdiction of the national court or tribunal to rule on such an application on the merits in the event of illegality of the decision rejecting an application as inadmissible – Procedural safeguards – Article 14(2)

Ruling on a reference for a preliminary ruling from the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen, Germany), the Court of Justice, sitting as the Grand Chamber, rules, inter alia, on the question of whether a preliminary ruling of the Court constitutes a new element implying that a subsequent asylum application must be examined on the merits and not rejected as inadmissible.

On 26 July 2017, a Syrian national lodged an asylum application in Germany. During his interview before the competent German authority, he explained that he had performed his military service in Syria between 2003 and 2005 and that he had left that country for fear of being recalled to serve in the armed forces or of being arrested if he refused to fulfil his military obligations.

By decision of 16 August 2017, the competent German authority granted the applicant subsidiary protection, but refused to grant him refugee status. It found, inter alia, that it could not be assumed that, having left Syria before being called up to join the Syrian army, the applicant would be regarded in his country as a deserter or an opponent of the regime. Moreover, he had not established that conscription was the reason for his departure. He relied, in general terms, only on the dangerous situation due to the war in Syria.

The applicant did not lodge an appeal against that decision, which therefore became final. On 15 January 2021, however, he lodged a further asylum application ('subsequent asylum application') in which he relied on the judgment of the Court of 19 November 2020, Bundesamt für Migration und Flüchtlinge (Military service and asylum). [21] He argued that, in that judgment, the Court had indicated that, in certain circumstances, there is a 'strong presumption' that refusal to perform military service relates to one of the reasons for persecution listed in Article 10 of Directive 2011/95. [22]

By decision of 22 March 2021, the competent German authority rejected as inadmissible the applicant's subsequent asylum application on the ground that the Court judgment relied on did not mean that it had to examine that application on the merits.

Ruling on an appeal brought by the applicant against that decision, the Administrative Court, Sigmaringen, which is the referring court, has doubts as to the question of whether a judgment of the

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21 Judgment of 19 November 2020, Bundesamt für Migration und Flüchtlinge (Military service and asylum) (C-238/19, EU:C:2020:945).

22 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9). Article 10 of that directive, contained in the chapter entitled 'Qualification for being a refugee', contains a list of elements which the Member States must take into account when assessing the reasons for persecution.

Court, which is limited to interpreting a provision of EU law already in force at the time of the adoption of the decision on a previous application, is capable of constituting a 'new element or finding', which excludes the possibility of rejecting a subsequent asylum application as inadmissible.

Findings of the Court

The Court recalls, first of all, that it is apparent from the wording and purpose of Article 33(2) of Directive 2013/32 as well as from the scheme of that directive that the possibility of rejecting an application for international protection as inadmissible as referred to in that provision derogates from the obligation to examine the substance of such an application. The Court has thus already held that it follows both from the exhaustiveness of the list in the said provision and from the fact that the grounds of inadmissibility set out in that list are exemptions that those grounds must be interpreted strictly. [23] Accordingly, the situations in which Directive 2013/32 requires a subsequent application to be considered admissible must, conversely, be interpreted broadly.

Furthermore, it is apparent from the very wording of Article 33(2)(d) of Directive 2013/32 and, in particular, from the use of the expression 'new elements or findings' that that provision refers not only to a factual change in the personal circumstances of an applicant or in that of his or her country of origin, but also to new legal elements.

It follows, in particular, from the case-law that a subsequent application cannot be declared inadmissible, pursuant to Article 33(2)(d) of Directive 2013/32, [24] where the determining authority, within the meaning of that directive, [25] finds that the definitive rejection of the earlier application is contrary to EU law. Such a finding must necessarily be made by that determining authority when that incompatibility arises from a judgment of the Court or was established, as an ancillary finding, by a national court or tribunal. [26]

It follows that, in the specific context of Directive 2013/32, any judgment of the Court is liable to come within the concept of 'new element', within the meaning of Article 33(2)(d) and Article 40(2) and (3) of that directive. [27] That finding is irrespective of whether that judgment was delivered before or after the adoption of the decision on the previous application or whether it finds that a national provision on which that decision was based is incompatible with EU law or is limited to the interpretation of EU law, including that already in force at the time when the said decision was adopted.

However, in order for a subsequent application to be admissible, it is necessary, moreover, in accordance with Article 40(3) of Directive 2013/32, that the new elements or findings 'significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive [2011/95]'.

It follows that any judgment of the Court, including a judgment which is limited to interpreting a provision of EU law already in force at the time that a decision on a previous application was adopted, constitutes a new element, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32, irrespective of the date on which it was delivered, if it significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection.

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23 See, to that effect, judgment of 1 August 2022, Bundesrepublik Deutschland (Child of refugees, born outside the host State) (C-720/20, EU:C:2022:603, paragraphs 49 and 51).

24 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60). Under Article 33(2)(d) of that directive, Member States may consider as inadmissible an application for international protection where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 have arisen or have been presented by the applicant.

25 Article 2(f) of Directive 2013/32 defines 'determining authority' as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases'.

26 See, to that effect, judgment of 14 May 2020, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 198 and 203).

27 Article 40 of Directive 2013/32 contains provisions relating to the examination of subsequent applications.

Judgment of the Court of Justice (Third Chamber), 29 February 2024, Bundesamt für Fremdenwesen und Asyl (Subsequent religious conversion), C-222/22

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Asylum policy – Directive 2011/95/EU – Standards for the qualification as beneficiaries of international protection – Content of that protection – Article 5 – International protection needs arising sur place – Subsequent application for recognition of refugee status – Article 5(3) – Concept of 'circumstances which the applicant has created by his or her own decision since leaving the country of origin' – Abusive intent and abuse of the applicable procedure – Activities in the host Member State not constituting the expression and continuation of convictions or orientations held in the country of origin – Religious conversion

Further to a request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the Court of Justice clarifies the conditions under which Article 5(3) of Directive 2011/95 [28] allows the Member States to limit the recognition of a need for international protection resulting from activities carried out by a third-country national or stateless person since leaving his or her country of origin.

In 2015, JF, an Iranian national, lodged an application for international protection in Austria. His application was definitively rejected in 2018.

In 2019, JF lodged a subsequent application within the meaning of Article 2(q) of Directive 2013/32, [29] stating that he had in the meantime converted to Christianity and, on that ground, feared persecution in his country of origin. By a decision adopted in June 2020, the competent Austrian authority refused to grant him refugee status since the risk of persecution relied on had arisen sur place and had been created by his own decision. Taking the view, however, that, because of his conversion, JF risked being exposed to individual persecution in the event that he returned to Iran, it granted him subsidiary protection status and a fixed-period residence permit.

In September 2020, the Bundesverwaltungsgericht (Federal Administrative Court, Austria) allowed the complaint brought by JF against that decision. That court took the view that there was nothing in the application to suggest abusive intent and that the lack of evidence demonstrating that JF's conversion was the expression and continuation of convictions held in his country of origin did not justify refusing to grant refugee status. The competent Austrian authority brought an appeal on a point of law (revision) against that decision before the referring court.

In those circumstances, that court decided to refer a question to the Court of Justice concerning the question whether Article 5(3) of Directive 2011/95 [30] precludes national legislation which makes the

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28 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

29 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60). Under Article 2(q) of that directive, a 'subsequent application' is a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal.

30 Under that provision, 'without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin'.

recognition of the status of refugee, following a subsequent application based on a risk of persecution arising from circumstances which the applicant has created by his or her own decision since leaving his or her country of origin, subject to the twofold condition that those circumstances must come within activities permitted in the Member State concerned and constitute the expression and continuation of convictions held in the country of origin.

Findings of the Court

The Court states, first of all, that Article 5(3) of Directive 2011/95 is an exception to the principle laid down in Article 5(1) and (2), [31] in so far as it allows a risk of persecution, relied on in support of a subsequent application and based on circumstances which the applicant has created by his or her own decision since leaving the country of origin, 'normally' to lead to refusal to grant refugee status. Consequently, the possibility given to the Member States by that provision must be interpreted restrictively.

Next, the Court finds that a refusal to grant refugee status further to a subsequent application on the basis of that provision tends to sanction an abusive intent on the part of an applicant who has 'manufactured' the circumstances on which the risk of persecution to which he or she would be exposed in the event of return to the country of origin and thus abused the applicable procedure for the grant of international protection.

The question whether the circumstances relied on stem from abusive intent and abuse of the applicable procedure requires an individual assessment of that application, carried out by the competent authorities of the Member States in accordance with Article 4(3) of Directive 2011/95, in the light of all of the circumstances at issue. In that regard, the Court observes that the transposition of Article 5(3) of that directive does not allow the Member States to introduce a legal presumption that any subsequent application based on circumstances which the applicant has created by his or her own decision since leaving the country of origin stems from abusive intent and abuse of the procedure for the grant of international protection. A contrary interpretation would negate the effectiveness of Article 4 of Directive 2011/95, which is applicable to all applications for international protection, irrespective of the ground for persecution relied on in support of those applications.

Consequently, where, following an individual assessment of the subsequent application, it is found that the circumstances relied on by the applicant reveal an abusive intent and abuse of the applicable procedure, Article 5(3) of Directive 2011/95 allows the Member State concerned to provide for that applicant, in principle, not to be granted refugee status within the meaning of Article 2(e) of that directive. [32] However, the wording 'without prejudice to the Geneva Convention' [33] in Article 5(3) of that directive requires, if the competent national authority finds that there is a probable risk of persecution in the event that the applicant is returned to the country of origin, that the applicant be able to benefit, in the Member State concerned, from the rights guaranteed by the Geneva Convention against which no reservations may be made. Those rights include the principle of non-refoulement enshrined in Article 33(1) of that convention.

Lastly, the Court considers that the wording 'without prejudice to the Geneva Convention' does not preclude a condition provided for in national law under which the activities giving rise to the risk of

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31 Under Article 5(1) and (2) of Directive 2011/95: '1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin. 2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.'

32 Under that provision, 'refugee status' is understood to mean the recognition by a Member State of a third-country national or a stateless person as a refugee.

33 Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954 and was supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

persecution relied on by the applicant must be permitted in the host Member State. It observes on that point that, under Article 2 of the Geneva Convention, 'every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order'.

In the light of the foregoing, the Court finds that Article 5(3) of Directive 2011/95 precludes national legislation which makes the recognition of the status of refugee, following a subsequent application based on a risk of persecution arising from circumstances which the applicant has created by his or her own decision since leaving his or her country of origin, subject to the condition that those circumstances must constitute the expression and continuation of convictions held in the country of origin.

Judgment of the Court of Justice (Fourth Chamber), 29 February 2024, Staatssecretaris van Justitie en Veiligheid (Mutual trust in the event of transfer), C-392/22

Link to the full text of the judgment

Reference for a preliminary ruling – Common policy on asylum and immigration – Application for international protection – Charter of Fundamental Rights of the European Union – Article 4 – Risks of inhuman or degrading treatment – Criteria and mechanisms for determining the Member State responsible for examining the application for international protection – Regulation (EU) No 604/2013 – Article 3(2) – Scope of the obligations of the Member State which has sought to have the applicant taken back by the Member State responsible and wishes to transfer the applicant to the latter Member State – Principle of mutual trust – Evidence and standard of proof of the real risk of inhuman or degrading treatment, resulting from systemic flaws – Practices of pushback to a third country and detention at border control posts

Ruling on a request for a preliminary ruling from the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting in 's-Hertogenbosch, Netherlands), the Court of Justice determines the scope of the obligations of a Member State seeking to have an applicant for international protection taken back by the Member State responsible for examining that application, in a situation in which the latter Member State engages in practices such as pushbacks [34] and detention at border control posts.

On 9 November 2021, X, a Syrian national, made an application for international protection in Poland. Subsequently, on 21 November 2021, he entered the Netherlands where, the following day, he made a further application for international protection. On 1 February 2022, Poland accepted the Netherlands' request to take charge of X in accordance with the provisions of the Dublin III Regulation. [35] Next, by a decision of 20 April 2022, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) declined to consider the application for international protection lodged by X in the Netherlands, on the ground that Poland was responsible for examining that application, and rejected the arguments put forward by X in objecting to his transfer.

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34 The practice of pushback to the external borders of the European Union effectively removes persons seeking to make an application for international protection from the territory of the European Union or removes them from that territory before an application made on entry has been examined as provided for by EU legislation.

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

X brought an action against that decision before the referring court and sought an order prohibiting his transfer to Poland, maintaining, inter alia, that the Polish authorities infringed his fundamental rights. X claimed, first, to have been subjected to pushbacks to Belarus on three occasions after entering Polish territory. Secondly, he stated that he had been held in detention for approximately one week in the border guard centre, where he had been very badly treated, particularly because of a lack of food and the absence of any medical checks. According to the referring court, X had indicated that he was afraid that his fundamental rights would be infringed again if he were to be transferred to Poland.

The referring court took the view that objective, reliable, specific and properly updated information shows that Poland has, for a number of years, systematically infringed a number of fundamental rights of third-country nationals by subjecting them to pushbacks, regularly accompanied by the use of violence, and by systematically detaining, in what are described as 'appalling' conditions, third-country nationals who enter its territory illegally.

In those circumstances, it asked the Court, in essence, whether the fact that the Member State responsible for examining a third-country national's application for international protection carries out pushbacks with respect to third-country nationals seeking to make such applications at its border and detains them at its border control posts precludes the transfer of that third-country national to that Member State. It also sought guidance from the Court as to the assessment of whether there is a risk of that third-country national being subjected to inhuman or degrading treatment.

Findings of the Court

The Court confirms, first of all, that practices of pushback and detention at border posts, such as those established by the referring court in this case, are incompatible with EU law and constitute serious flaws in the asylum procedure and in the reception conditions for applicants. First, the practice of pushbacks is contrary to Article 6 of Directive 2013/32, [36] which is one of the cornerstones of the Common European Asylum System. [37] Secondly, it may be incompatible with the principle of non-refoulement, which is guaranteed, as a fundamental right, in Article 18 of the Charter of Fundamental Rights of the European Union ('the Charter'), read in conjunction with Article 33 of the Geneva Convention, [38] and in Article 19(2) of the Charter. As regards the practice of detention at border control posts, recital 15 of Directive 2013/33/EU [39] and recital 20 of the Dublin III Regulation refer to the principle that a person should not be held in detention for the sole reason that he or she is seeking international protection.

However, the fact that the Member State responsible for examining a third-country national's application for international protection has carried out pushbacks and detention at its border control posts does not in itself preclude the transfer of that third-country national to that Member State. In order for that transfer to be ruled out, the flaws established must satisfy the two cumulative conditions set out in the second subparagraph of Article 3(2) of the Dublin III Regulation, according to which only 'systemic' flaws 'resulting in a risk of inhuman or degrading treatment within the meaning

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36 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

37 That provision means that any third-country national or stateless person has the right to make an application for international protection, including at the borders of a Member State, by expressing his or her wish to benefit from international protection to one of the authorities referred to in that provision, even if he or she is staying illegally on that territory and irrespective of the prospects of success of such a claim (judgment of 22 June 2023, Commission v Hungary (Declaration of intent prior to an asylum application), C 823/21, EU:C:2023:504, paragraph 43 and the case-law cited).

38 Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.

39 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96).

of Article 4 of the [Charter]' make such a transfer impossible.[40] It follows that, first, the flaws established must concern, generally, the asylum procedure and the reception conditions applicable to applicants for international protection or, at the very least, to certain groups of such applicants taken as a whole. Secondly, there must be substantial grounds for believing that the third-country national concerned would, during his or her transfer or thereafter, face a real risk of being subjected to the practices referred to above, and that those practices are capable of placing that third-country national in so grave a situation of extreme material poverty that it may be equated with the inhuman or degrading treatment prohibited by Article 4 of the Charter.

As regards the standard of proof and rules of evidence that would trigger the application of the second subparagraph of Article 3(2) of the Dublin III Regulation, it is necessary, in the absence of specific details in that provision, to refer to the general provisions and scheme of that regulation.

It follows that, first, the Member State wishing to transfer an applicant for international protection to the Member State responsible must, before it can carry out that transfer, take into consideration all of the information provided to it by the applicant, in particular as regards the possible existence of a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, at the time of that transfer or thereafter.

Secondly, the Member State which has sought to have an applicant for international protection taken back must cooperate in establishing the facts by assessing whether that risk is real, on the basis of information that is objective, reliable, specific and properly updated, and having regard to the standard of protection of fundamental rights guaranteed by EU law, if necessary by taking account, on its own initiative, of relevant information of which it cannot be unaware concerning any systemic flaws in the asylum procedure and in the reception conditions for applicants for international protection in the Member State responsible.

Thirdly, if there are substantial grounds for believing that there is a real risk of treatment contrary to Article 4 of the Charter in the event of transfer, that Member State must refrain from carrying out that transfer. In that situation, the Member State required to carry out the process of determining the Member State responsible must continue to examine the criteria set out in Chapter III of the Dublin III Regulation in order to establish whether another Member State can be designated as responsible.

However, the Member State wishing to carry out the transfer may seek to obtain individual guarantees from the Member State responsible that are sufficient to exclude a real risk of inhuman or degrading treatment in the event of transfer and, if such guarantees are provided and appear to be both credible and sufficient to rule out any real risk of such treatment, may carry out that transfer.

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40 The second subparagraph of Article 3(2) of the Dublin III Regulation provides: 'Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the [Charter], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.'

VI. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 1215/2012 ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Judgment of the Court of Justice (First Chamber), 8 February 2024, Inkreal, C-566/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Scope – Article 25 – Agreement conferring jurisdiction – Parties to a contract established in the same Member State – Jurisdiction of the courts of another Member State to settle disputes arising from that contract – International element

In a dispute concerning a conflict of international jurisdiction, the Court of Justice has ruled on the applicability of the Brussels Ia Regulation [41] to agreements conferring jurisdiction, from the perspective of the existence of an international element.

Between 2016 and 2017, FD, residing in Slovakia, and Dúha reality, a company governed by Slovak law and domiciled in Slovakia, concluded two pecuniary loan contracts including an agreement conferring jurisdiction according to which any dispute which cannot be resolved by negotiation 'shall be settled by a court of the Czech Republic having substantive and territorial jurisdiction'.

In 2021, FD assigned the receivables arising from the pecuniary loan contracts to Inkreal, a company governed by Slovak law and domiciled in Slovakia. Since Dúha reality had not repaid the pecuniary loans, Inkreal brought an action before the Nejvyšší soud (Supreme Court, Czech Republic) seeking, among other things, the determination of a court having territorial jurisdiction to rule on the merits. That action was on the basis of the agreement conferring jurisdiction contained in the pecuniary loan contracts which Inkreal believes to be valid under the Brussels Ia Regulation.

That Supreme Court points out that, according to the case-law of the Court of Justice, the applicability of the Brussels Ia Regulation is subject to the existence of an international element. By its reference for a preliminary ruling, that first court requests the Court to determine whether that regulation is applicable to the situation at issue in the main proceedings, where the international element is limited to an agreement conferring jurisdiction on the courts of a Member State other than that in which the parties have their seat.

Findings of the Court

First, the Court notes that the wording of Article 25(1) of the Brussels Ia Regulation concerning agreements conferring jurisdiction [42] does not preclude an agreement, by which the parties to a contract which are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising from that contract, from being covered under that provision, even if that contract has no other connection with that other Member State.

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

42 That provision reads: 'If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. …'

Next, as regards the context of that provision, it is settled case-law that for the jurisdiction rules of the Brussels Ia Regulation to apply, the existence of an international element is required, even though that is not defined in the regulation.

By relying on the equivalent concept of 'cross-border litigation', defined by Article 3(1) of Regulation No 1896/2006 [43] as 'one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised', the Court states that, first, the dispute in the main proceedings meets that definition, since the parties to that dispute are established in a Member State other than the Member State of the court which was seised on the basis of the agreement conferring jurisdiction at issue. Secondly, in accordance with the case-law of the Court on the existence of an international element, the dispute in the main proceedings raises a question relating to the determination of international jurisdiction, more specifically whether the courts having jurisdiction to settle that dispute are those of the Czech Republic, or those of the Slovak Republic.

In those circumstances, the existence of an agreement conferring jurisdiction on the courts of a Member State other than that in which the parties are established in itself demonstrates the cross-border implications of the dispute in the main proceedings.

Finally, the Court pointed out that the interpretation of Article 25(1) of the Brussels Ia Regulation, according to which an agreement conferring jurisdiction such as the one at issue in the main proceedings is covered under that provision, meets the aim of legal certainty pursued by that regulation. By contrast, the aim of legal certainty would be compromised if that provision were applicable only on condition that, over and above the agreement conferring jurisdiction on the courts of another Member State, there were additional elements capable of demonstrating the cross-border impact of the dispute concerned. Not only would the predictability for the contracting parties of the court having jurisdiction to settle their dispute be reduced, but the examination by the court seised of its own jurisdiction would be made more complex.

The Court therefore concludes that Article 25(1) of the Brussels Ia Regulation applies to an agreement conferring jurisdiction by which the parties to a contract which are established in the same Member State agree on the jurisdiction of the courts of another Member State to settle disputes arising from that contract, even if that contract has no other connection with that other Member State.

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43 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

VII. COMPETITION: STATE AID

Judgment of the General Court (Eighth Chamber), 7 February 2024, Ryanair v Commission (KLM II; COVID-19), T-146/22

Link to the full text of the judgment

State aid – Aid granted by the Netherlands to KLM in the context of the COVID19 pandemic – State guarantee for a bank loan and a subordinated loan by the State – Decision declaring the aid compatible with the internal market – Action for annulment – Locus standi – Substantial adverse effect on the applicant's position on the market – Admissibility – Determination of the beneficiary of the aid in the context of a group of companies

In an action brought by the airline Ryanair, the General Court annuls the Commission's decision of 16 July 2021 [44] by which the Commission classified financial support notified by the Kingdom of the Netherlands in favour of the airline KLM as State aid compatible with the internal market under Article 107(3)(b) TFEU. Within that framework, the General Court provides clarifications as to the determination of the beneficiary of an aid measure in the context of a group of companies.

On 26 June 2020, the Kingdom of the Netherlands notified the Commission of State aid in favour of KLM consisting of (i) a State guarantee for a loan granted to it by a consortium of banks, and (ii) a State loan ('the measure at issue'). The total budget of that aid was EUR 3.4 billion.

The measure at issue forms part of a series of other State aid measures aimed at supporting the companies owned by the Air France-KLM holding company, the two main subsidiaries of which are the airlines KLM and Air France.

In particular, by decision of 4 May 2020 ('the Air France decision'), [45] the Commission authorised individual aid granted by the French Republic to Air France in the form of (i) a State loan guarantee covering 90% of a loan of EUR 4 billion granted by a consortium of banks and (ii) a shareholder loan of up to EUR 3 billion. Moreover, on 5 April 2021, the Commission concluded that individual aid granted by the French Republic in the form of a recapitalisation of Air France and the Air France-KLM holding totalling EUR 4 billion was compatible with the internal market ('the Air France-KLM and Air France decision'). [46]

The objective of the measure at issue was to provide temporary liquidity to KLM which it needed to deal with the adverse effects of the COVID19 pandemic.

By decision of 13 July 2020, [47] the Commission found that the measure at issue constituted State aid compatible with the internal market on the basis of Article 107(3)(b) TFEU. According to that decision, KLM was the sole beneficiary of the aid, to the exclusion of the other companies in the Air France-KLM group.

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44 Commission Decision C(2021) 5437 final of 16 July 2021 on State aid SA.57116 (2020/N) – The Netherlands – COVID19: State loan guarantee and State loan for KLM.

45 Commission Decision C(2020) 2983 final of 4 May 2020 on State Aid SA.57082 (2020/N) – France – COVID19 : Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Commission Decision C(2020) 9384 final of 17 December 2020 and Commission Decision C(2021) 5701 final of 26 July 2021.

46 Commission Decision C(2021) 2488 final of 5 April 2021 on State Aid SA.59913 – France – COVID19 – Recapitalisation of Air France and the Air France-KLM holding.

47 Commission Decision C(2020) 4871 final of 13 July 2020 on State aid SA.57116 (2020/N) – The Netherlands – COVID19: State loan guarantee and State loan for KLM.

By judgment of 19 May 2021, the Court nevertheless annulled the decision of 13 July 2020 [48] on the ground that it was vitiated by a failure to state reasons as regards the determination of the beneficiary of the measure at issue. In addition, it ordered that the effects of the annulment of that decision be suspended pending the adoption of a new decision by the Commission under Article 108 TFEU.

Consequently, on 16 July 2021, the Commission adopted a second decision, by which it found that the aid at issue constituted State aid within the meaning of Article 107(1) TFEU; however, it considered that aid to be compatible with the internal market on the basis of Article 107(3)(b) TFEU. On this occasion, the Commission identified KLM and its subsidiaries as the sole beneficiaries of the aid, to the exclusion of the other companies in the Air France-KLM group.

Disputing in particular the exclusion of the Air France-KLM holding and its subsidiary Air France from the scope of the beneficiaries of the measure at issue, Ryanair brought an action for annulment of that second decision before the General Court.

Findings of the Court

As regards the determination of the beneficiaries of a notified aid measure in the context of a group of companies, the Court recalls that, while the Commission has a broad discretion in that regard, the fact remains that the EU judicature must establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account and whether it is capable of substantiating the conclusions drawn from it.

Moreover, it is apparent from the case-law and the Commission Notice on the notion of State aid [49] that several separate legal entities may be considered to form one economic unit for the purposes of the application of State aid rules. The factors taken into account in order to determine whether such an economic unit exists include, inter alia, the capital, organic, functional and economic links between the entities concerned, the contracts providing for the grant of the notified aid and the type of aid measure granted and its context.

In the light of those clarifications, the Court notes, first of all, that the capital and organic links within the Air France-KLM group indicate that the separate legal entities within that group form a single economic unit for the purposes of the application of the rules on State aid. In that regard, the Court notes that the findings of the Commission in the contested decision and the evidence adduced by Ryanair show that the Air France-KLM holding actually exercises control over the sister companies Air France and KLM by involving itself directly or indirectly in their management and thus takes part in the economic activity carried on by them. It also follows that there is, at the level of the Air France-KLM group, a centralised decision-making procedure and a certain degree of coordination, carried out through joint bodies bringing together high-level representatives of the Air France-KLM holding, Air France and KLM, at least as regards the way in which certain important decisions are taken.

The Commission's conclusion that the Air France-KLM holding, Air France and KLM do not constitute an economic unit for the purpose of identifying the beneficiaries of the measure at issue is, moreover, undermined by the functional and economic links between those entities. The description of those links in the contested decision and the examples relied on in that regard by Ryanair demonstrate a degree of integration and functional, commercial and financial cooperation between those entities.

Next, the Court states that, contrary to what the Commission argues, the contractual framework on the basis of which the measure at issue is granted does not support the conclusion that the sole beneficiaries of the measure at issue are KLM and its subsidiaries, to the exclusion of the Air France-

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48 Judgment of 19 May 2021, Ryanair v Commission (KLM; Covid-19) (T643/20, EU:T:2021:286).

49 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

KLM holding and Air France, and of the subsidiaries controlled by them. On that point, the Court notes that several conditions for the grant of the measure at issue were explicitly subject to the approval of the Air France-KLM holding or were the subject of a commitment on its part. That shows that the contracts on the basis of which the measure at issue was granted impose on that holding company significant contractual rights and obligations in the context of the grant and implementation of that measure. Moreover, by ensuring KLM's viability, the measure at issue also enhances the viability of the Air France-KLM holding. In the absence of that measure, the risk of failure by KLM could have spread to the Air France-KLM holding and, consequently, the Air France-KLM group as a whole. Thus, in view of the level of integration within the Air France-KLM group, the measure at issue is capable of strengthening, at least indirectly, the financial position of that group as a whole.

Emphasising the existence of a chronological, structural and economic link between the measure at issue and the aid measures which are the subject of the Air France decision and the Air France-KLM and Air France decision, the Court notes, moreover, that the contested decision makes no mention of the aid measure which is the subject of the Air France-KLM and Air France decision. In that decision, which was adopted more than three months before the contested decision, the Commission had considered both the Air France-KLM holding and its subsidiaries, and Air France and its subsidiaries, to the exclusion of KLM and its subsidiaries, to be beneficiaries of the aid measure which was the subject of that decision. In the specific circumstances of the present case, it was incumbent on the Commission to take account also of the Air France-KLM and Air France decision, which it failed to do.

Lastly, the Court rejects the Commission's argument that the measure at issue has, at most, merely secondary economic effects vis-à-vis the Air France-KLM holding and Air France. On that point, the Court recalls that the foreseeable effects of the measure at issue from an ex ante perspective suggest that the financing solution provided for was likely to benefit the Air France-KLM group as a whole, by improving its overall financial position. In accordance with the Commission Notice on the notion of State aid, such a financing solution indicates the existence, at the very least, of an indirect advantage in favour of the Air France-KLM group.

In the light of all of the foregoing, the Court holds that the Commission committed a manifest error of assessment by considering that the beneficiaries of the measure at issue were KLM and its subsidiaries, to the exclusion of the Air France-KLM holding and its other subsidiaries, including Air France and its subsidiaries. Since that incorrect identification of the beneficiaries is likely to have an impact on the entire analysis of the compatibility of the measure at issue with the internal market under Article 107(3)(b) TFEU, the Court annuls the contested decision.

Judgment of the General Court (Eighth Chamber, Extended Composition), 21 February 2024, Telefónica Gestión Integral de Edificios y Servicios and Banco Santander v Commission, T-29/14 and T-31/14

Link to the full text of the judgment

State aid – Aid granted by the Spanish authorities in favour of certain economic interest groupings (EIGs) and their investors – Tax scheme applicable to certain finance lease agreements for the acquisition of ships (Spanish tax lease system) – Decision declaring the aid partly incompatible with the internal market and ordering its partial recovery – Partial disappearance of the subject matter of the dispute – No need to adjudicate in part – New aid – Recovery – Contractual clauses protecting the beneficiaries against the recovery of unlawful State aid incompatible with the internal market – Division of powers between the Commission and the national authorities

By the present judgment, the General Court dismisses the actions for annulment brought by Telefónica Gestión Integral de Edificios y Servicios, SL, and Banco Santander, SA, respectively, against the decision by which the European Commission classified as State aid a number of tax measures making up the 'Spanish tax lease system' ('the STL system') applicable to certain finance lease agreements for the acquisition of ships. [50] In so doing, it considers whether the subject matter of the dispute has disappeared following the partial annulment of the contested decision by the judgment of the Court of Justice in Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P). [51] The General Court also ruled on the novel question of whether the Commission had exceeded its powers in the field of State aid by disregarding, in the contested decision, indemnification clauses contained in contracts concluded between private parties, which protected the recipients against the recovery of unlawful State aid incompatible with the internal market. [52]

In the present case, the Commission had received several complaints about the application of the STL system to certain finance lease agreements, in so far as that system allowed shipping companies to benefit from a price reduction of 20% to 30% for the purchase of ships built by Spanish shipyards. According to the Commission, the purpose of the STL system was to provide tax advantages to economic interest groupings ('EIGs') and the investors participating in them, which then transferred part of those advantages to the shipping companies that had purchased a new vessel.

In the contested decision, adopted in July 2013, the Commission found that three of the five tax incentives making up the STL system constituted State aid, within the meaning of Article 107(1) TFEU, taking the form of a selective tax advantage that was partially incompatible with the internal market. Since the aid in question had been implemented since 1 January 2002 in breach of the notification obligation, [53] the Commission ordered the national authorities to recover it from the investors, namely the members of the EIGs ('the recovery order').

A number of actions for annulment have been brought against the contested decision. The actions brought by Telefónica Gestión Integral de Edificios y Servicios and Banco Santander were suspended pending the final resolution of the actions brought by the Kingdom of Spain, Lico Leasing, SA, and Pequeños y Medianos Astilleros Sociedad de Reconversión, SA ('PYMAR'). In its judgment in Spain and Others v Commission, [54] the General Court annulled the contested decision. Following an appeal by the Commission against that judgment, the Court of Justice set it aside in its judgment in Commission v Spain and Others (C-128/16 P), [55] and referred the cases back to the General Court.

In its judgment after the referral in Spain and Others v Commission, [56] the General Court dismissed the actions brought by the Kingdom of Spain, Lico Leasing and PYMAR. In that judgment, the General Court dismissed the plea challenging the selectivity of the STL system, holding, in essence, that the existence of a wide discretionary power on the part of the tax authorities to authorise early depreciation was sufficient to accept the selectivity of the STL system as a whole. It also rejected, in particular, the pleas alleging breach of the principles applicable to recovery of the aid, namely the principle of the protection of legitimate expectations and the principle of legal certainty. On the latter point, in particular, it held that the Commission had not erred in law by ordering the recovery of all of

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

51 Judgment of 2 February 2023, Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

52 Under indemnification clauses in contracts concluded between private parties, investors could claim from the shipyards the amounts which they had to repay to the State.

53 Obligation under Article 108(3) TFEU.

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

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

56 Judgment of 23 September 2020, Spain and Others v Commission (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434).

the aid in question from the EIG investors alone, even though a part of the tax advantage obtained had been transferred to third parties, namely the shipping companies.

Ruling on separate appeals against that judgment, the Court of Justice, in its judgment in Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P), [57] upheld the Kingdom of Spain's plea that the judgment under appeal failed to state adequate reasons as regards recovery of the aid in question and dismissed the remainder of the appeals. Having thus set aside that judgment in part and considering that it was itself in a position to give final judgment on the part of the appeals still to be considered, the Court held, at the end of its examination, that the contested decision should be annulled in so far as it designated the EIGs and their investors as the sole recipients of the aid in question and in so far as it ordered the recovery of the entire amount of the aid in question solely from the EIG investors.

Findings of the Court

Considering first whether, following the judgment of the Court of Justice in Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P), which annulled in part the contested decision, the actions brought by the applicants have become devoid of purpose, the General Court points out that the subject matter of the dispute must continue to exist until the judicial decision is delivered, failing which there is no need to adjudicate, which presupposes that the action is likely to be of benefit to the party which brought it.

Thus, in the context of an action brought pursuant to Article 263 TFEU, the annulment of the contested measure in the course of proceedings renders the action devoid of purpose as regards the claims seeking annulment of that decision. By annulling that act, the applicant obtains the only result that its action can bring and there is therefore no longer any matter for decision by the Courts of the European Union. The same applies where the partial annulment of the contested measure has given the applicant the result which it sought by one part of its action, so that there is no longer any need to rule on that part.

In the present case, the General Court finds that the actions brought by the applicants have become devoid of purpose in so far as they seek to challenge the identification of the EIGs and their investors as the sole beneficiaries of the STL system and of those investors as the sole undertakings covered by the recovery order, as well as the statement of reasons given in the contested decision in that regard, and the method described in the contested decision for calculating the amount to be repaid by the EIG investors.

First, the judgment of the Court of Justice in Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P) has already annulled the contested decision in so far as it designates the EIGs and their investors as the sole beneficiaries of the STL system and orders the recovery of the full amount of the aid in question from those investors. Furthermore, the applicants have not shown that their argument challenging the exclusion of the shipyards from the beneficiaries of the STL system and from the undertakings covered by the recovery order, even if well founded, was capable of conferring on them a benefit going beyond that which they derive from the judgment of the Court.

Secondly, the method described in that decision for calculating the amount to be repaid by the investors, based on the now erroneous premiss that the entire advantage must be recovered from EIG investors alone, has become obsolete as a result of that judgment.

That being so, it is still necessary to rule on the heads of claim of the applicants seeking annulment of those parts of the contested decision which were not annulled by the Court in Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P). That decision remains valid in that it declares unlawful and incompatible with the internal market aid which benefits at least the EIGs and their investors, and requires the Kingdom of Spain to recover that aid, or part of it, from the latter.

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57 Judgment of 2 February 2023, Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

Furthermore, the fact that, for the purposes of calculating the amounts to be recovered, the method described in the contested decision must be amended in the light of that judgment does not alter the fact that the obligation to recover remains in force as such.

In that regard, in the first place, the General Court rejects the plea alleging that the tax measures constituting the STL system, taken individually, were wrongly classified as new aid.

Accordingly, the applicants' arguments challenging the classification of those tax measures as new aid, their selective nature and the existence of an advantage are based on the erroneous premiss that those measures should be assessed separately, in the light of Article 107 TFEU, and not in the light of the STL system as a whole.

Those tax measures are linked in law, in essence, because early depreciation was subject to authorisation by the tax authorities, and in fact, because the administrative authorisation for early depreciation was granted only in the context of hire-purchase contracts for ships eligible for the tonnage tax regime. Thus, it was because of that link that the General Court held, in its judgment in Spain and Others v Commission (T-515/13 RENV and T-719/13 RENV), that, since one of the measures making it possible to benefit from the STL system as a whole was selective, namely the authorisation of early depreciation, the Commission had rightly considered, in the contested decision, that the system was selective as a whole. In the judgment in Spain and Others v Commission (C-649/20 P, C-658/20 P and C-662/20 P), the Court of Justice confirmed that conclusion and, implicitly, the need to assess the STL system as a whole as an aid scheme.

In the second place, the General Court rejects the plea that the Commission exceeded its powers in relation to State aid by prohibiting indemnification clauses in contracts concluded between private parties which protect the recipients against the recovery of unlawful and incompatible State aid.

In that regard, the Court notes that the clarification made in Article 4(1) of the operative part of the contested decision, according to which the Kingdom of Spain must recover the aid from the recipients 'without the possibility for [the latter] to transfer the burden of recovery to other persons', is drafted in broad terms and is not expressly limited to the indemnification clauses. Furthermore, those clauses do not specifically refer to the eventuality of recovery of unlawful State aid incompatible with the internal market, but, more generally, to the consequences of the possibility that the competent authorities do not approve the tax benefits deriving from the STL system, or that, following their approval, their validity is called into question.

That said, in certain recitals of the contested decision, the Commission identifies, in more specific terms, specific aspects of the indemnification clauses which, in its view, are problematic in the specific context of the recovery of unlawful aid incompatible with the internal market. It therefore states that the objective of recovery, which is to restore the previous situation and in particular to eliminate the distortion of competition caused by the competitive advantage conferred by the unlawful aid incompatible with the internal market, would be irreparably compromised if private-sector operators were able, through contractual clauses, to alter the effects of recovery decisions adopted by the Commission. It follows that the clarification made in Article 4(1) of the operative part of the contested decision must be understood as referring only to indemnification clauses in so far as they may be interpreted as protecting the recipients of unlawful and incompatible with the internal market against its recovery.

Furthermore, the Commission did not provide that such indemnification clauses would be null and void, such a power being reserved, where appropriate, to the national courts. The Commission's clarification in the contested decision is merely intended to clarify the scope of the Kingdom of Spain's obligation to recover the aid from the recipients so that the situation prior to payment of that aid is restored.

It follows that the Commission did not exceed the powers vested in it in relation to State aid. [58] While it is true that recovery is effected in accordance with the procedures laid down by the national law of the Member State concerned, [59] the fact remains that those procedures must permit the immediate and effective execution of the Commission's decision. Accordingly, there is nothing to prevent the Commission from stating, in the contested decision, that the Kingdom of Spain must ensure that the recipients repay the amounts of aid which they have actually received, without being able to transfer the burden of recovering those amounts to another party to the contract. That is all the more the case given that those indemnification clauses were provided for in the framework contracts concluded between the various participants in the STL system, and that those contracts were taken into account by the tax authorities in authorising early depreciation.

Judgment of the Court of Justice (Fourth Chamber), 22 February 2024, Mytilinaios v DEI and Commission & Commission v DEI, C-701/21 P and C-739/21 P

Link to the full text of the judgment

Appeal – State aid – Article 107 TFEU – Concept of 'aid' – Advantage – Private investor test – Arbitration award setting reduced electricity tariffs – Whether the arbitration award can be imputed to the State – Regulation (EU) 2015/1589 – Article 4(2) – Decision that the measure does not constitute aid

The Court of Justice upholds the appeals brought against the judgment of the General Court [60] annulling a number of Commission measures whereby it concluded that an arbitration award setting the electricity supply tariff applicable to the Greek aluminium producer Mytilinaios AE – Omilos Epicheiriseon ('Mytilinaios') did not involve the grant of State aid. According to the Court of Justice, the General Court erred in law in classifying that arbitration award as a State measure capable of constituting State aid.

Dimosia Epicheirisi Ilektrismou AE (DEI), an electricity producer and supplier controlled by the Greek State, and Mytilinaios, which is its main customer, are involved in a long-running dispute concerning the electricity supply tariff which DEI charges to Mytilinaios, since those parties have been unable to agree on the amount of that tariff. Under an arbitration agreement signed on 16 November 2011, the two parties agreed to entrust the resolution of their dispute to the Rythmistiki Archi Energeias (Greek Energy Regulator, Greece; 'the RAE') by which a permanent arbitration body is established under Greek law ('the arbitration tribunal of the RAE'). The arbitration tribunal of the RAE was entrusted with the task of determining, on the basis of negotiations which took place between DEI and Mytilinaios, the electricity supply tariff corresponding to the specific characteristics of Mytilinaios and covering at least the costs borne by DEI.

By decision of 31 October 2013 ('the arbitration award'), the arbitration tribunal of the RAE set the energy tariff applicable to Mytilinaios. The action brought by DEI against that arbitration award was dismissed by the Efeteio Athinon (Court of Appeal, Athens, Greece).

On 23 December 2013, DEI lodged a complaint with the European Commission, maintaining that the arbitration award constituted unlawful State aid, in so far as the tariff in question obliged DEI to

58 See Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

59 Article 14(3) of Regulation (EU) No 659/1999.

60 Judgment of 22 September 2021, DEI v Commission (T-639/14 RENV, T-352/15 and T-740/17, EU:T:2021:604).

supply Mytilinaios with electricity at a price below its costs. By letter of 12 June 2014 ('the letter at issue'), the Commission informed DEI that no further action would be taken on its complaint.

Following that letter, DEI brought an action before the General Court, registered as Case T-639/14, seeking the annulment of the letter at issue.

During those proceedings, the Commission, by decision of 25 March 2015 ('the first decision at issue'), [61] withdrew and replaced the letter at issue. In that decision, it found that the arbitration award did not constitute aid granted to Mytilinaios, since DEI's voluntary referral of their dispute to arbitration was consistent with the conduct of a prudent investor operating in a market economy and, therefore, did not grant an advantage to Mytilinaios.

DEI subsequently brought an action before the General Court, registered as Case T-352/15, seeking the annulment of the first decision at issue.

By order of 6 February 2016, the General Court found that there was no longer any need to adjudicate on the action in Case T-639/14. Hearing the appeal, the Court of Justice [62] however set aside that order and referred the case back to the General Court where it was registered as Case T-639/14 RENV.

On 14 August 2017, the Commission adopted a second decision ('the second decision at issue'), [63] repealing and replacing both the letter at issue and the first decision at issue. Relying on identical reasoning to that set out in the first decision at issue, the second decision at issue confirms that the arbitration award does not involve the grant of State aid within the meaning of Article 107(1) TFEU.

DEI once more brought an action before the General Court for the annulment of the second decision at issue, registered as Case T-740/17.

After joining the three pending cases, the Third Chamber, Extended Composition, of the General Court upheld the three actions brought by DEI and annulled both the letter at issue and the first and second decisions at issue.

In its judgment, the General Court found that the Commission ought to have initiated the formal investigation procedure under Article 108(2) TFEU in order to assess the content of the arbitration award from the perspective of the possible grant of State aid, since the arbitration tribunal of the RAE could be treated in the same way as an ordinary State court, and that it follows from the case-law that an advantage granted by such a court to a party to the proceedings is capable of being regarded as the grant of State aid.

Mytilinaios and the Commission brought appeals against that judgment before the Court of Justice.

Findings of the Court

In support of their appeals, Mytilinaios and the Commission argue, inter alia, that the General Court erred in law in finding that the arbitration tribunal of the RAE could be treated in the same way as an ordinary State court, which has the effect of the arbitration award being established as a State measure capable of constituting State aid.

In that respect, the Court of Justice observes, in the first place, that the criteria adopted by the General Court in order to treat the arbitration tribunal of the RAE as similar to an ordinary State court do not make it possible to distinguish the arbitration tribunal of the RAE from any other arbitration tribunal appointed by contract. In that regard, the Court of Justice notes that the only criterion, relied on by the General Court, capable of distinguishing the arbitration tribunal of the RAE from other

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61 Commission Decision C(2015) 1942 final of 25 March 2015 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid granted to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision) (OJ 2015 C 219, p. 2).

62 Judgment of 31 May 2017, DEI v Commission (C-228/16 P, EU:C:2017:409).

63 Commission Decision C(2017) 5622 final of 14 August 2017 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid granted to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision) (OJ 2017 C 291, p. 2).

arbitration tribunals appointed by contract is the fact that its arbitrators, selected from a list drawn up by decision of the President of the RAE, must demonstrate their independence and their impartiality before their appointment. However, that fact cannot, in itself, make it possible to find that that arbitration tribunal is to be distinguished from any other arbitration tribunal appointed by contract, since it constitutes merely a purely procedural element which does not affect the function or the nature of that tribunal.

The Court of Justice considers, in the second place, that the General Court erred in law in failing to ascertain whether the arbitration tribunal of the RAE had, as is the case, generally, for courts which form part of the State judicial system, mandatory jurisdiction which therefore did not depend solely on the will of the parties.

In the light of the foregoing, the Court of Justice holds that the General Court erred in law in finding that the arbitration tribunal of the RAE could be treated in the same way as an ordinary court and that the arbitration award was a State measure capable of constituting State aid.

That assessment cannot be called into question by the fact that, in the judgment in Commission v European Food and Others, [64] the Court of Justice confirmed that the Commission was competent to review whether compensation paid to Swedish investors by Romania pursuant to an arbitration award constituted State aid or not.

In that respect, the Court states, first, that the arbitration tribunal which made the arbitration award in question in the judgment in Commission v European Food and Others had been established on the basis of a bilateral investment treaty concluded between the Swedish Government and Romania. As follows from settled case-law, the consent of a Member State to the possibility of litigation being brought against it in the context of the arbitration procedure provided for by a bilateral investment treaty, unlike that which would have been given in contractual arbitration proceedings, does not have its origin in a specific agreement reflecting the freely expressed wishes of the parties concerned, but is derived from a treaty concluded between two States in which they have, generally and in advance, agreed to exclude from the jurisdiction of their own courts disputes which may concern the interpretation or application of EU law in favour of arbitration proceedings. Second, in the judgment in Commission v European Food and Others, the Court did not give a ruling on whether the arbitration award in question in that case constituted State aid within the meaning of Article 107(1) TFEU.

Furthermore, the fact that, in the present case, DEI's action seeking the annulment of the arbitration award was dismissed by the Court of Appeal, Athens, does not mean that that award may, on that ground alone, be attributable to the Greek State. The judicial review carried out by that court does not relate to the lawfulness of the arbitration award, which remains a measure attributable only to the arbitration body which adopted it. In addition, the establishment as such of State aid cannot result from a judicial decision, since such an establishment of State aid entails a decision as to the appropriate course of action which falls outside the scope of a court's powers and obligations.

In the light of the foregoing, the Court concludes that, in view, inter alia, of the particularities of the dispute between DEI and Mytilinaios and the specific feature of the task entrusted to the arbitration tribunal of the RAE, the Commission was legitimately entitled to find, first, that the only State measure capable of constituting State aid was DEI's decision to conclude the arbitration agreement with Mytilinaios and, second, that, in order to know whether that decision had conferred an advantage on Mytilinaios, it had been necessary to ascertain whether a private operator, under normal market conditions, would have taken that decision under the same conditions.

64 Judgment of 25 January 2022, Commission v European Food and Others (C-638/19 P, EU:C:2022:50).

In those circumstances, the Court sets aside the judgment of the General Court and refers the three cases back to the General Court for it to adjudicate on the pleas in law on which the Court of Justice has not given a ruling.

Judgment of the General Court (Fifth Chamber, Extended Composition), 28 February 2024, Denmark v Commission, T-364/20

State aid – Public financing of the Fehmarn Belt fixed rail-road link – Aid granted by Denmark to Femern – Decision declaring the aid compatible with the internal market – Action for annulment – Whether separable – Admissibility – Concept of 'undertaking' – Concept of 'economic activity' – Activities involving the construction and operation of a fixed rail-road link – Effect on trade between Member States and distortion of competition

The General Court dismisses the action for partial annulment brought by the Kingdom of Denmark against the decision of the European Commission of 20 March 2020 [65] by which the Commission found that the support measures granted by Denmark to the public undertaking Femern A/S for the planning, construction and operation of a Fehmarn Belt fixed rail-road link between Denmark and Germany constitute State aid that is compatible with the internal market. In doing so, the Court clarifies aspects relating to the concept of 'activity of an economic nature' that is subject to EU competition law.

In 2008, Denmark and Germany signed a treaty regarding a Fehmarn Belt fixed link project consisting of, on the one hand, a railway and road tunnel under the Baltic Sea between Denmark and Germany ('the Fixed Link') and, on the other, road and rail hinterland connections in Denmark.

The Danish public undertaking Femern was entrusted with the financing, construction and operation of the Fixed Link. Having received capital injections, loans guaranteed by the State and loans granted by Denmark, Femern will receive fees from users as from when the Fixed Link is put into service, in order to repay its debt.

At the end of 2014, the Danish authorities notified the Commission of the financing model for the Fehmarn Belt Fixed Link project. Without initiating the formal investigation procedure, the Commission decided not to raise any objections to the notified measures. [66]

By judgments of 13 December 2018, [67] the Court partially annulled that decision. As regards the public financing granted to Femern, the Court held that the Commission had failed to fulfil its obligation under Article 108(3) TFEU to initiate the formal investigation procedure due to the existence of serious difficulties.

Having initiated the formal investigation procedure following those judgments, the Commission found, by its decision of 20 March 2020, that the measures consisting of capital injections and a combination of State loans and State guarantees granted to Femern for the planning, construction

65 Decision C(2020) 1683 final of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S (OJ 2020 L 339, p. 1).

66 Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt Fixed Link project (OJ 2015 C 325, p. 5).

67 Judgments of 13 December 2018, Scandlines Danmark and Scandlines Deutschland v Commission (T-630/15, not published, EU:T:2018:942), and of 13 December 2018, Stena Line Scandinavia v Commission (T-631/15, not published, EU:T:2018:944).

and operation of the Fixed Link constituted State aid that was compatible with the internal market on the basis of Article 107(3)(b) TFEU. [68]

Denmark brought an action before the Court, seeking annulment of that decision in so far as it classifies the public financing granted to Femern as State aid within the meaning of Article 107(1) TFEU.

Findings of the Court

In the first place, the Court rejects Denmark's argument that the Commission erred in law in subjecting Femern's activities to EU competition rules when its activities are connected with the exercise of public powers.

According to the case-law, public power activities or activities connected with the exercise of public powers are not economic in nature and do not justify the application of the competition rules laid down in the FEU Treaty.

In that regard, the Court begins by stating that the Commission did not err in law in considering, in the contested decision, that an entity exercises public powers when its activity is connected with the essential functions of the State by its nature, its aim and the rules to which it is subject.

Having made that clear, the Court observes that the information submitted to the Commission by the Danish authorities during the formal investigation procedure did not constitute factors which, taken individually or together, might lead to a finding that the construction and operation of the Fixed Link by Femern were connected with the exercise of public powers.

More particularly, the fact that Femern is placed under the close supervision of the public authorities and is required to comply with certain public law obligations applicable to public administrations is not sufficient to find that its activities are connected with the exercise of public powers. Furthermore, although the purpose of Femern's activities is to implement an international agreement, the fact nonetheless remains that the Fehmarn Belt Treaty contains no provision to support the finding that, as such, the activities involving the construction and operation of the Fixed Link are connected with the exercise of such powers. In addition, the fact that a sector of activity has not been liberalised does not constitute conclusive evidence that, as a matter of principle, an activity is connected with the exercise of public powers.

Nor can the Commission be criticised for not having examined in detail whether the functions delegated to Femern as road authority and rail infrastructure manager and also for preparing the safety plans of the Fixed Link are connected with the exercise of public powers, since Denmark had not explicitly relied on that argument during the formal investigation procedure.

The Court rejects, in the second place, the various complaints alleging that the Commission made an error of assessment in finding that the operation of the Fixed Link constitutes an economic activity that is subject to EU competition law.

In accordance with settled case-law, for the purposes of the application of the provisions of EU competition law, any entity engaged in an economic activity consisting in offering goods or services on a given market is an undertaking. In order to determine whether an entity is engaged in an economic activity, the Commission must therefore establish that the entity offers goods or services on a market in competition with operators seeking to make a profit.

In the light of that case-law, the Court rejects, first of all, Denmark's criticisms of the finding in the contested decision that the services that will be offered by Femern after the Fixed Link is put into service will be in direct competition with those offered by the private ferry operator which already operates, with the aim of making a profit, in the Fehmarn Belt. Although Femern and that private ferry

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68 Under that provision, aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.

operator offer services the characteristics of which differ in certain respects, they operate on the same market, namely the market for transport services for crossing the Fehmarn Belt, on which consumers will have the choice between the services offered by the ferry operator and those offered by Femern in the context of the operation of the Fixed Link. Furthermore, the Commission had also identified a market for transport services on other links which constitute an alternative for crossing the Fehmarn Belt.

Next, the Court observes that the Commission did not make an error of assessment in finding that the fact that users of the Fixed Link are required to pay is a relevant factor for the classification of the operation of that link as an economic activity. Where a Member State decides, as in this instance, to make access to an infrastructure conditional upon payment of a fee in order to generate revenues allocated, inter alia, to the repayment of the debt incurred in financing the planning and construction of that infrastructure, it must be considered that that infrastructure is the subject of an economic operation.

Lastly, the Court approves the Commission's finding that the activity involving the construction of the Fixed Link is economic in nature on the ground that it is inseparably linked with the economic operation of that infrastructure.

In that regard, the Court observes that the commercial operation and the construction of transport infrastructures with a view to such commercial operation are capable of constituting economic activities. In that context, it has been held, [69] inter alia, that the Commission could properly conclude that it was not possible to separate the activity involving the operation of a commercial airport and the activity involving the construction of a new runway at that airport, since the airport fees are the major source of revenue for financing the new runway and the operation of that runway will form part of the economic activity of the airport. The principles established in those judgments cannot be limited solely to a situation involving the extension of a pre-existing transport infrastructure that is the subject of economic operation, but may also apply to the construction of a new infrastructure intended to be the subject of future economic operation, such as the infrastructure at issue in the present case.

As regards Denmark's argument that, in essence, Femern would not be present on any market during the construction stage, the Court points out that the revenue from the operation of the Fixed Link will be used by Femern, inter alia, to repay the loans which it has taken out for the planning and construction of the Fixed Link. If the construction activity were considered to be separable from the operation of the Fixed Link and therefore non-economic, the preferential financing obtained for the construction of the Fixed Link could not be classified as State aid. It would follow that, at the stage of the operation of the Fixed Link, Femern would have the advantage of being able to operate a subsidised infrastructure, which would secure for it an economic advantage which it would not have obtained on normal market conditions. Thus, the Court concludes that the effectiveness of the State aid rules also precludes the activities involving the construction and operation of the Fixed Link from being separated on the ground that the Fixed Link will be put into service only when its construction has been completed.

Moreover, the fact that Danish law attributes the construction and operation of the Fixed Link solely to Femern also does not preclude those activities from being classified as economic activities, since the operation of the Fixed Link will consist in offering transport services on a market which is liberalised and open to competition. Were that not the case, it would be sufficient for a Member State to grant exclusive rights to an entity called upon to offer services on a liberalised market in order to circumvent the application of the competition rules.

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69 Judgments of 19 December 2012, Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission (C-288/11 P, EU:C:2012:821), and of 24 March 2011, Freistaat Sachsen and Land Sachsen-Anhalt v Commission (T-443/08 and T-455/08, EU:T:2011:117).

Having regard to all of those considerations, the Court dismisses the action for partial annulment of the contested decision.

Judgment of the General Court (First Chamber, Extended Composition), 28 February 2024, Scandlines Danmark and Scandlines Deutschland v Commission, T-390/20

Link to the judgment as published in extract form

State aid – Public financing of the Fehmarn Belt fixed rail-road link – Aid granted by Denmark to Femern – Decision declaring the aid compatible with the internal market – Individual aid – Important project of common European interest – Necessity of the aid – Proportionality – Weighing the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition – Communication on the criteria for the analysis of the compatibility with the internal market of State aid to promote the implementation of important projects of common European interest

The General Court dismisses the action for annulment brought by the shipping companies Scandlines Danmark ApS and Scandlines Deutschland GmbH against the Commission Decision of 20 March 2020 [70] by which the European Commission found that the support measures granted by Denmark to the public undertaking Femern A/S for the planning, construction and operation of a Fehmarn Belt fixed rail-road link between Denmark and Germany constitute State aid that is compatible with the internal market. In that context, the Court provides clarification as to the Commission's procedures for monitoring aid measures that are paid in several tranches. The Court is also called upon to review the Commission's application of certain paragraphs of its communication on the execution of important projects of common European interest [71] ('the IPCEI Communication').

In 2008, Denmark and Germany signed a treaty regarding a Fehmarn Belt fixed link project consisting of, on the one hand, a railway and road tunnel under the Baltic Sea between Denmark and Germany ('the Fixed Link') and, on the other, road and rail hinterland connections in Denmark.

The Danish public undertaking Femern was entrusted with the financing, construction and operation of the Fixed Link. Having received capital injections, loans guaranteed by the State and loans granted by Denmark, Femern will receive fees from users as from when the Fixed Link is put into service, in order to repay its debt.

At the end of 2014, the Danish authorities notified the Commission of the financing model for the Fehmarn Belt Fixed Link project. Without initiating the formal investigation procedure, the Commission decided not to raise any objections to the notified measures. [72]

By judgments of 13 December 2018, [73] the Court partially annulled that decision. As regards the public financing granted to Femern, the Court held that the Commission had failed to fulfil its obligation

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70 Decision C(2020) 1683 final of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S (OJ 2020 L 339, p. 1).

71 Communication of 20 June 2014 on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ 2014 C 188, p. 4).

72 Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt Fixed Link project (OJ 2015 C 325, p. 5).

73 Judgments of 13 December 2018, Scandlines Danmark and Scandlines Deutschland v Commission (T-630/15, not published, EU:T:2018:942), and of 13 December 2018, Stena Line Scandinavia v Commission (T-631/15, not published, EU:T:2018:944).

under Article 108(3) TFEU to initiate the formal investigation procedure due to the existence of serious difficulties.

Having initiated the formal investigation procedure following those judgments, the Commission found, by its decision of 20 March 2020, that the measures consisting of capital injections and a combination of State loans and State guarantees granted to Femern for the planning, construction and operation of the Fixed Link constituted State aid that was compatible with the internal market on the basis of Article 107(3)(b) TFEU, [74] in that those measures were intended to promote the execution of an important project of common European interest in observance of the principle of proportionality.

The shipping companies Scandlines Danmark and Scandlines Deutschland brought an action before the Court for annulment of that decision.

Findings of the Court

In the light of the fact that the State guarantees and State loans in favour of Femern had been granted by way of successive tranches paid according to the progress of the Fixed Link project, the applicants complained that the Commission had erred in finding, in the contested decision, that the various financial support measures could be grouped into three individual aid measures, namely a first aid in the form of a capital injection in 2005, a second aid in the form of capital injection, State guarantees and State loans granted under a law adopted in 2009, [75] and a third aid in the form of State loans and State guarantees granted under a law adopted in 2015. [76]

On that point, the Court states that several consecutive measures of State intervention may be regarded as a single intervention where those measures, having regard in particular to their chronology, their purpose and the undertaking's situation at the time of those interventions, are so closely linked to each other that they are inseparable from one another. Since that condition was satisfied in respect of all the financing granted under the law adopted in 2009 and as regards the financing granted under the law adopted in 2015, the Commission did not err in classifying them as individual aids. It follows that the Commission was also not obliged to require the Danish authorities to notify it separately of each State loan and each State guarantee granted to Femern under those laws.

Moreover, since the three individual aids granted to Femern in 2005, 2009 and 2015 were to finance one and the same project, the Commission did not exceed the limits of its discretion by jointly examining their compatibility with the internal market. It is precisely by taking account of all those aids that the Commission is in a position to assess their effect on competition in the context of the examination of one of the derogations provided for in Article 107(3) TFEU, in particular for an important project of common European interest, the implementation of which involves the payment of public financing over a long period.

The Court also rejects the plea for annulment alleging infringement of Article 107(3)(b) TFEU, resulting from the fact that the Commission allegedly incorrectly classified the project at issue as a project of common European interest and wrongly concluded that the aid was necessary and proportionate.

First, as regards the classification of the Fixed Link project as a project of common European interest within the meaning of Article 107(3)(b) TFEU, the Court states that the concept of 'common European interest' laid down in that provision must be interpreted strictly and that an initiative is classified as a project of common European interest only where it forms part of a transnational European

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74 Under that provision, aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.

75 Law No 285 on the planning of the Fehmarn Belt Fixed Link and Danish hinterland connections of 15 April 2009.

76 Law No 575 on the construction and operation of the Fehmarn Belt Fixed Link and Danish hinterland connections of 4 May 2015.

programme jointly supported by various Member State governments or where it is part of concerted action by various Member States in order to combat a common threat.

The concept of 'common European interest' was also clarified by the Commission in the IPCEI Communication, which sets out the general cumulative criteria to be satisfied in order for a project to fall within that concept, as well as positive indicators justifying a more favourable approach by the Commission for the purposes of classification as a project of common European interest, including that of co-financing of the project by way of an EU fund.

Since the Fixed Link project met the general cumulative criteria set out in the IPCEI Communication and that project had, moreover, received EU financing, the Commission was entitled to conclude, on the basis of only those criteria and indicators, that the Fixed Link project was of common European interest.

Second, as regards the necessity of the aid, the Court states that, in the context of Article 107(3)(b) TFEU, aid to promote the execution of an important project of common European interest must, in order to be compatible with the internal market, have an incentive effect on the recipient undertakings. To that end, it must be demonstrated that, in the absence of the planned aid, the investment intended to implement the project at issue would not take place. In that regard, the Court states that a finding that an aid measure is not necessary can arise in particular from the fact that the aided project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities, which means that the aid concerned cannot operate as an incentive (criterion that the application for aid must be submitted prior to the start of the works).

On the latter point, the Court endorses the Commission's line of argument that, in the present case, the criterion that the application for aid must be submitted prior the start of the works was satisfied because the application for aid was inherent in the establishment of Femern. In that regard, the Court states that, as a specific-purpose company set up by the public authorities to carry out the Fixed Link project, Femern is dependent on public financing until the Fixed Link is brought into operation. Moreover, since the Commission could jointly examine the compatibility with the internal market of all the financing granted to Femern since it was established, the criterion that the application for aid must be submitted prior to the start of the works did not have to be verified for each of the three individual aids.

Nor did the Commission err in finding that the counterfactual scenario taken into account, in accordance with the IPCEI Communication, for the purposes of assessing the necessity of the notified aid, consisted in the absence of an alternative project. More specifically, the applicants and the interveners have not demonstrated that there was an alternative project that was feasible without aid and that was of a comparable size or scope or that would provide benefits equivalent to those expected from the Fixed Link project.

The Court also rejects the complaint that the Commission made manifest errors of assessment in relying on a lifetime of 40 years in order to calculate both the internal rate of return of the Fixed Link project (necessity of the aid) and the calculation of the funding gap (proportionality of the aid), whereas the Fixed Link project has a lifetime of 120 years.

In that regard, the Court states, on the one hand, that, in accordance with paragraph 30 of the IPCEI Communication, in the absence of an alternative project, the Commission must verify that the amount of aid does not exceed the minimum necessary for the aided project to be sufficiently profitable, and that all the expected costs and benefits concerned must be considered over the lifetime of the project. Since that reference to the lifetime must be understood as referring to the economic lifetime of the investment project and not of the infrastructure from a technical perspective, the Commission did not err in referring to the conduct of investors on the relevant market in order to calculate the internal rate of return on the basis of an economic lifetime of the investment of 40 years.

On the other hand, in accordance with paragraph 31 of the IPCEI Communication, the maximum amount of aid is determined by reference to the funding gap, which corresponds to the difference between the positive and negative cash flows over the lifetime of the investment. Since the aim of the funding gap analysis is to determine the extent to which the project could be financed under market conditions, the Commission cannot be criticised for having taken into account, in order to carry out

that analysis, the period which a reasonable investor in that project would have taken into account, estimated at 40 years.

Third, as regards the proportionality of the aid, the Court notes, first of all, that the applicants cannot complain that the Commission disregarded the requirement that aid in the form of a guarantee or loan be limited in time, as set out in the IPCEI Communication, since the contested decision states that (i) at the latest 16 years after the opening of the Fixed Link, all loans with a guarantee must have been terminated and all State loans must have been repaid and (ii) the Danish authorities are not authorised to grant Femern such loans and guarantees for an amount that exceeds the maximum guaranteed amount of 69.3 billion Danish kroner (approximately EUR 9.3 billion).

Next, the Commission did not underestimate Femern's revenues in order to increase the funding gap artificially. On the one hand, the IPCEI Communication does not require that the revenues cover the entire costs of the project. On the other hand, the applicants and the interveners have not adduced evidence that a price structure for road traffic differing from that adopted by the Commission would automatically lead to an increase in revenues because of the elasticity of demand and competition on the market.

Lastly, the Commission did not disregard the IPCEI Communication by including operating costs of the Fixed Link in the eligible costs for the calculation of the funding gap. The inclusion of those costs in the negative cash flows of the Fixed Link project does not result in operating aid being granted, since the operating revenues of that fixed link, which should also be taken into account under positive cash flows, largely exceed the operating costs. Moreover, no evidence has been adduced that could call into question the Commission's explanations in support of the inclusion of those costs in the funding gap analysis.

In the light of all those considerations, the Court dismisses the action for annulment of the contested decision.

VIII. APPROXIMATION OF LAWS

1. EUROPEAN UNION TRADEMARK

Order of the General Court (Seventh Chamber, Extended Composition), 8 February 2024, Fly Persia and Barmodeh v EUIPO – Dubai Aviation (flyPersia), T-30/23

Link to the full text of the order

EU trade mark – Opposition proceedings – Intervention – Article 173(1) and Article 179 of the Rules of Procedure – Response lodged out of time – Articles 142 to 145 of the Rules of Procedure – Inapplicability – Rejection

The General Court, ruling in the extended five-judge composition, has not granted Dubai Aviation Corp. – a party to the proceedings before the Board of Appeal of the European Union Intellectual Property Office (EUIPO) – leave to participate as intervener in the proceedings before the Court, after it had exceeded the time limit for lodging its response in accordance with Articles 173 and 179 of the Rules of Procedure of the General Court. Those provisions lay down specific rules in intellectual

property matters concerning the intervention before the Court of a party to the proceedings before the Board of Appeal other than the applicant. [77] According to the order, the general provisions on intervention, namely Articles 142 to 145 of those rules, do not apply to such a party where it has lost the opportunity of becoming a party to the proceedings before the Court in accordance with Article 173 of those rules.

In the present case, the applicants, Fly Persia IKE and Mr Ali Barmodeh, applied to EUIPO for registration of an EU trade mark. Dubai Aviation Corp. filed a notice of opposition to that registration. The Opposition Division of EUIPO upheld the opposition in part. The appeal against that decision was dismissed by the Board of Appeal of EUIPO ('the contested decision').

By application lodged at the Court Registry, the applicants brought an action seeking the annulment of the contested decision. On 13 February 2023, the application was served on Dubai Aviation Corp. as a party before the Board of Appeal. On 26 April 2023, that company lodged a document entitled 'Response' at the Registry, thereby exceeding the time limit prescribed under Article 179 of the Rules of Procedure. [78]

Findings of the Court

In the first place, the Court points out that the status before the General Court of a party to the proceedings before the Board of Appeal other than the applicant before the General Court is governed by Article 173 of the Rules of Procedure. When such a party to the proceedings before the Board of Appeal failed to submit a response to the application within the time limit prescribed in that regard by Article 179 of the Rules of Procedure, it does not have the status of party before the Court. Beyond that time limit, that party cannot therefore submit observations in the course of the proceedings before the Court.

In the present case, Dubai Aviation Corp. did not lodge any procedural documents before the expiry of the time limit for the lodging of the response and lodged its response outside that time limit. In addition, it did not plead the existence of exceptional circumstances constituting unforeseeable circumstances or force majeure. Accordingly, Dubai Aviation Corp. did not become a party to the proceedings before the Court as an intervener in accordance with Article 173(1) and (2) of the Rules of Procedure.

In the second place, the Court examines whether Dubai Aviation Corp. is to be granted leave to intervene on the basis of Articles 142 to 145 of the Rules of Procedure, which lay down the general rules governing the submission and the examination of applications to intervene before the Court. This would allow Dubai Aviation Corp. to rely on a general time limit. [79]

However, the Court observes that those provisions, which form part of Title III of those rules relating to direct actions, apply to the proceedings referred to in Title IV concerning litigation relating to intellectual property rights, subject to the special provisions of that Title IV. Since Title IV, in Articles 173 and 179 of the Rules of Procedure, lays down specific rules concerning the intervention before the Court of a party to the proceedings before the Board of Appeal other than the applicant, Articles 142 to 145 of those rules do not apply to that party.

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77 Pursuant to Article 173(1) and (2) of the Rules of Procedure, 'a party to the proceedings before the Board of Appeal other than the applicant may participate, as intervener, in the proceedings before the General Court by responding to the application in the manner and within the time limit prescribed'. 'Before the expiry of the time limit prescribed for the lodging of a response, [that party] shall become a party to the proceedings before the General Court, as intervener, on lodging a procedural document. He shall lose the status of intervener before the General Court if he fails to respond to the application in the manner and within the time limit prescribed'. According to Article 179 of the Rules of Procedure, the parties to the proceedings before the Board of Appeal other than the applicant are to submit their responses to the application within a time limit of two months from the service of the application.

78 Read in conjunction with Article 60 of those Rules.

79 According to Article 143(1) of the Rules of Procedure, an application to intervene must be submitted within six weeks of the publication of the notice in the Official Journal of the European Union on the related application to initiate proceedings.

Accordingly, the Court finds that it cannot be accepted that, having lost the opportunity of becoming a party to the proceedings as an intervener in accordance with Article 173 of the Rules of Procedure, Dubai Aviation Corp. would be allowed to intervene pursuant to Articles 142 to 145 of those rules. It is also therefore excluded from being entitled to rely on the time limit laid down by Article 143(1) of those rules.

2. COMMUNITY DESIGNS

Judgment of the Court of Justice (Grand Chamber), 27 February 2024, EUIPO v The KaiKai Company Jaeger Wichmann, C-382/21 P

Link to the full text of the judgment

Appeal – Intellectual property – Community designs – Patent Cooperation Treaty (PCT) – Agreement on Trade-Related Aspects of Intellectual Property Rights – Paris Convention for the Protection of Industrial Property – Article 4 – Regulation (EC) No 6/2002 – Article 41 – Application for registration of a Community design – Right of priority – Priority claim based on an international application filed under the PCT – Time period – Interpretation consistent with Article 4 of that convention – Limits

In upholding the appeal brought by the European Union Intellectual Property Office (EUIPO) against the judgment of the General Court in The KaiKai Company Jaeger Wichmann v EUIPO (Gymnastic and sports apparatus and equipment), [80] the Grand Chamber of the Court of Justice provides clarifications as to the distinction between the direct effect of international agreements and the interpretation of secondary legislative acts in conformity with such agreements, and rules on the limits of such consistent interpretation.

On 24 October 2018, the applicant at first instance, The KaiKai Company Jaeger Wichmann GbR, applied to EUIPO for the registration of 12 Community designs, claiming a right of priority on the basis of an international patent application filed under the Patent Cooperation Treaty (PCT) [81] on 26 October 2017.

EUIPO granted the application for registration but refused the right of priority, on the ground that the date of the earlier filing was more than six months prior to the date of the application for registration. Article 41(1) of Regulation No 6/2002 [82] in fact provides that a person who has duly filed an earlier application for a design right or for a utility model is to enjoy, for the purpose of filing a subsequent application for a registered Community design, a right of priority of six months from the date of filing of the first application. EUIPO found that, even though an international application filed under the PCT could, in principle, form the basis for a right of priority under Article 41(1) of Regulation No 6/2002, given that the broad definition of the concept of 'patent' in Article 2 of the PCT also included the utility models referred to in Article 41(1) of that regulation, the claim of such a right of priority was also subject to a period of six months, which had not been complied with in the present case.

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80 Judgment of 14 April 2021, The KaiKai Company Jaeger Wichmann v EUIPO (Gymnastic and sports apparatus and equipment) (T-579/19, EU:T:2021:186).

81 The PCT was concluded in Washington (United States) on 19 June 1970 and last modified on 3 October 2001 (*United Nations Treaties Series*, Vol. 1160, No 18336, p. 231).

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

By its judgment of 14 April 2021, the General Court annulled the EUIPO decision. It ruled that there was a gap in Article 41(1) of Regulation No 6/2002, in that it did not fix the time period for claiming priority for an 'international patent application' in the context of a subsequent design application. The General Court considered that the purpose of that provision was to ensure the consistency of that regulation with the obligations stemming from Article 4 of the Paris Convention [83] and, therefore, it was necessary to fill that gap by applying that Article 4. The General Court found, in essence, that pursuant to Article 4, it was the nature of the earlier right that determined the duration of such a priority period, with the result that that period was 12 months. It therefore concluded that EUIPO had erred in law by finding that the period applicable to the claim for priority at issue was six months.

On 23 June 2021, EUIPO brought an appeal against that judgment, raising a single ground of appeal alleging infringement of Article 41(1) of Regulation No 6/2002. By way of that ground of appeal, EUIPO takes issue, in essence, with the General Court for having directly applied Article 4 of the Paris Convention, disapplying the clear and exhaustive provisions of Article 41(1) of the regulation, in order to replace them with a misinterpretation of Article 4 of that convention.

By document lodged on the same date, EUIPO requested that its appeal be allowed to proceed, in accordance with the third paragraph of Article 58a of the Statute of the Court of Justice. By order of 10 December 2021, [84] the Court of Justice decided to allow the appeal to proceed.

Findings of the Court

In the first place, as regards the effects of the Paris Convention in the legal order of the European Union, first of all, the Court recalls that, although that convention was not concluded by the European Union, the rules set out in certain articles thereof, including Article 4, have been incorporated into the TRIPs Agreement, [85] which was itself concluded by the European Union. Consequently, those rules must be regarded as producing the same effects as those produced by the TRIPs Agreement.

Next, the Court states that, having regard to their nature and structure, the provisions of the TRIPs Agreement do not have direct effect. Furthermore, Article 4 of the Paris Convention also does not come under the two exceptional situations in which private individuals may rely directly on the provisions of the WTO Agreements before the Courts of the European Union. On the one hand, Article 41 of Regulation No 6/2002 in fact makes no express reference to Article 4 of the Paris Convention. On the other hand, Article 41 does not seek to implement, in the legal order of the European Union, a specific obligation entered into in the context of the WTO Agreements. On the contrary, that regulation is in fact the expression of the EU legislature's intention to adopt, in respect of one of the industrial property rights covered by that convention, an approach specific to the legal order of the European Union, by establishing a specific system of unitary and indivisible protection for Community designs on the territory of the European Union, of which the right of priority provided for in that Article 41 forms an integral part.

The Court infers that the rules set out in Article 4 of the Paris Convention do not have direct effect and, accordingly, are not such as to create, for individuals, rights on which they may directly rely by virtue of EU law. Consequently, the right of priority to file an application for a Community design is governed by Article 41 of Regulation No 6/2002, without economic operators being able to rely directly on Article 4 of the Paris Convention.

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83 Paris Convention for the Protection of Industrial Property, signed in Paris (France) on 20 March 1883, last revised in Stockholm (Sweden) on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, Vol. 828, No 11851, p. 305).

84 Order of 10 December 2021, EUIPO v The KaiKai Company Jaeger Wichmann (C-382/21 P, EU:C:2021:1050).

85 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organization (WTO), was signed in Marrakesh (Morocco) on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

Finally, the Court nevertheless points out that, since the TRIPs Agreement is binding on the European Union and, accordingly, takes precedence over EU secondary legislation, the latter must be interpreted, as far as is possible, in accordance with the provisions of that agreement. It follows that Regulation No 6/2002 must be interpreted, as far as is possible, in accordance with the rules set out by the articles of the Paris Convention, including Article 4 thereof, which are incorporated into the TRIPs Agreement.

In the second place, the Court of Justice finds that the General Court erred in law, in that it manifestly exceeded the limits of a consistent interpretation of Article 41(1) of Regulation No 6/2002 and proceeded, in fact, to apply directly Article 4 of the Paris Convention, as interpreted by that court, to the detriment of the clear wording of Article 41(1) of that regulation and in disregard of the exhaustive nature of the latter provision.

It in fact follows unequivocally from the clear and exhaustive wording of Article 41(1) that, first, an international application filed under the PCT can form the basis of a right of priority, pursuant to that provision, only in so far as the subject of the international application in question is a utility model and, second, the period for claiming that right of priority on the basis of such an application is six months, expressly set in that provision.

In the third place, as regards the General Court's interpretation of Article 4 of the Paris Convention, under which that provision allows the priority of an earlier 'international patent application' to be claimed when filing a later design application within a period of 12 months, the Court of Justice holds that that interpretation is also vitiated by errors of law.

It follows from a combined reading of sections A, C and E of Article 4 that the latter does not allow priority to be claimed, and therefore, a fortiori, does not lay down any rules on the time period prescribed to the applicant to that end. Thus, only an international application filed under the PCT relating to a utility model can give rise to a right of priority for a design application by virtue of that Article 4, within the period of six months referred to in Article 4(E)(1).

In the light of all of those considerations, the Court upholds the single ground of appeal, annuls the judgment of the General Court, and rules on the action at first instance by dismissing it.

3. PROTECTION OF NEW PLANT VARIETIES

Judgment of the General Court (Third Chamber), 28 February 2024, House Foods Group v CPVO (SK20), T-556/22

Link to the full text of the judgment

Plant varieties – Grant of a Community plant variety right for the plant variety SK20 – Inadmissibility of the appeal before the Board of Appeal – No interest in bringing proceedings – Article 81(1) of Regulation (EC) No 2100/94

In its judgment, the General Court dismisses the action for annulment brought by House Foods Group, Inc. against the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) ('the contested decision'). The Court considers that the breeder of a plant variety has no interest in having the decision of the CPVO granting protection to its variety annulled on the ground that the official description of that variety does not include an additional characteristic asserted by that breeder.

In 2017, the applicant applied to the CPVO for a Community plant variety right [86] for the onion variety SK20. In the technical questionnaire attached to the application, the applicant referred to the 'low lachrymatory factor and pyruvic acid' as an additional characteristic which may help to distinguish the variety SK20.

By its decision of 3 May 2021, the CPVO granted the protection to the candidate variety. However, the official description of the variety SK20 did not contain the additional characteristic in question, because, in the CPVO's opinion, the outcome of the technical examination [87] had been conclusive on the basis of the standard characteristics included in the technical protocol in force, with the result that it was not necessary to take into consideration the additional characteristic asserted by the applicant during the technical examination.

By the contested decision, the Board of Appeal of the CPVO dismissed the appeal by which the applicant sought the inclusion of the low lachrymatory factor and pyruvic acid in the official description of the variety. The Board of Appeal found that the applicant had no interest in bringing proceedings since it was not contesting the decision to grant a Community plant variety right for the variety SK20.

Findings of the Court

Ruling on the applicant's interest in bringing proceedings, the Court assesses whether the amendment of the description of the protected variety accompanying the decision granting protection could procure an advantage for the applicant.

First of all, the Court states that the grant of the protection to a candidate variety does not require an exhaustive assessment of all that variety's characteristics, but only of those of particular importance to its protectability and, in particular, its distinctness. [88] Accordingly, the technical examination is intended only to determine whether the candidate variety is sufficiently distinct, uniform and stable in relation to other varieties. However, its aim is not to assess all the candidate variety's characteristics, or the use or commercial value of those characteristics.

Moreover, the official variety description established by the Examination Office is a summary of the observations made during the technical examination and reflects only certain specific characteristics which suffice to demonstrate the distinctness of the variety.

The Court subsequently recalls that, for a plant variety to be protectable, it is sufficient that it be distinguishable by at least one of the characteristics that result from its genotype. [89] Therefore, even if the additional characteristic asserted by the applicant had been included in the official description of the variety SK20, that would not have had any bearing on the protection conferred on that variety. A new variety, displaying the same low lachrymatory factor and pyruvic acid, would still be protectable so long as it displayed one or more other characteristics distinguishing it from the applicant's variety.

Lastly, the Court finds that inserting the additional characteristic into the description of the protected variety cannot procure any advantage for the applicant because the protection concerns the plant material itself, as defined by all the characteristics that result from its genotype, whether or not they are included in the official variety description. [90]

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86 Under Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

87 The technical examination within the meaning of Article 55(1) of Regulation No 2100/94 is intended to verify compliance with the conditions of distinctness, uniformity and stability.

88 See the eleventh recital of Regulation No 2100/94 as well as the first indent of Article 5(2) and Articles 6 to 9 thereof.

89 See the second indent of Article 5(2) of Regulation No 2100/94, read in conjunction with Article 7(1) of that regulation.

90 See Article 5(1), (2) and (3) and Article 13(1) and (2) of Regulation No 2100/94.

Accordingly, by concluding that inserting the additional characteristic into the official variety description would in no way amend the scope of the protection of the variety SK20, the Court confirms that the Board of Appeal was correct to find that the applicant had no interest in bringing proceedings.

4. PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS

Judgment of the Court of Justice (Second Chamber), 29 February 2024, Tez Tour, C-299/22

Link to the full text of the judgment

Reference for a preliminary ruling – Package travel and linked services – Directive (EU) 2015/2302 – Article 12(2) – Right of a traveller to terminate a package travel contract without paying a termination fee – Unavoidable and extraordinary circumstances – Spread of COVID-19 – No official recommendation against travel – Consideration of personal circumstances relating to the individual situation of the traveller concerned – Significant consequences on the performance of the package or on the transport of passengers to the place of destination – Circumstances existing or foreseeable on the date of conclusion of the package travel contract concerned – Possibility of taking into account consequences occurring at the place of departure or return as well as at other places

Ruling on a question referred by the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania), the Court of Justice clarifies the right of travellers to terminate a package travel contract at no cost in the presence of unavoidable and extraordinary circumstances, [91] in the context of the COVID-19 pandemic.

On 10 February 2020, M. D. entered into a package travel contract with Tez Tour under which Tez Tour undertook to organise a holiday trip for him and the members of his family to the United Arab Emirates during the period from 1 to 8 March 2020. The package at issue included, in particular, a return flight from Vilnius (Lithuania) to Dubai (United Arab Emirates) and a seven-night stay in a hotel.

On 27 February 2020, M. D. informed Tez Tour that, due to the health risk associated with the spread of COVID-19, he wished to terminate the contract. Tez Tour refused his request. As a result, M. D. brought an action before the competent courts, claiming that there were unavoidable and extraordinary circumstances at the place of destination of the tour package or in its immediate vicinity that were likely to make it impossible to perform the tour safely or to transport the passengers to the place of destination, in particular without exposing them to inconvenience or health risks. Those claims were dismissed both at first instance and on appeal.

On hearing an appeal on a point of law brought by M. D., the referring court decided to refer questions to the Court of Justice on the interpretation of the Package Travel Directive, asking it to clarify the conditions under which a traveller may rely on the existence of 'unavoidable and extraordinary circumstances' within the meaning of Article 12(2) of that directive, [92] in a context in

91 Provided for in Article 12(2) of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015 L 326, p. 1; 'the Package Travel Directive').

92 Under that provision 'Notwithstanding paragraph 1, the traveller shall have the right to terminate the package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination'.

which the competent national authorities had published only on 12 March 2020, and therefore after the termination, a recommendation addressed to travellers to encourage them to postpone, over the coming months, all their trips abroad, including to the United Arab Emirates, because of the COVID-19 pandemic.

Findings of the Court

In the first place, the Court notes that the finding that 'unavoidable and extraordinary circumstances', [93] within the meaning of the Package Travel Directive, [94] have arisen at or in the immediate vicinity of the travel destination is not subject to the condition that the competent authorities have issued an official recommendation advising travellers against travelling to the area concerned or an official decision classifying that area as a 'risk area'. First of all, such a requirement would contradict the very nature and basis of the adoption of such recommendations or decisions, which presuppose, in principle, the existence of health or other risks likely to fall under the concept of 'unavoidable and extraordinary circumstances'. [95] Next, such a requirement is likely to compromise the objective of harmonisation pursued by the Package Travel Directive, since the conditions for the adoption of such a recommendation or decision are not uniform in the various Member States. Finally, to require the adoption of official recommendations or decisions in this respect would be likely to make it impossible to exercise the right to terminate without cost, [96] precisely in so far as those unavoidable and extraordinary circumstances may exist independently of the adoption of any official recommendations or decisions.

In the second place, the Court rules, first, on the question of what type of circumstances fall within the concept of 'unavoidable and extraordinary circumstances … significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination'. [97] Thus, it notes that the right to terminate a package travel contract without paying cancellation charges is not subject to the condition that circumstances have arisen which make it objectively impossible to perform the package concerned or to transfer passengers to the place of destination. To that effect, a health crisis, such as the spread of COVID-19, may, in view of the serious risk it represents for human health, be considered to have '[significant effects on] the performance of the package, or [on] the carriage of passengers to the destination', regardless of the fact that it is not necessarily such as to make such performance objectively impossible.

As regards the assessment of the existence of such consequences, the Court points out that personal factors relating to the individual situation of travellers, such as the fact of travelling with young children or of belonging to a higher-risk group, are likely to have an impact on the seriousness of the consequences caused by the unavoidable and extraordinary circumstances invoked by a traveller, in so far as they are objective in nature. Those same factors can have an impact on the possibility of performing the package in question under good conditions. However, such personal factors are not sufficient in themselves to justify the traveller concerned exercising his right to terminate a package travel contract without paying a termination fee. On the contrary, those factors are relevant only when they are such as to influence the assessment of the consequences objectively attributable to the occurrence of 'unavoidable and extraordinary circumstances'.

Accordingly, the Court concludes that the concept of 'unavoidable and extraordinary circumstances … significantly affecting the performance of the package, or which significantly affect the carriage of

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93 That concept is defined in Article 3, point 12, of the Package Travel Directive as 'a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken'.

94 And in particular Article 3, point 12, and Article 12(2) of that directive.

95 Within the meaning of Article 12(2) of the Package Travel Directive.

96 Referred to in Article 12(2) of the Package Travel Directive.

97 Within the meaning of Article 12(2) of the Package Travel Directive.

passengers to the destination' of the trip in question also covers circumstances which mean that the package cannot be performed without exposing the travellers concerned to risks to their health and safety, taking into account, where appropriate, personal factors relating to the individual situation of those travellers.

Secondly, ruling on the assessment of the significant consequences for the performance of the package in question or for the carriage of passengers to the place of destination, the Court notes, first, that that assessment must be based on a 'prediction' as to the likelihood that the unavoidable and extraordinary circumstances relied on by the traveller concerned will have such consequences for the performance of the package. As those consequences are only definitively felt during the performance of the package, their assessment at the time of termination is necessarily forward-looking. Secondly, the assessment of such consequences must be made from the perspective of an average traveller who is reasonably well-informed and reasonably observant and circumspect on the date of termination of the package travel contract concerned.

In the third place, the Court notes that the terms 'unavoidable and extraordinary' [98] themselves tend to indicate that the concept of 'unavoidable and extraordinary circumstances' covers only situations which, on the one hand, did not exist on the date on which the package travel contract was concluded and, on the other hand, were unforeseeable. Thus, circumstances already known to the traveller concerned or foreseeable for him or her on that date cannot be invoked by that traveller under that concept and, consequently, cannot be the basis for exercising the right to terminate such a contract without paying a termination fee. As regards the assessment of a situation which existed or could be foreseen on the date of the conclusion of a package travel contract, but which is evolving significantly, it cannot be ruled out that such a situation may have undergone significant changes after the conclusion of that contract, so that it is different from the situation of which the traveller concerned was aware or which he or she could reasonably have foreseen when he or she concluded that contract. In such a scenario, those changes could give rise to a new situation, capable of meeting as such the definition of the concept of 'unavoidable and extraordinary circumstances'.

In the fourth and final place, as regards the place where the consequences caused by unavoidable and extraordinary circumstances must occur, the Court points out that, where those consequences extend beyond the place of destination to reach, in particular, the place of departure or return or the places of intermediate stops and transport connections, they are likely to affect the performance of the package concerned. As such, they must be eligible for consideration for the purposes of applying Article 12(2) of the Package Travel Directive. In that regard, it is possible, in particular, for measures to be adopted at the place of departure as a consequence of the circumstances arising at the place of destination, such as measures consisting in subjecting travellers returning to the place of departure to restrictions, which could then form part of the assessment of the significant effects on the performance of the package travel contract concerned.

98 Falling under the concept of 'unavoidable and extraordinary circumstances', as set out in Article 12(2) of the Package Travel Directive.

5. INFORMATION SOCIETY SERVICES

Judgment of the Court of Justice (Second Chamber), 29 February 2024, Doctipharma, C-606/21

Link to the full text of the judgment

Reference for a preliminary ruling – Medicinal products for human use – Directive 2001/83/EC – Article 85c – Scope – Distance selling to the general public of medicinal products – Medicinal products for human use not subject to compulsory medical prescription – Persons authorised or entitled to engage in distance selling to the general public of medicinal products – Power of the Member States to impose conditions, justified by the protection of public health, on the retailing, on their territory, of medicinal products sold online – Information society services – Directive 98/34/EC – Directive (EU) 2015/1535 – Service connecting pharmacists and customers for the online sale of medicinal products

Hearing a reference for a preliminary ruling from the Cour d'appel de Paris (Court of Appeal, Paris, France), the Court of Justice clarifies the concept of an 'information society service' and provides a basis for assessing whether a Member State's prohibition of a service provided by means of a website and consisting of connecting pharmacists and customers for the online sale of non-prescription medicinal products ('the service provided') complies with EU law.

Doctipharma set up the www.doctipharma.fr website, where internet users could buy pharmaceutical products and medicinal products not subject to prescription from pharmacy websites.

On that website, pharmacists subscribed to the online sales platform through a monthly subscription paid to Doctipharma, and customers had to create a customer account in order to access the websites of the pharmacists of their choice.

Since the Union des Groupements de pharmaciens d'officine (UDGPO) considers that that practice involved Doctipharma in the e-commerce of medicinal products, it brought an action against Doctipharma before the Tribunal de commerce de Nanterre (Commercial Court, Nanterre, France), which found that the website was unlawful and ordered Doctipharma to cease its activity. The Cour de cassation (Court of Cassation, France) set aside the decision of the Cour d'appel de Versailles (Court of Appeal, Versailles, France), which had overturned the lower court's judgement. It held that, by connecting dispensing pharmacists with potential patients, Doctipharma had acted as an intermediary in the sale of non-prescription medicinal products and participated in the e-commerce of medicinal products, without, however, having the status of pharmacist required by national legislation. It referred the case back to the Cour d'appel de Paris (Court of Appeal, Paris), the referring court in this case.

Confronted with the different approaches adopted by the French courts, the referring court decided to refer several questions to the Court of Justice for a preliminary ruling. It asks the Court to interpret Directive 98/34, [99] in order to determine whether the service provided falls within the concept of an 'information society service', and Article 85c of Directive 2001/83, [100] in order to determine whether

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99 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) ('Directive 98/34').

100 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2011/62/EU of the European Parliament and of the Council of 8 June 2011 (OJ 2011 L 174, p. 74).

the Member States may, on the basis of that provision, prohibit the provision of the service in question.

Findings of the Court

In the first place, as regards the conditions to be satisfied in order to classify a service as falling within the concept of an 'information society service' for the purposes of Directives 98/34 and 2015/1535, [101] the Court considers, first of all, that it is irrelevant, first, whether Doctipharma was remunerated by the pharmacists who subscribed to its platform on the basis of a flat-rate fee and, secondly, whether the service provided by Doctipharma was subject to a monthly subscription fee paid to it by pharmacists and to a retrocession of a percentage of the amount of sales, deducted by the platform, since those circumstances, if proven, imply that the service in question must be regarded as fulfilling the condition of being provided in return for payment. Next, the classification of the service in question as an 'information society service' also follows from the fact that it is provided via a website that does not require the simultaneous presence of the service provider and the customer or pharmacist, and from the fact that the service is provided at the individual request of pharmacists and customers.

The Court concludes that a service provided on a website, connecting pharmacists and customers for the sale, via the websites of pharmacies which have subscribed to the service, of medicinal products not subject to medical prescription, falls within the concept of an 'information society service'.

In the second place, as regards the possibility for the Member States to prohibit such an intermediation service under Article 85c of Directive 2001/83, the Court points out that the Member States alone are competent to determine the natural or legal persons authorised or entitled to supply medicinal products to the public at a distance by means of information society services.

It considers that Article 85c(1)(a) of Directive 2001/83 requires the referring court to determine whether the provider of the service in question must be regarded as merely connecting sellers and customers by means of a service which is specific to and distinct from the sale, or whether that provider must be regarded as itself providing the sale.

In that regard, in the present case, if, following that analysis, Doctipharma were to be regarded as itself providing the service, Article 85c(1)(a) would not preclude the prohibition of that service by the Member State in whose territory it is established. A Member State may restrict the distance selling of non-prescription medicinal products to the public by means of information society services to persons who are qualified pharmacists.

Conversely, if Doctipharma were found to be providing a service of its own distinct from selling, then the service provided could not be prohibited on the basis of Article 85c(2) of Directive 2001/83 and would not fall within the concept of 'conditions for the retail supply' of medicinal products offered for distance selling to the public. The service provided must be classified as an 'information society service'. Article 85c(1) explicitly provides that, without prejudice to national legislation prohibiting the offer for distance selling to the public of medicinal products subject to prescription, Member States are to ensure that medicinal products are offered for distance selling to the public by means of information society services. It would therefore be inconsistent to hold that the use of such a service could be prohibited by the Member States.

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101 Article 1(2) of Directive 98/34 and Article 1(1)(b) of Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1) are worded identically. Those articles define the concept of 'information society service' on the basis of four conditions: 'any service normally provided for remuneration, at a distance, by electronic means, and at the individual request of a recipient of services'.

6. PLANT PROTECTION PRODUCTS

Judgment of the General Court (Fourth Chamber), 21 February 2024, PAN Europe v Commission, T-536/22

Plant protection products – Active substance cypermethrin – Implementing Regulation (EU) 2021/2049 – Request for internal review – Article 10(1) of Regulation (EC) No 1367/2006 – Rejection of the request – Identification of critical areas of concern by EFSA – Risk assessment and risk management – Precautionary principle – Discretion enjoyed by the Commission

In the context of an action for annulment concerning the renewal of the approval of the active substance cypermethrin, the General Court explains the rules governing the admissibility of such an action brought by a non-governmental organisation on the basis of Regulation No 1367/2006, [102] as well as the scope of the European Commission's discretion as risk manager in the light of the precautionary principle.

Cypermethrin is an insecticide used in the European Union, which was authorised for use in plant protection products in 2005. [103]

As part of the procedure for renewing the approval of cypermethrin, the European Food Safety Authority (EFSA) identified, in its scientific conclusions of July 2018, four critical areas of concern relating to that active substance. It then published a statement on risk mitigation measures on cypermethrin in September 2019.

Following that risk assessment, on 24 November 2021 the Commission adopted Implementing Regulation (EU) 2021/2049, [104] which renews the approval of cypermethrin, accompanied by a series of specific provisions.

On 20 January 2022, the applicant, the environmental organisation Pesticide Action Network Europe (PAN Europe), sent the Commission a request for an internal review [105] of Implementing Regulation 2021/2049.

By its decision of 23 June 2022, the Commission rejected that request.

The applicant asks the General Court to annul that decision. In support of its action, it alleges infringement of the precautionary principle and of the European Union's obligation to ensure a high level of protection of human health and the environment. It claims, inter alia, that since EFSA had identified certain critical areas of concern in relation to cypermethrin, the Commission should not have renewed the approval of that substance. In that context, the Commission no longer has any discretion and cannot rely on its role as risk manager in that respect.

By its judgment, the Court of Justice dismissed the action in its entirety.

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102 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), in particular on the basis of Article 12 thereof.

103 That substance was included in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1) by Commission Directive 2005/53/EC of 16 September 2005 amending Council Directive 91/414/EEC to include chlorothalonil, chlorotoluron, cypermethrin, daminozide and thiophanate-methyl as active substances (OJ 2005 L 241, p. 51).

104 Commission Implementing Regulation (EU) 2021/2049 of 24 November 2021 renewing the approval of the active substance cypermethrin as a candidate for substitution in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2021 L 420, p. 6).

105 On the basis of Article 10(1) of Regulation No 1367/2006.

Findings of the Court

In the first place, the General Court provides procedural clarifications concerning the scope of the rule of concordance between the request for review and the action for annulment of the decision adopted in response to that request.

In that regard, the Court points out that such an action for annulment is admissible only if it is directed against the response to that request and if the pleas in law relied on in support of the annulment relate specifically to that response.

Such an action cannot be founded on new grounds or on evidence not appearing in the request for review, otherwise the requirement that reasons be given for such a request would be made redundant and the object of the procedure initiated by the request would be altered. [106]

Nevertheless, on the one hand, an applicant under Regulation No 1367/2006 must be able to raise, at the stage of the action before the General Court, arguments which seek to criticise, in law, the merits of the response to its request for review, provided that those arguments do not alter the subject-matter of the procedure initiated by that request. On the other hand, an argument which was not raised at the stage of the request for review does not constitute a new argument if it is simply an amplification of an argument already developed in the context of that request, that is to say, if it presents a sufficiently close connection with the pleas or heads of claim initially put forward in the application in order to be considered as forming part of the normal evolution of the debate in proceedings before the Court.

In the second place, the Court points out that, if the Commission is to be able to pursue effectively the objectives assigned to it by Regulation No 1107/2009, it must be recognised as enjoying a broad discretion. That applies, in particular, to the risk management decisions which it must take pursuant to that regulation. [107]

Risk management corresponds to the body of actions taken by an institution faced with a risk in order to reduce it to a level deemed acceptable for society having regard to its obligation, in accordance with the precautionary principle, to ensure a high level of protection of public health, safety and the environment. [108]

That involves carrying out a prior assessment of the risks, which consists, first, in scientifically assessing those risks, based on the best scientific data available, and, second, in determining whether they exceed the level of risk deemed acceptable for society, which is a political choice of determining an appropriate level of protection for society.

Accordingly, although, as part of the procedure for the renewal of active substances, the Commission must 'take into account', inter alia, EFSA's scientific conclusions, [109] it is not bound, as risk manager, by EFSA's findings. Such taking into account cannot be interpreted as an obligation on the part of the Commission to follow EFSA's conclusions in all respects.

However, the Commission's broad discretion in its capacity as risk manager remains governed by the need to comply with the provisions of Regulation No 1107/2009, in particular Article 4 of that

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106 Judgment of 12 September 2019, TestBioTech and Others v Commission (C-82/17 P, EU:C:2019:719, paragraph 39).

107 Judgment of 17 May 2018, Bayer CropScience and Others v Commission (T-429/13 and T-451/13, EU:T:2018:280, paragraph 143).

108 Judgments of 12 April 2013, Du Pont de Nemours (France) and Others v Commission (T-31/07, not published, EU:T:2013:167, paragraph 148); of 17 May 2018, Bayer CropScience and Others v Commission (T-429/13 and T-451/13, EU:T:2018:280, paragraph 125); and of 17 March 2021, FMC v Commission (T-719/17, EU:T:2021:143, paragraph 78).

109 Under the terms of the second subparagraph of Article 14(1) of Commission Implementing Regulation (EU) No 844/2012 of 18 September 2012 setting out the provisions necessary for the implementation of the renewal procedure for active substances, as provided for in Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (OJ 2012 L 252, p. 26).

regulation, [110] read in conjunction with Annex II thereto, and by the precautionary principle which underpins all the provisions of that regulation.

In those circumstances, the Commission can renew the approval of an active substance only if it is adequately demonstrated that, notwithstanding the identification of critical areas of concern, risk mitigation measures support the conclusion that the criteria of Article 4 of Regulation No 1107/2009 are fulfilled. Accordingly, the Commission's specific role is to determine the risks which are acceptable to society, with a higher tolerance threshold for environmental protection than as regards human or animal health, and taking into account management measures to mitigate the risks identified.

In the present case, the mere fact that EFSA identified four critical areas of concern in its conclusions as regards cypermethrin does not support the conclusion that the Commission, in its capacity as risk manager, no longer had any discretion, provided that it ensured that the criteria set out in Article 4 of Regulation No 1107/2009 were fulfilled. In other words, the Commission is not precluded from ascertaining, in compliance with the precautionary principle, whether the risk could have become acceptable by imposing certain measures.

110 According to that article, the approval of an active substance can be granted only if it is demonstrated that the conditions for approval provided for in paragraphs 2 and 3 are satisfied, under realistic conditions of use. A presumption is established that those conditions for approval are deemed to be met if it has been established that that is the case for at least one representative use of at least one plant protection product containing that active substance.

IX. ECONOMIC AND MONETARY POLICY

1. PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the General Court (Third Chamber), 28 February 2024, Sber v ECB, T-647/21 and T-99/22

Link to the full text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Second subparagraph of Article 9(1) of Regulation (EU) No 1024/2013 – Application by the ECB of absorption interest pursuant to Austrian law where Article 395 of Regulation (EU) No 575/2013 has been infringed and following a decision imposing an administrative pecuniary penalty under Article 18 of Regulation No 1024/2013 – Proportionality

Judgment of the General Court (Third Chamber, Extended Composition), 28 February 2024, BAWAG PSK v ECB, T-667/21

Link to the full text of the judgment

Economic and monetary policy – Prudential supervision of credit institutions – Second subparagraph of Article 9(1) of Regulation (EU) No 1024/2013 – Direct exercise by the ECB of a power of a competent authority under the relevant Union law – Levying absorption interest under Austrian law where Article 395 of Regulation (EU) No 575/2013 has been infringed – Competence of the ECB – Article 65(1) and Article 70 of Directive 2013/36/EU – Proportionality

By upholding the actions for annulment brought against decisions adopted by the European Central Bank (ECB) levying absorption interest on the basis of the SSM Regulation [111] and pursuant to national law, by two judgments delivered on the same day, the General Court clarifies the circumstances in which it may have recourse to an interpretation in conformity with EU law of national law transposing a directive, which departs from the interpretation of the national courts.

In addition, in the judgment in Sber v ECB (Joined Cases T-647/21 and T-99/22), the Court gives a ruling on the novel question of the application of the principle ne bis in idem where the ECB imposes administrative pecuniary penalties under the SSM Regulation, while in the judgment in BAWAG PSK v ECB (T-667/21), it develops its case-law on the extent of the ECB's competence under that regulation.

The cases concern two Austrian credit institutions subject to direct prudential supervision by the ECB.

Accordingly, in Joined Cases T-647/21 and T-99/22, the ECB imposed on the applicant, Sber Vermögensverwaltungs AG, an administrative pecuniary penalty under the SSM Regulation in respect of the limits to large exposures established by Regulation No 575/2013 [112] having been exceeded both on an individual and on a consolidated basis. Next, on the basis of the SSM Regulation, [113] and

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

112 Article 395(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, and corrigenda OJ 2013 L 208, p. 68 and OJ 2013 L 321, p. 6).

113 Article 4(1)(d) and (3) and the second subparagraph of Article 9(1) of the SSM Regulation.

pursuant to point 2 of Paragraph 97(1) of the BWG, [114] the ECB decided to levy absorption interest on it in respect of the amounts concerned by such limits having been exceeded.

Following an opinion delivered by the ECB's Administrative Board of Review finding that there were flaws in the ECB's initial decision, the ECB, on 21 December 2021, replaced that decision with a new decision, [115] but maintained the amount of absorption interest. It stated that, in situations where an institution breaches its obligations under Regulation No 575/2013, the levying of absorption interest under the BWG fell within the exercise of a non-discretionary power by the competent authority, leaving it no discretion.

By two separate actions, the applicant requested the Court to annul both the initial decision and the decision of 21 December 2021 adopted by the ECB.

In Case T-667/21, the applicant, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG, indirectly acquired a portfolio of residential property loans in France. That portfolio was transferred to a joint fund without legal personality, in which it acquired all the shares, thereby becoming the beneficial owner.

Following an inspection at the applicant's premises, the ECB found that the applicant was not in possession of data enabling each of the debtors of the underlying loans to be identified and that it had disregarded the limit to large exposures provided for in Regulation No 575/2013 in respect of the portfolio. Accordingly, by decision of 2 August 2021, [116] on the basis of the same legislative provisions as mentioned in the description of the joined cases referred to above, the ECB levied absorption interest on it. The applicant disputed that decision before the Court.

By its judgments in Sber v ECB (Joined Cases T-647/21 and T-99/22) and in BAWAG PSK v ECB (T-667/21), the Court annulled the ECB's decision of 21 December 2021, which had replaced its initial decision, and the decision of 2 August 2021, respectively, on the ground that, when levying absorption interest, the ECB failed to examine the circumstances of the case.

Findings of the Court

- *The application of the principle ne bis in idem*

The Court considers that the levying of absorption interest by the ECB under point 2 of Paragraph 97(1) of the BWG in respect of conduct which has already been the subject of an administrative pecuniary penalty under the SSM Regulation is not contrary to the principle ne bis in idem.

In that regard, it recalls that the application of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which prohibits a duplication of proceedings and of penalties of a criminal nature for the same facts and against the same person, is not limited to proceedings and penalties which are classified as 'criminal' by national law. Indeed, it extends to proceedings and penalties which must be considered to have a criminal nature on the basis of the intrinsic nature of the offence and the degree of severity of the penalty which the person concerned is liable to incur.

Accordingly, the Court points out that administrative pecuniary penalties imposed under Article 18(1) of the SSM Regulation fall within the scope of Article 50 of the Charter. It observes that those penalties are clearly modelled on the fines which the European Commission may impose in the field of competition law [117] and are of an equivalent nature and severity. It results from settled case-law

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114 Bundesgesetz über das Bankwesen (Bankwesengesetz) (Law on the banking sector) of 30 July 1993 (BGBl. 532/1993), as amended by the Law of 28 May 2021 (BGBl. I, 98/2021) ('the BWG').

115 Decision ECB-SSM-2021-ATSBE-12.

116 Decision ECB/SSM/2021-ATBAW-7-ESA-2018-0000126.

117 Pursuant to Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

that the principle ne bis in idem must be observed in proceedings for the imposition of fines under competition law. That classification must therefore be applied, by analogy, to those penalties.

By contrast, the Court finds that it is apparent from the case-law of the Austrian courts that absorption interest is classified as a non-punitive prudential measure. Since neither the nature of the offence nor the degree of severity of the penalty brings them into the realm of criminal law, their application pursuant to the BWG does not fall within the scope of Article 50 of the Charter. That conclusion is, for that matter, confirmed by the judgment in VTB Bank (Austria), [118] in which, as regards absorption interest, the Court favoured classification as an 'administrative measure' rather than as an 'administrative penalty'.

- *The ECB's competence to levy absorption interest*

The Court states that the ECB was competent to levy absorption interest pursuant to Paragraph 97 of the BWG on the basis of the SSM Regulation.

At the outset, it states that, for the purpose of carrying out its prudential tasks, the ECB has three categories of supervisory and investigatory powers, namely those laid down in the SSM Regulation, the powers of competent authorities under relevant Union law and the power to instruct national authorities to make use of their powers in accordance with the conditions set out in national law.

In analysing whether, in the present case, the ECB had available to it the powers belonging to the second category, namely the powers of the competent authorities under relevant Union law, the Court observes that the expression 'under Union law' has been interpreted as including all the powers resulting from the legal framework established by a directive, which result from an obligation or a power for the Member State to legislate, as opposed to the recognition by that directive of the power which the Member States enjoy under national law to provide for stricter provisions outside the framework of the regime established by that directive. [119]

However, in the judgment in VTB Bank (Austria), [120] it was held, with regard to an earlier version of Paragraph 97 of the BWG, that the levying of absorption interest is akin to an administrative measure falling within the scope of Article 65(1) of Directive 2013/36, [121] which in the present case forms part of the relevant legal framework. The fact that they are not mentioned in a list of penalties and other administrative measures mentioned in that directive is irrelevant, since that list is not exhaustive, and that directive provides that Member States are to take all measures necessary to ensure that that directive and Regulation No 575/2013 are implemented. The General Court states that, in that judgment, the Court of Justice emphasised that prudential minimum requirements adopted by EU law should ensure maximum harmonisation and that, where the limits set out in Regulation No 575/2013 are exceeded, Member States are required to levy on credit institutions not a measure governed by national law but an administrative penalty or other administrative measure within the meaning of Article 65(1) of Directive 2013/36.

Accordingly, the fact that the levying of absorption interest is not referred to in the list in Directive 2013/36 does not prevent it from falling within the legal regime established by that directive. Consequently, the Court concludes that it is akin to a power available to the competent national authority 'under the relevant Union law' within the meaning of the second sentence of the second subparagraph of Article 9(1) of the SSM Regulation and which power, consequently, the ECB has.

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118 Judgment of 7 August 2018, VTB Bank (Austria) (C-52/17, EU:C:2018:648, paragraphs 40 to 42).

119 See, to that effect, judgment of 10 March 2016, Safe Interenvíos (C-235/14, EU:C:2016:154, paragraph 79 and the case-law cited).

120 Judgment of 7 August 2018 cited above, paragraphs 31 to 44.

121 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

- *Interpretation of national law*

The Court observes that, by relying on the interpretation of the Austrian courts that absorption interest was levied automatically in cases where the limits to large exposures are exceeded and by failing to examine the circumstances of the case, the ECB relied on a premiss which was legally incorrect, which vitiated its examination of the proportionality of the application of point 2 of Paragraph 97(1) of the BWG.

In that context, the Court recalls that, where it is called upon to review the substance of the ECB's application of national law transposing a directive, the interpretation of national courts is sufficient to establish the scope of that national law where it results in a finding that it is compatible with the directive which it transposes. By contrast, where the interpretation of the national courts does not make it possible to ensure the compatibility of national law with a directive, compliance with the principle of the primacy of EU law means that the Court must, as must a national court, where necessary, interpret national law so far as possible in the light of the wording and the purpose of the directive transposed in order to achieve the result sought by that directive. Accordingly, the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law which is incompatible with the objectives of a directive.

Moreover, where it is unable to interpret national law in compliance with the requirements of EU law, the General Court, like the national court which is called upon to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any national legislation, even if adopted subsequently, which is contrary to a provision of EU law with direct effect.

In the present case, the Court considers, on the basis of a literal, contextual and teleological interpretation of Article 70 of Directive 2013/36, [122] that that provision must be understood as meaning that it is for the competent national authority and, in consequence, the ECB, to determine the type of administrative measure by taking into account all the circumstances, which necessarily implies that they have a margin of discretion and precludes them from being in a position of non-discretionary competence as regards the application of absorption interest levied pursuant to point 2 of Paragraph 97(1) of the BWG.

2. SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Eighth Chamber, Extended Composition), 21 February 2024, NRW. Bank v SRB, T-466/16 RENV

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2016 ex ante contributions – Duty to state reasons – Principle of non-retroactivity – Article 5(1)(f) of Delegated Regulation (EU) 2015/63 – Exclusion of certain liabilities from the calculation of ex ante contributions – Promotional loans – Ancillary promotional activities – Plea of illegality

Hearing an action for annulment, which it dismisses, against Decision SRB/ES/2022/23 of the Single Resolution Board (SRB) of 27 April 2022 ('the contested decision'), the General Court provides important clarifications concerning, first, the calculation of the ex ante contributions to the Single Resolution Fund (SRF), in particular as regards the interpretation and application of Article 5(1)(f) of

122 Read in conjunction with Article 4(1), Article 65(1) and recital 37 of Directive 2013/36.

Delegated Regulation 2015/63, [123] and, second, the statement of reasons for the determination of the annual target level of the SRF for the 2016 contribution period.

NRW.Bank, the applicant, is the promotional bank of the Land Nordrhein-Westfalen (Land of North Rhine-Westphalia, Germany).

On 15 April 2016, the SRB adopted a decision on the 2016 ex ante contributions to the Single Resolution Fund (SRB/ES/SRF/2016/06) of credit institutions and certain investment firms, including the applicant. On 20 May 2016, the SRB adopted a decision on the adjustment of the 2016 ex ante contributions to the Single Resolution Fund supplementing the SRB's Decision of 15 April 2016 on the 2016 ex ante contributions to the Single Resolution Fund (SRB/ES/SRF/2016/13). Hearing an action for annulment brought by the applicant against those two decisions ('the initial decisions'), the General Court, by judgment of 26 June 2019, NRW.Bank v SRB (T-466/16), [124] dismissed the action as inadmissible. By judgment of 14 October 2021, NRW.Bank v SRB (C-662/19 P), [125] the Court of Justice, hearing an appeal brought by the applicant, set aside the judgment of the General Court and referred the case back to the General Court. On 27 April 2022, the SRB adopted the contested decision, by which it withdrew and replaced the initial decisions, with a view to remedying the failure to state reasons for those decisions which it had determined further to judgments of the General Court. [126]

Findings of the Court

In the first place, the applicant claims that Article 5(1)(f) of Delegated Regulation 2015/63 must be interpreted as allowing the exclusion from the calculation of the ex ante contributions of the liabilities related to 'ancillary promotional' activities, which consist in particular in the acquisition of debt securities on the capital market ('the activities concerned'). The Court notes that those provisions establish that the liabilities at issue can be excluded from the calculation of ex ante contribution of the institution concerned only up to the amount of the promotional loans operated by that institution. In order to be classifiable as 'promotional loans', the transactions in question must be carried out on a non-competitive, not-for-profit basis. [127] The Court finds that the activities concerned are performed, first, on the open capital market on which other actors operate; those actors carry on the same types of activities and are able to acquire the same debt securities as promotional banks, and on the same market terms as such banks. In addition, on such a market, promotional banks are, by definition, in direct competition with those other market operators, and therefore the activities concerned cannot be regarded as being carried out on a non-competitive basis. Second, the purpose of the activities concerned is to generate – and they do generate – revenue, because they consist in producing interest margins in order to finance the banking activity as such of promotional banks. Those activities cannot therefore be regarded as being carried out on a not-for-profit basis.

That conclusion is not called into question by the applicant's argument that the 'ultimate objective' of those activities is not to generate a profit because it is prohibited from distributing dividends. The not-for-profit nature of an activity [128] is assessed having regard to the nature of each activity concerned, it being irrelevant whether or not the profits generated by that activity are subsequently used to finance promotional activities which are, for their part, carried out on a not-for-profit basis. Any other

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123 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to the resolution financing arrangements (OJ 2015 L 11, p. 44).

124 Judgment of 26 June 2019, NRW.Bank v SRB (T-466/16, not published, EU:T:2019:445).

125 Judgment of 14 October 2021, NRW.Bank v SRB (C-662/19 P, EU:C:2021:846).

126 Judgments of 28 November 2019, Hypo Vorarlberg Bank v SRB (T-377/16, T-645/16 and T-809/16, EU:T:2019:823), and of 28 November 2019, Portigon v SRB (T-365/16, EU:T:2019:824).

127 Under Article 3, point 28, of Delegated Regulation 2015/63, 'promotional loan' means 'a loan granted by a promotional bank or through an intermediate bank on a non-competitive, non for profit basis, in order to promote the public policy objectives of central or regional governments in a Member State'.

128 For the purpose of applying Article 3, point 28, of Delegated Regulation 2015/63.

interpretation would mean regarding the activities concerned as being of a not-for-profit nature solely because they are carried on by a promotional bank; this would render meaningless the condition laid down by the use of the words 'on a non-competitive, not for profit basis'. [129]

Accordingly, the Court concludes that Article 5(1)(f) of Delegated Regulation 2015/63, read in conjunction with Article 3, points 27 and 28, of that same delegated regulation, must be interpreted as not allowing the liabilities related to the ancillary promotional activities of promotional banks, such as the applicant, to be excluded from the calculation of their ex ante contribution.

In the second place, the Court observes that, in the context of a delegated power within the meaning of Article 290 TFEU, the European Commission enjoys broad discretion in the exercise of the powers conferred on it where it is called upon, inter alia, to make complex assessments and evaluations. The Court takes the view that this is the case as regards the determination of the rules specifying the notion of adjusting ex ante contributions in proportion to the risk profile of institutions. [130] In those circumstances, with regard to the method of risk adjustment of the basic annual contributions, the review by the Courts of the European Union must be limited to examining whether the exercise of the discretion afforded to the Commission is vitiated by a manifest error or a misuse of power, or whether the Commission has manifestly exceeded the limits of that discretion. The Court considers that the applicant has failed to demonstrate that Article 5(1)(f) of Delegated Regulation 2015/63 was vitiated by a manifest error or a misuse of power or that it had manifestly exceeded the limits of the Commission's discretion because it did not exclude the liabilities related to the ancillary promotional activities of regional promotional banks from the calculation of their ex ante contribution.

In the third place, the Court recalls that the contested decision was adopted in order to remedy a failure to state reasons for the initial decisions determined by the SRB further to judgments of the Court, but that that decision and those judgments did not alter the scope of the applicant's obligation to pay an ex ante contribution for the 2016 contribution period, as had been ordered by the initial decisions and as had existed for that contribution period. In those specific circumstances, if the SRB had not adopted the contested decision and given effect to it from the date on which the first of the initial decisions took effect, the contested decision could not have been effective over the period from 15 April 2016 to 27 April 2022, during which the applicant would have been exempted from its obligation to pay an ex ante contribution for the 2016 contribution period, even though it was subject to that obligation pursuant to Regulation No 806/2014. [131] Similarly, over that period, the SRF would have been deprived, in breach of those same provisions, of the funds from the applicant's ex ante contributions, which would have undermined the implementation of Directive 2014/59, of Regulation No 806/2014 and of Delegated Regulation 2015/63. Accordingly, the purpose of adopting the contested decision with effect from 15 April 2016 was to ensure synchronicity between the applicability of the contested decision and the time at which the applicant's obligation to pay a 2016 ex ante contribution had come into being and, thus, to avoid a result contrary to the applicable legislation. In addition, in order to achieve such a goal, that decision had to enter into force on a date prior to that on which it was adopted.

In the fourth and final place, the Court recalls that institutions liable to the ex ante contributions must be able to understand, on reading the decision determining those contributions, at least the main

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129 As provided for in Article 3, point 28, of Delegated Regulation 2015/63.

130 Pursuant to Article 103(7) of Directive 2014/59 of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

131 Pursuant to Article 2, Article 67(4) and Articles 69 and 70 of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

stages of the method of calculating the amount of the annual target level for the contribution period in question.

With regard to the adequacy of the statement of reasons for the contested decision, the Court observes that the 2016 contribution period corresponds to the first year of the initial eight-year period. It is apparent from the contested decision that the SRB determined the annual target level by undertaking the following two main stages. First, it determined the forecast amount of the final target level and, secondly, it divided that amount by eight in order to take account of the fact that the initial period comprised eight contribution years. However, there is nothing to indicate that the calculation of the annual target level for the 2016 contribution period was made using a different mathematical formula from that contained in the contested decision or that it included other additional stages not set out in the contested decision. In those circumstances, the General Court takes the view that the SRB did set out, in the contested decision, the main stages of the method of calculating the amount of the annual target level for the 2016 contribution period.

As regards the forecast amount of the final target level, the Court observes that that amount can be deduced from the mathematical formula contained in the contested decision.

As for the manner in which it determined the forecast amount of the final target level, the SRB based its analysis on the fact that, according to Regulation No 806/2014, that amount had to correspond to at least 1% of the amounts of the covered deposits, at the end of the initial period, of all of the institutions authorised in all of the Member States participating in the Single Resolution Mechanism. In that regard, it took into account the forecast evolution in the covered deposits of all of the institutions authorised in all of the participating Member States, from the amount of those deposits as it stood in 2015 and until the end of the initial period, that is to say, until the end of 2023. Furthermore, the SRB identified, initially, an annual growth rate of those covered deposits of 3% between 2015 and 2023, but subsequently scaled down that percentage in order to take into account the analysis of the phase of the business cycle and the potential pro-cyclical impact the ex ante contributions might have on the financial position of the institutions. It thus applied an annual growth rate of covered deposits of less than 3% between 2015 and 2023 in order to determine the final target level.

Lastly, the Court observes that, when the annual target level for the 2016 contribution period was determined, the SRB did not have reliable data on the likely evolution of the institutions' covered deposits between 2015 and 2023, because a re-definition of the covered deposits had been introduced only one year earlier. [132] Without such data, the SRB had to evaluate the forecast development of the deposits on the basis of the growth rates of household deposits and the deposits of non-financial commercial companies.

In those specific circumstances, and given that, in addition, the contested decision related to the first contribution period following the adoption of Regulation No 806/2014, the institutions, as prudent operators, could reasonably expect that, in order to determine the annual target level for that period, the SRB would also take into account the forecast amount of the final target level, as set out in the explanatory memorandum to the Commission proposal which led to the adoption of that regulation. [133]

The Court therefore takes the view that the institutions were in a position to understand the main rules in accordance with which the SRB would determine the final target level, with a view to determining the annual target level for the 2016 contribution period.

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

[133] Commission proposal COM(2013) 520 final of 10 July 2013.

X. SOCIAL POLICY: PROTECTION OF FIXED-TERM WORKERS

Judgment of the Court of Justice (Grand Chamber), 20 February 2024, X (Lack of reasons for termination), C-715/20

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 4 – Principle of non-discrimination – Difference in treatment in the event of dismissal – Termination of a fixed-term employment contract – No obligation to state the reasons for termination – Judicial review – Article 47 of the Charter of Fundamental Rights of the European Union

Ruling on a request for a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the principle of non-discrimination against fixed-term workers in the light of the obligation to state reasons for the termination of an employment contract, as well as the obligations resting on national courts in the event of a breach of that principle in a dispute between individuals.

K.L., a worker, and X sp. z o.o., a company governed by Polish law, entered into a fixed-term part-time employment contract for the period from 1 November 2019 to 31 July 2022. On 15 July 2020, X notified K.L. of a statement of termination of that employment contract with a notice period, without stating the reasons for that termination. Under Article 30(4) of the Polish Labour Code, [134] an employer is required to state the reason for termination only in the case of termination of contracts of indefinite duration with a notice period. [135]

K.L. brought proceedings before the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta, Kraków, Poland), the referring court, seeking compensation on account of the unlawful nature of his dismissal. In particular, he alleged infringement of the principle of non-discrimination of fixed-term workers, laid down in clause 4 of the framework agreement on fixed-term work. [136]

According to the order for reference, even though the Trybunał Konstytucyjny (Constitutional Court, Poland) had already held that Article 30(4) of the Labour Code was consistent with the constitutional principles of the democratic rule of law and equality before the law, the Sąd Najwyższy (Supreme Court, Poland) had expressed doubts as to the compatibility of that national provision with EU law. However, the latter court could not have ruled out the application of the provision at issue, on the ground that the principle of non-discrimination against fixed-term workers does not have direct effect in a dispute between individuals.

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134 Ustawa – Kodeks pracy (Law establishing the Labour Code) of 26 June 1974 (Dz. U. No 24, item 141), in the version applicable to the dispute in the main proceedings (Dz. U. of 2020, item 1320, as amended) ('the Labour Code').

135 Or where an employment contract is terminated without a notice period, whether the contract is entered into for a fixed or indefinite term.

136 Framework agreement on fixed-term work, concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43; 'the framework agreement').

It is in that context that the referring court asked the Court, in essence, whether clause 4 of the framework agreement precludes national legislation such as that at issue in the main proceedings and whether that clause may be relied on in a dispute between individuals.

Findings of the Court

After stating that the rules on termination of an employment contract at issue fall within the concept of 'employment conditions', within the meaning of clause 4(1) of the framework agreement, relating to the principle of non-discrimination, the Court examines whether those rules establish a difference in treatment which constitutes less favourable treatment of fixed-term workers as compared with permanent workers in a comparable situation, before assessing, if relevant, whether such a difference in treatment can be justified on 'objective grounds'.

In the first place, as regards the comparability of the situations in question, the Court recalls that it is for the referring court to assess whether the persons concerned are engaged in the same or similar work, within the meaning of the framework agreement, [137] in the light of a number of factors, such as the nature of the work, training requirements and employment conditions.

In the second place, the Court finds that, subject to verifications carried out by the referring court, the existence of less favourable treatment of fixed-term workers as opposed to permanent workers arises from the fact that the latter are not subject to the limitation in question concerning the provision of information on the reasons justifying the dismissal. Even assuming that, in response to legal proceedings brought by a fixed-term worker against the termination of his or her employment contract, the judicial review of the validity of the reasons for the termination of that contract is guaranteed and that effective judicial protection of the person concerned is ensured – that worker is not provided, beforehand, with information which may be decisive for the purposes of deciding whether or not to bring such legal proceedings.

In the third place, as regards the existence of 'objective grounds', within the meaning of clause 4(1) of the framework agreement, the Polish Government invokes, on the basis of the abovementioned judgment of the Constitutional Court, the pursuit of a policy of full employment requiring a great degree of flexibility in the labour market to which fixed-term employment contracts contribute.

According to the Court, those factors rather are similar to a criterion which, in a general and abstract manner, refers exclusively to the duration itself of the employment; therefore they do not make it possible to ensure that the difference in treatment at issue responds to a genuine need. It does not appear to be necessary in the light of the objective relied on by the Polish Government. The employment condition concerned does not relate to the right itself of an employer to terminate a fixed-term employment contract with a notice period, but to the provision of information to the worker, in writing, relating to the reason or reasons justifying his or her dismissal. Accordingly, even if employers were obliged to state the reasons for the early termination of a fixed-term contract, they would not, on that basis, be deprived of the flexibility inherent in that kind of employment contract.

In those circumstances, it will be for the referring court to ascertain whether Article 30(4) of the Labour Code lends itself to an interpretation consistent with clause 4 of the framework agreement. In the absence thereof, that court is not, in principle, required, solely on the basis of EU law, to disapply the provision of its domestic law that is contrary to clause 4 of the framework agreement, which does not have direct effect between individuals.

That being said, when adopting legislation specifying and giving specific expression to the employment conditions which are governed, inter alia, by clause 4 of the framework agreement, a Member State implements EU law [138] and must therefore ensure compliance, inter alia, with the right

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137 See clause 3(2) and clause 4(1) of the framework agreement.

138 Within the meaning of Article 51(1) of the Charter of Fundamental Rights.

to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. The latter provision has direct effect. The Court holds that the difference in treatment introduced by the national provision at issue undermines that right since a fixed-term worker is deprived of the possibility, which is however available to a permanent worker, of assessing beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract and, where appropriate, to bring an action challenging in a precise manner the reasons for such a termination.

Therefore, in a dispute between individuals, the national court is required, where it is not possible for it to interpret the applicable national law in a way which is consistent with clause 4 of the framework agreement, to guarantee the full effectiveness of Article 47 of the Charter of Fundamental Rights by disapplying, in so far as necessary, any contrary provision of national law.

XI. INTERNATIONAL AGREEMENTS: INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court of Justice (Second Chamber), 29 February 2024, Raad van bestuur van de Sociale verzekeringsbank (Transfer of survivors' benefits), C-549/22

Link to the full text of the judgment

Reference for a preliminary ruling – EC-Algeria Association Agreement – Social security for Algerian migrant workers and their survivors – Transfer of benefits to Algeria at the rates applied by virtue of the legislation of the debtor Member State – Survivors' benefit – National legislation applying the country-of-residence principle – Residence clause involving a reduction in the amount of survivors' benefit for recipients residing in Algeria

Ruling on a request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands; 'the referring court'), the Court of Justice holds that Article 68(4) [139] of the EC-Algeria Association Agreement, [140] concerning the right to transfer freely social security benefits, has direct effect and does not preclude a reduction in the amount of survivors' benefits on the ground that their recipients reside in Algeria, where those benefits are

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139 Article 68 of that agreement reads as follows:

'1. Subject to the provisions of the following paragraphs, workers of Algerian nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed. The term "social security" shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits.

These provisions shall not, however, cause the other coordination rules provided for in Community legislation based on Article 42 of the Treaty establishing the European Community to apply, except under the conditions set out in Article 70 of this Agreement.

...

4. The workers in question shall be able to transfer freely to Algeria, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits. ...'

140 Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, approved on behalf of the European Community by Council Decision 2005/690/EC of 18 July 2005 (OJ 2005 L 265, p. 2; 'the EC-Algeria Association Agreement').

intended to guarantee a basic income calculated on the basis of the cost of living in the debtor Member State and where that reduction respects the substance of that right.

X resides in Algeria. As the survivor of her spouse who worked in the Netherlands and was insured under the Algemene nabestaandenwet (General law on survivors' insurance; 'the ANW') at the time of his death, she has been entitled to a survivors' benefit since 1 January 1999. After reinstating X's survivors' benefit retroactively in 2018, which it had terminated in 2012, the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank, Netherlands) informed X that that benefit would be reduced with effect from 1 January 2013 on the ground that it should have been paid in accordance with the country-of-residence principle, namely, in the present case, on the basis of a percentage reflecting the level of the cost of living in Algeria in relation to the cost of living in the Netherlands. [141]

After several actions against that decision had been dismissed, X brought an appeal before the referring court, which decided to refer a number of questions to the Court of Justice for a preliminary ruling on the interpretation of Article 68(4) of the EC-Algeria Association Agreement in order to ascertain whether that agreement precludes the reduction, based on the country-of-residence principle, in the amount of X's survivors' benefit.

Findings of the Court

The Court answers, first of all, the question whether, having regard to the wording, purpose and nature of the EC-Algeria Association Agreement, Article 68(4) of that agreement has direct effect.

It notes, in that regard, that that provision establishes in clear, precise and unconditional terms the right to transfer freely to Algeria the pensions and annuities referred to in that provision, at the rates applied by virtue of the legislation of the debtor Member State. Thus, that provision imposes on the Member States a clear and precise obligation as to the result to be achieved, consisting of enabling the persons concerned to make such a free transfer, an obligation which is not, as such, subject, in its implementation or effects, to the adoption of any subsequent measure.

Although the Court notes that that right to transfer freely is not absolute, since its actual effects in each individual case depend on the 'rates applied by virtue of the legislation of the debtor Member State or States', that cannot be interpreted as allowing the Member States to make that right to transfer freely subject to discretionary limitations and to render that right meaningless. It also notes that the implementation or effects of the right provided for in that provision are not subject to the adoption of another measure and, in particular, to the adoption, by the Association Council, of the provisions referred to in Article 70(1) of the EC-Algeria Association Agreement, which may not therefore be regarded as rendering conditional the immediate application of that right. The Court concludes in that regard that Article 68(4) of the EC-Algeria Association Agreement has direct effect, so that the persons to whom that provision applies are entitled to rely on it directly before the Member States' courts to have rules of national law which are contrary to it disapplied.

The Court then answers the question concerning the personal scope of Article 68(4) of the EC-Algeria Association Agreement.

While observing that Article 68(4) refers expressly only to 'the workers in question', which refers back to 'workers of Algerian nationality' mentioned in paragraph 1 of that article, the Court finds that the benefits which may be transferred freely to Algeria include pensions and annuities in respect of survivor status, the recipients of which can, by definition, only be the survivors of those workers. Article 68(4) of the EC-Algeria Association Agreement would therefore be deprived of its useful effect if those survivors were excluded from its personal scope. It also observes that it would run counter to

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[141] That percentage is fixed in accordance with the provisions of the Regeling woonlandbeginsel in de sociale zekerheid 2012 (Regulation of 2012 on the country-of-residence principle in social security), adopted on the basis of Article 17(3) of the ANW, as amended by the Wet woonlandbeginsel in de sociale zekerheid (Law on the country-of-residence principle in social security). For Algeria, that percentage was 60% of the maximum survivors' benefit as from 1 January 2013 and has been 40% of that maximum amount since 1 January 2016.

the logic underlying the very principle of the free transfer of benefits to Algeria to require that the recipient be obliged to reside in the debtor Member State, in this case the Netherlands. The Court concludes in that regard that Article 68(4) of the EC-Algeria Association Agreement applies to the survivors of a worker who, wishing to transfer their survivors' benefit to Algeria, are not themselves workers and who reside in Algeria.

Lastly, as regards the compatibility of the reduction in the amount of a survivors' benefit by reason of the fact that the recipient of that benefit resides in Algeria with Article 68(4) of the EC-Algeria Association Agreement, the Court points out that that provision provides for the right to transfer freely the benefits at issue to Algeria 'at the rates applied by virtue of the legislation of the debtor Member State or States'. Thus, the debtor Member State has a discretion in establishing rules for calculating the amount of the benefits referred to in that provision, and that Member State may therefore lay down rules designed to adjust the amount of those benefits on the occasion of that transfer, such as the rule based on the country-of-residence principle.

The Court notes, however, that such rules must respect the substance of the right to transfer freely benefits, without depriving that right of its practical effect, and examines, to that end, the factors characterising the survivors' benefit at issue in the main proceedings. It notes that the amount of that benefit is fixed on the basis of the cost of living in the Netherlands and that, consequently, that benefit is intended to ensure that survivors have a basic income calculated on the basis of the cost of living in that Member State. Therefore, the fact of adjusting the amount of the benefit transferred to take account of the cost of living in Algeria does not appear, in the Court's view, to be liable to render meaningless the right to transfer freely, provided that the determination of the rate used for the purposes of that adjustment is based on objective factors, which it is for the referring court to ascertain.

XII. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (Ninth Chamber, Extended Composition), 21 February 2024, Sinopec Chongqing SVW Chemical and Others v Commission, T-762/20

Link to the full text of the judgment

Dumping – Imports of certain polyvinyl alcohols originating in China – Definitive anti-dumping duty – Implementing Regulation (EU) 2020/1336 – Calculation of the normal value – Significant distortions in the exporting country – Article 2(6a) of Regulation (EU) 2016/1036 – WTO law – Principle of consistent interpretation – Adjustments – Non-refundable VAT – Functions similar to those of an agent acting on a commission basis – Fair comparison of the export price and the normal value – Burden of proof – Article 2(10)(b) and (i) of Regulation 2016/1036 – Non-cooperation – Facts available – Article 18 of Regulation 2016/1036 – Double application – Punitive application – Different production processes – Price undercutting – Market segments – Product control number method – Article 3(2) and (3) of Regulation 2016/1036 – Rights of the defence – Confidential treatment – Articles 19 and 20 of Regulation 2016/1036

In an action brought by entities of the Chinese group Sinopec, the General Court annuls Implementing Regulation 2020/1336 of the European Commission imposing definitive anti-dumping duties on

imports of certain polyvinyl alcohols ('PVA') originating in the People's Republic of China. [142] In its judgment, in the context of a fair comparison of the export price and the normal value, the Court clarifies the extent of the Commission's burden of proof for the purposes of making a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions similar to those of an agent working on a commission basis. It also rules on the question whether, in the event that the Commission bases its conclusions on the facts available following a finding of a company's non-cooperation, the Commission may apply a presumption that the normal value of products sold by that company corresponds to the highest normal value of those of the other exporting producers.

In the present case, the Commission, after receiving a complaint lodged by Kuraray Europe GmbH, the main PVA producer in the European Union, initiated an anti-dumping investigation at the end of which it adopted the contested regulation.

It is in that context that Sinopec group entities – Sinopec Chongqing SVW Chemical Co. Ltd ('Sinopec Chongqing') and Sinopec Great Wall Energy & Chemical (Ningxia) Co. Ltd ('Sinopec Ningxia'), Chinese undertakings which produce PVA, and Central-China Company, Sinopec Chemical Commercial Holding Co. Ltd ('Sinopec Central-China'), a related Chinese undertaking exporting, inter alia, to the European Union products manufactured by those undertakings – considering themselves to have been adversely affected by the anti-dumping duties imposed by the Commission, brought an action before the Court for annulment of Implementing Regulation 2020/1336 in so far as that regulation concerns them. [143]

Findings of the Court

In support of their action, the applicants submit, first of all, that the Commission's application of Article 2(6a) of Regulation 2016/1036, [144] for the purpose of determining the normal value of the products manufactured by them, is contrary to the obligations arising from World Trade Organisation (WTO) law. That provision establishes a special regime laying down rules for determining normal value in the case of exports from countries whose domestic market has been shown to have significant distortions, as defined in that provision.

In that regard, the Court states that the Commission was not required to interpret that provision in the light of WTO rules. Although EU legislation must be interpreted, as far as possible, in the light of international law, in particular where it is intended to give effect to an international agreement concluded by the European Union, the fact remains that Article 2(6a) of the basic regulation cannot be considered to be a provision intended to give effect to specific obligations under WTO agreements, since WTO law does not include specific rules for calculating normal value in the situations covered by the provision concerned.

Next, as regards the comparison between the export price and the normal value of the products concerned, the Court finds that the Commission was wrong to make a downward adjustment to the export price, pursuant to Article 2(10)(i) of the basic regulation. It made an error of assessment in finding that, notwithstanding the existence of common control, the applicants did not constitute a common economic entity, since, according to the Commission, Sinopec Central-China, a sales company affiliated to the other two applicants, was not acting as an internal sales department; rather, it was carrying out functions similar to those of an agent working on a commission basis.

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142 Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China (OJ 2020 L 315, p. 1; 'the contested regulation').

143 Reference should also be made to two other judgments delivered on the same day on two actions for annulment of the contested regulation: judgment in Inner Mongolia Shuangxin Environment-Friendly Material v Commission (T-763/20), and judgment in Anhui Wanwei Updated High-Tech Material Industry and Inner Mongolia Mengwei Technology v Commission (T-764/20).

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

In that regard, it is apparent from settled case-law that where EU institutions consider that it is appropriate to apply a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions similar to those of an agent working on a commission basis, it is the responsibility of those institutions to adduce at the very least consistent evidence showing that that condition is fulfilled.

Thus, the Commission was required to adduce sufficient consistent evidence to demonstrate that, notwithstanding the existence of common control, Sinopec Central-China was carrying out functions similar to those of an agent working on a commission basis and was not acting as an internal sales department. However, the Commission was unable to discharge its burden of proof, the evidence adduced being either irrelevant or of no probative value in the light of the functions carried out by Sinopec Central-China.

As regards the calculation of the normal value of the products sold by Sinopec Ningxia, the Court notes, moreover, that the Commission erred in law when it applied a presumption that that value corresponded to the highest of the normal values of the other exporting producers.

In the present case, since the applicants were unable to provide the Commission with the necessary data relating to Sinopec Ningxia, the Commission calculated the normal value of the products sold by that company on the basis of the facts available, within the meaning of Article 18 of the basic regulation. The data which it did have in its possession were thus compared. While the Commission is not required to explain why the facts available that were used were the best possible, since no such obligation is apparent either from Article 18 of the basic regulation or from the case-law, it must nevertheless explain why the facts used are relevant.

Thus, although, because of differences between the production processes of Sinopec Ningxia and Sinopec Chongqing, the Commission was entitled to reject, as relevant data, the data relating to the latter and to use those relating to the other exporting producers, it was required to justify its choice of using, for each product type sold by Sinopec Ningxia, the highest of the normal values of the other exporting producers. That choice cannot be based on a presumption which in turn is based on a mere finding of the applicants' non-cooperation, since the Commission is not entitled to penalise an exporting producer for its lack of cooperation.

Furthermore, recourse to a presumption, even where it is difficult to rebut, remains within acceptable limits provided, inter alia, that it is possible to adduce evidence to the contrary. As it is, in the present case, rebuttal of the presumption in question is possible only if the applicants provide the Commission with the information the non-production of which specifically represents the factor that triggered the Commission's use of the facts available within the meaning of Article 18 of the basic regulation.

Lastly, the Court finds that the Commission did not infringe the applicants' rights of defence by refusing to disclose to them information about the quantities sold and sales prices of the EU industry or the price undercutting and underselling margins, since that information is by nature confidential.

The fact that there was no error is confirmed by the fact that when the applicants received the email from the Commission refusing their request for access to the abovementioned information, they did not bring the matter before the hearing officer, although they could have done so. [145] In so doing, they accepted the Commission's decision which reflects the balance struck between the objectives pursued by the basic regulation, namely to allow the interested parties effectively to defend their interests, and to preserve the confidentiality of the information collected in the course of the investigation. [146]

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[145] Article 15 of Decision (EU) 2019/339 of the President of the European Commission of 21 February 2019 on the function and terms of reference of the hearing officer in certain trade proceedings (OJ 2019 L 60, p. 20).

[146] See, to that effect, Article 6(7) and Articles 19 and 20 of the basic regulation.

Judgment of the General Court (Ninth Chamber, Extended Composition), 21 February 2024, Inner Mongolia Shuangxin Environment-Friendly Material v Commission, T-763/20

Link to the judgment as published in extract form

Dumping – Imports of certain polyvinyl alcohols originating in China – Definitive anti-dumping duty – Implementing Regulation (EU) 2020/1336 – Calculation of the normal value – Significant distortions in the exporting country – Article 2(6a) of Regulation (EU) 2016/1036 – WTO law – Principle of consistent interpretation – Choice of appropriate representative country – Readily available data – Non-cooperation – Definition of 'necessary information' – Article 18 of Regulation 2016/1036 – Price undercutting – Market segments – Product control number method – Article 3(2) and (3) of Regulation 2016/1036 – Rights of the defence – Confidential treatment – Articles 19 and 20 of Regulation 2016/1036

The General Court dismisses the action brought before it by a Chinese exporting producer for the annulment of Implementing Regulation 2020/1336 of the European Commission imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols ('PVA') originating in the People's Republic of China. [147] In its judgment, the Court clarifies what is meant by 'readily available' data in the context of the choice of appropriate representative country for the calculation of the normal value of the product concerned by an anti-dumping investigation where there are significant distortions of the market in the exporting country. It also elaborates on the concept of 'necessary information' to be provided by interested parties to the Commission in the course of the anti-dumping investigation. In the present case, the Commission, after receiving a complaint lodged by Kuraray Europe GmbH, the main PVA producer in the European Union, initiated an anti-dumping investigation at the end of which it adopted the contested regulation.

It was against that backdrop that Inner Mongolia Shuangxin Environment-Friendly Material Co. Ltd, a Chinese company which produces and exports PVA to the European Union, considering itself to have been adversely affected by the anti-dumping duties imposed by the Commission, brought an action before the Court for annulment of Implementing Regulation 2020/1336 in so far as that regulation concerns it. [148]

Findings of the Court

In support of its action, the applicant submits, in the first place, that the Commission misinterpreted Article 2(6a)(a) of the basic regulation. [149] Under that article, where it is determined that it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions on the domestic market, the normal value of the product concerned is to be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks. To that end, the sources of information which the Commission may use include the corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available. Where several countries meet that criterion, preference is to be given to the country with an adequate level of social and environmental protection.

147 Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China (OJ 2020 L 315, p. 1; 'the contested regulation').

148 Reference should also be made to two other judgments delivered on the same day on two actions for annulment of the contested regulation: judgment in Sinopec Chongqing SVW Chemical and Others v Commission (T-762/20), and judgment in Anhui Wanwei Updated High-Tech Material Industry and Inner Mongolia Mengwei Technology v Commission (T-764/20).

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

In that regard, the Court finds that the Commission did not err in choosing Türkiye over Mexico as the representative country in order to construct the normal value of the product concerned. Indeed, the Commission had no option but to rely on the data provided by a company established in Türkiye, since the data provided by the companies established in Mexico could not be regarded as being 'readily available'.

Thus, as regards, first of all, the concept of 'readily available' data, the Court confirms the literal interpretation adopted by the Commission in the contested regulation to the effect that 'publicly available' means available to the public at large, whereas 'readily available' means available to everybody, provided that certain conditions, like a payment of a fee, have been fulfilled. The data provided by the companies established in Mexico either had been supplied in confidential form alone and were not publicly available or were available only for a different period than that covered by the investigation.

Relying on a contextual and teleological interpretation, the Court rules that that concept must be construed in the light of the requirements arising from the provisions of the basic regulation concerning confidentiality and disclosure, in order to protect the parties' rights of defence. Thus, the basic regulation pursues two objectives: on the one hand, to allow the interested parties effectively to defend their interests and, on the other hand, to preserve the confidentiality of the information collected in the course of the investigation. [150] Consequently, when seeking to obtain data that are 'readily available', the Commission is, in view of those objectives, entitled to refuse to use data which are considered by the party providing them to be confidential and in respect of which it is unable to secure a non-confidential summary as a basis enabling the other interested parties in the investigation to exercise their rights of defence.

Next, the Court makes clear that, by accepting the data provided by the company established in Türkiye, the Commission did not breach its duty of care by calculating the normal value of the product concerned in an inappropriate or unreasonable manner. The applicant's arguments challenging the relevance of the data chosen – having regard to the investigation period and the information contained in those data – are not substantiated in the present case. Therefore, the applicant has not adduced sufficient evidence to render implausible the assessments of the facts in the contested regulation.

Finally, having concluded that Türkiye was the only appropriate representative country, the Commission was fully entitled to find that it was not required to carry out an assessment of the level of social and environmental protection in accordance with Article 2(6a)(a) of the basic regulation.

As regards, in the second place, the infringement of Article 18 of the basic regulation, the Court rejects the applicant's claim that the Commission was wrong to calculate the normal value on the basis of the facts available within the meaning of Article 18 of the basic regulation, despite the fact that the applicant had cooperated to the best of its ability.

The objective of Article 18 of the basic regulation is to enable the Commission to continue with the anti-dumping investigation even though the interested parties refuse to cooperate or do not cooperate satisfactorily. Thus, the first paragraph of that provision allows the Commission to resort to the facts available where the requested information is not ultimately obtained. In order to be regarded as cooperating under that provision, the parties must provide all the information that they have which the institutions consider necessary for the purpose of reaching their findings.

As for the concept of 'necessary information', it follows from the wording, context and objective of Article 18(1) of the basic regulation that that term refers to information held by the interested parties which the EU institutions ask them to provide in order to enable those institutions to reach the appropriate findings in an anti-dumping investigation. Thus, information relating to production

[150] See, to that effect, Article 6(7) and Articles 19 and 20 of the basic regulation.

volumes and manufacturing costs of the product under investigation is necessary information within the meaning of that provision.

In the present case, the Court notes, first of all, that the applicant did not supply the information requested by the Commission regarding the inputs for self-produced factors of production, information that was necessary for determining the normal value. Since the normal value was constructed using a method based on production costs, there was a need to be acquainted with the consumption volumes of all the inputs used to produce PVA, including the inputs for producing self-produced factors of production. As the applicant did not demonstrate that it was impossible for it to provide that information, the Commission did not infringe Article 18(1) by using the facts available as a substitute for that information.

Next, as regards the alleged infringement of Article 18(3) of the basic regulation, the Court recalls that paragraphs 1 and 3 of that article cover different situations. Thus, whereas paragraph 1 of Article 18 sets out in general terms cases in which the information needed by the institutions for the purposes of the investigation has not been supplied, paragraph 3 of that article contemplates the cases in which the information necessary for the purposes of the investigation has been supplied but is irrelevant, with the result that the facts available do not necessarily have to be used. Since the applicant did not provide the information required, Article 18(3) of the basic regulation is not applicable and the Commission was able to use only the facts available as a substitute for the missing information.

Finally, the Commission also did not infringe the applicant's rights of defence in so far as it did not provide the applicant in good time with the 'verification report', which had to be sent to the applicant before the letter informing that party of the Commission's intention to use the facts available within the meaning of Article 18 of the basic regulation. In that regard, it follows from settled case-law that an infringement of the rights of the defence results in the annulment of the decision adopted at the end of a procedure only if, had it not been for that irregularity, the outcome of the procedure might have been different. The applicant has not put forward any evidence to show that it could not be ruled out that the outcome of the procedure might have been different if it had received that report earlier.

As regards the other pleas challenging the dumping margin adopted by the Commission in the contested regulation, it follows from the analysis of those pleas that the calculation of the dumping margin is not tainted by error, with the result that the dumping margin remains higher than the injury margin, that latter margin having been taken into account in order to determine the anti-dumping rate under the lesser duty rule. Thus, as those other pleas are not such as to call that finding into question, the Court rejects them as ineffective.

XIII. JUDGMENTS PREVIOUSLY DELIVERED

1. FUNDAMENTAL RIGHTS: RIGHT TO AN IMPARTIAL TRIBUNAL AND A FAIR TRIAL

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Krajowa Rada Sądownictwa (Continued holding of a judicial office), C-718/21

Link to the full text of the judgment

Reference for a preliminary ruling – Article 267 TFEU – Concept of 'court or tribunal' – Criteria – Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs) of the Sąd Najwyższy (Supreme Court, Poland) – Reference for a preliminary ruling from an adjudicating panel which does not have the status of an independent and impartial tribunal previously established by law – Inadmissibility

By letter of 30 December 2020, L.G., a judge within the Sąd Okręgowy w K. (Regional Court, K., Poland), notified the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') of his wish to continue to perform his duties beyond the normal retirement age. The KRS having declared that there was no need to rule on the application, because the time limit for lodging it had expired, L.G. brought an action before the referring body. Having doubts as to whether a piece of national legislation which (i) makes the effectiveness of such a declaration by a judge subject to the authorisation of the KRS and (ii) lays down an absolute time limit in respect of that declaration is in line with the second subparagraph of Article 19(1) TEU, that body has made a reference to the Court of Justice for a preliminary ruling.

In this instance, the referring body is composed of three judges of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs; 'the Chamber of Extraordinary Control'), established within the Sąd Najwyższy (Supreme Court, Poland) in connection with the recent reforms of the Polish judicial system. [151] Those three judges were appointed to that chamber on the basis of Resolution No 331/2018, adopted by the KRS on 28 August 2018 ('Resolution No 331/2018').

However, that resolution was annulled by a judgment handed down by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) on 21 September 2021. [152] In addition, in its judgment of 8 November 2021, Dolińska-Ficek and Ozimek v. Poland ('the judgment in Dolińska-Ficek and Ozimek v. Poland'), [153] the European Court of Human Rights ('the ECtHR') found a breach of the requirement of a 'tribunal established by law' laid down in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, [154] due to the process which, on the basis of Resolution No 331/2018, had led to the appointment of the members of two three-judge adjudicating panels of the Chamber of Extraordinary Control.

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151 That chamber and another new chamber of the Supreme Court – the Izba Dyscyplinarna (Disciplinary Chamber) – were created under the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, which entered into force on 3 April 2018.

152 That judgment was handed down following the judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153).

153 CE:ECHR:2021:1108JUD004986819.

154 Signed in Rome on 4 November 1950.

In its judgment, the Court, sitting as the Grand Chamber, declares the request for a preliminary ruling inadmissible on the ground that the referring body does not constitute a 'court or tribunal' within the meaning of Article 267 TFEU.

Findings of the Court

The Court begins by recalling that, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, the Court takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. In that regard, the Court has already noted that the Supreme Court as such meets those requirements and has stated that, in so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that that court or tribunal satisfies those requirements, irrespective of its actual composition. In the context of a preliminary ruling procedure, it is not for the Court of Justice, in view of the distribution of functions between itself and the national courts, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure.

However, that presumption may be rebutted where a final judicial decision handed down by a court or tribunal of a Member State or an international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). [155]

In that regard, the Court notes that the judgment in Dolińska-Ficek and Ozimek v. Poland of the ECtHR and the judgment of 21 September 2021 of the Supreme Administrative Court are final and relate specifically to the circumstances in which judges of the Chamber of Extraordinary Control were appointed on the basis of Resolution No 331/2018.

More specifically, in the judgment in Dolińska-Ficek and Ozimek v. Poland the ECtHR found, in essence, that the appointments of the members of the adjudicating panels of the Chamber of Extraordinary Control concerned had been made in manifest breach of fundamental national rules governing the procedure for the appointment of judges. While it is true that, of the six judges making up the adjudicating panels of the Chamber of Extraordinary Control at issue in the cases which gave rise to that judgment, only one of them sits within the referring body, it is nevertheless clear from the grounds of that judgment that the assessments made by the ECtHR apply without distinction to all the judges of the Chamber of Extraordinary Control who were appointed to that chamber in similar circumstances and, in particular, on the basis of Resolution No 331/2018.

In addition, in the judgment of 21 September 2021, the Supreme Administrative Court annulled Resolution No 331/2018 by relying, inter alia, on findings and assessments that largely overlap with those set out in the judgment in Dolińska-Ficek and Ozimek v. Poland.

In the light of the findings and assessments arising from those two judgments and from its own case-law, the Court examines whether the presumption that the requirements of a 'court or tribunal' within the meaning of Article 267 TFEU are met must be held to be rebutted with regard to the referring body.

In that regard, the Court emphasises, in the first place, that the judges making up the referring body were appointed to the Chamber of Extraordinary Control on a proposal from the KRS – that is to say,

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155 See judgment of 29 March 2022, Getin Noble Bank (C-132/20, EU:C:2022:235, paragraph 72).

from a body where, following recent legislative amendments, [156] 23 of its 25 members have been designated by the executive and the legislature or are members of those branches of government. Admittedly, the fact that a body, such as the KRS, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the status of that body as a tribunal previously established by law or the independence of the judges appointed at the end of that procedure. However, the situation is different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised. The legislative amendments concerning the KRS were made at the same time as the adoption of a substantial reform of the Supreme Court, including, in particular, the creation, within that court, of two new chambers and the lowering of the retirement age of judges of that court. Those amendments therefore came at a time when it was expected that numerous judicial posts at the Supreme Court declared vacant or newly created would soon be available to be filled.

In the second place, the Chamber of Extraordinary Control thus created ex nihilo was assigned jurisdiction over particularly sensitive matters, such as electoral disputes and proceedings relating to the holding of referendums, as well as extraordinary appeals enabling final decisions of the ordinary courts or other chambers of the Supreme Court to be set aside.

In the third place, in parallel with the legislative amendments referred to above, the rules concerning the judicial remedies available against resolutions of the KRS proposing candidates for appointment to judicial posts at the Supreme Court were substantially amended, thereby undermining the effectiveness of such remedies. In that regard, the Court of Justice has also emphasised that the restrictions introduced by those amendments concerned only appeals brought against resolutions of the KRS relating to applications for judicial posts at the Supreme Court, whereas the resolutions of the KRS relating to applications for judicial posts in other national courts remained subject to the general system of judicial review previously in force. [157]

In the fourth place, the Court of Justice has also already held in the judgment in W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) [158] that, when the member of the Chamber of Extraordinary Control concerned by the case which gave rise to that judgment was appointed on the basis of Resolution No 331/2018, the Supreme Administrative Court, before which an action for annulment of that resolution had been brought, had ordered, on 27 September 2018, that the effects of that resolution be suspended. Those circumstances also pertain as regards the appointment of the three members sitting within the referring body. Thus the fact that the President of the Republic of Poland made the appointments at issue, as a matter of urgency and without waiting to take cognisance of the grounds of the order of 27 September 2018, on the basis of Resolution No 331/2018, even though that resolution had been suspended by that order, seriously undermined the principle of the separation of powers which characterises the operation of the rule of law.

En cinquième lieu, alors que la Cour suprême administrative se trouvait saisie du recours en annulation contre la résolution no 331/2018 et avait sursis à statuer sur ce litige dans l'attente de l'arrêt de la Cour dans l'affaire A. B. e.a. , le législateur polonais a adopté une loi prévoyant notamment l'exclusion de tout recours futur contre les résolutions de la KRS proposant la nomination

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156 Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011, as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017, which entered into force on 17 January 2018, and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 20 July 2018, which entered into force on 27 July 2018.

157 Judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C824/18, EU:C:2021:153, paragraphs 157, 162 and 164).

158 Judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment) (C-487/19, EU:C:2021:798).

de juges à la Cour suprême ainsi qu'un non-lieu à statuer sur les recours de cette nature encore pendants . As regards the amendments thus introduced by that law, the Court of Justice has already held that, particularly when viewed in conjunction with a set of other contextual factors, those amendments are such as to suggest that the Polish legislature acted with the specific intention of preventing any possibility of exercising judicial review of the resolutions concerned. [159]

In the sixth and last place, the Court explains that, while, admittedly, the effects of the judgment of 21 September 2021 of the Supreme Administrative Court referred to above do not relate to the validity and effectiveness of the presidential acts of appointment to the judicial posts concerned, the fact remains that the act by which the KRS puts forward a candidate for appointment to a judicial post at the Supreme Court is an essential condition for that candidate to be appointed to such a post by the President of the Republic of Poland.

In conclusion, the Court rules that the consequence of all the factors – both systemic and circumstantial – referred to above, which characterised the appointment, within the Chamber of Extraordinary Control, of the three judges constituting the referring body, is that that body does not have the status of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter, with the result that that panel does not constitute a 'court or tribunal' within the meaning of Article 267 TFEU. Those factors are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the persons concerned and the adjudicating panel on which they sit with regard to external factors, in particular the direct or indirect influence of the national legislature and executive, and their neutrality with respect to the interests before them. Those factors are thus capable of leading to a lack of appearance of independence or impartiality on the part of those judges and of that body, which is likely to undermine the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.

2. INSTITUTIONAL PROVISIONS: RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the General Court (Fourth Chamber), 24 January 2024 Veritas v Commission, T-602/22

Link to the full text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Document disclosed in the context of an EU Pilot procedure concerning the repayment of VAT – Document originating from a Member State – Refusal to grant access – Prior agreement of the Member State – Exception relating to the protection of court proceedings – Obligation to state reasons

In an action seeking annulment of a decision of the European Commission refusing access to a document originating from a Member State, in its judgment, the General Court clarifies the distinction between the formal requirement to state reasons for a refusal of access to documents and the substantive legality of such a refusal. It also stipulates the methods of obtaining the prior agreement

159 Judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions) (C-824/18, EU:C:2021:153, paragraphs 137 and 138).

provided for in Article 4(5) of Regulation No 1049/2001, [160] regarding the disclosure of documents originating from Member States, and the conditions for the application of the exception based on the protection of court proceedings before the national courts, [161] in the presence of such documents and in the context of a possible reference for a preliminary ruling.

In the context of an EU Pilot procedure [162] opened following the complaint of the applicant, Veneziana Energia Risorse Idriche Territorio Ambiente Servizi SpA (Veritas), the Commission has asked the Italian authorities for clarification concerning the arrangements for repayment of VAT unduly paid on the Italian Environmental Hygiene Tax (TIAI). After being informed by the Commission that, having regard to the response from the Italian authorities, it had decided not to open an infringement procedure for failure to comply with EU law by those authorities, the applicant asked the Commission for a copy of the Italian authorities' response.

In its initial response, the Commission refused access to the Italian authorities' response, on the ground that its disclosure would undermine the protection of ongoing court proceedings in Italy, pursuant to the second indent of Article 4(2) of Regulation No 1049/2001. By the contested decision, [163] the Commission confirmed the refusal to grant access, following the objection to the disclosure of that letter by the Italian authorities pursuant to Article 4(5) of Regulation No 1049/2001, on the basis of the exception provided for in the second indent of Article 4(2) of that regulation.

Findings of the Court

In the first place, the Court recalls that the obligation to state reasons is an essential procedural requirement which must be distinguished from the question whether the reasoning is correct, the latter being a matter which goes to the substantive legality of the contested measure. A measure which lacks an adequate statement of reasons, for the purpose of the formal obligation to state reasons, is one which does not make it possible to understand why, on what basis or for what reason it was adopted, whereas the reasons for a measure and its justifications may be sufficiently known and comprehensible, but inadequate to justify it in law, in that they are not substantiated, clear or compliant with the relevant provisions.

As regards, in the second place, the applicant's line of argument regarding the allegedly unlawful reliance of the contested decision on Article 4(5) of Regulation No 1049/2001, in the absence of any effective objection to disclosure by the Italian authorities, in particular before the initial response of the Commission, the Court holds that it does not follow either from that provision or from the case-law that, in order to be able to lodge an objection, the Member State which is the author of the document at issue must first make a formal request specifically to the institution concerned, nor is it necessary for the Member State to rely expressly on that provision. There is nothing in the wording of that provision, which is a procedural provision dealing with the process of adoption of an EU decision to indicate that the Member State must submit a formal request, without which the Member State's objection cannot be taken into account in the adoption of that decision. Thus, the Member State is not required to proceed in two stages in order to object to the disclosure of one of its documents, first by asking the Commission not to disclose the document in question without its prior agreement and then by refusing to give that agreement.

It also follows that the fact that the Member State concerned is consulted under Article 4(4) of Regulation No 1049/2001 does not preclude the subsequent application of Article 4(5) of that

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160 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

161 Pursuant to the second indent of Article 4(2) of Regulation No 1049/2001.

162 EU Pilot procedure 9456/19/TAXUD concerning the repayment of value added tax (VAT) unduly paid on the Italian Environmental Hygiene Tax (tariffa di igiene ambientale, established by Article 49 of decreto legislativo n. 22 (Legislative Decree No 22) of 5 February 1997).

163 Commission Decision C(2022) 5221 final of 15 July 2022.

regulation. Those two provisions were not considered to be mutually exclusive, but rather, as a provision relating to third parties in general (paragraph 4) and a provision applying to specific third parties, namely the Member States, and reiterating Declaration No 35 annexed to the Treaty of Amsterdam (paragraph 5).

Besides, in order to ensure effective application of Article 4(5) of Regulation No 1049/2001, in particular by giving the Member State concerned the possibility of requiring its prior agreement to disclose a document of which it is the author, the Court notes that it is also necessary for the Member State to be informed of the existence of a request for access to that document, which is precisely the subject of the consultation provided for in Article 4(4) of that regulation.

In the third place, the Court rejects the applicant's argument, according to which the mere assertion of the particular plausibility of a reference for a preliminary ruling by the Italian courts concerned is not sufficient to justify the refusal to disclose the Italian authorities' letter.

However, it recalls that, in order for the exception relating to the protection of court proceedings to apply to documents which have not been drawn up in the context of specific court proceedings, the documents requested must, at the time of adoption of the decision refusing access to those documents, have a relevant link either with a dispute pending before the EU Courts, in respect of which the institution concerned is invoking that exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely.

However, that case-law concerns the documents drawn up by the institutions themselves, and not, as in the present case, documents originating from Member States and sent to an institution. In the case of a document drawn up by an institution, the undermining of equality of arms and of the ability of the institution concerned to defend itself can be brought only in the context of proceedings in which it takes part, that is to say, proceedings taking place in principle before the EU Courts.

By contrast, in the case of a document originating from a Member State and linked to proceedings pending before the national courts to which the State is a party, as in the present case, it is the guarantee of equality of arms in those national proceedings which is taken into account. It follows that the question whether a reference for a preliminary ruling by the Italian courts hearing the national proceedings at issue was particularly plausible is irrelevant.

3. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR ANNULMENT

Order of the General Court (Third Chamber), 25 January 2024 Lukoil v Parliament and Others, T-280/23

Link to the full text of the order

Action for annulment – Time limit for bringing proceedings – Out of time – Manifest inadmissibility

Hearing an action for annulment, which it dismisses as manifestly inadmissible on the ground that it is out of time, the General Court applies, for the first time in a field other than civil service, the case-law stemming from the judgment of 1 August 2022, Kerstens v Commission, [164] concerning the

[164] Judgment of 1 August 2022, Kerstens v Commission (C-447/21 P, not published, EU:C:2022:612).

calculation of the time limit for bringing an action against a decision notified by email, and, in addition, provides clarifications as regards the single registration principle under the Interinstitutional Agreement on a mandatory transparency register. [165]

By its action lodged at the Court Registry on 17 May 2023, Oil company 'Lukoil' PAO, the applicant, established in Moscow, sought the annulment of the decision of the Secretariat of the Transparency Register declaring the removal of the applicant from the Transparency Register of the European Union. [166] That secretariat, by an email of 6 March 2023, notified the contested decision to the applicant. The applicant admitted explicitly that that email had arrived on the same date in the email inboxes of both representatives it had designated when it was entered into the Transparency Register ('the representatives').

Findings of the Court

The Court recalls, first of all, that, in order for a decision to be validly notified, it is necessary not that the addressee should actually gain effective knowledge of its content, but that he or she should be given the opportunity to gain effective knowledge of it. In that regard, various circumstances may provide proof that the addressee of a decision has not only received it, but has also been able to gain effective knowledge of it.

To that effect, in order to establish that a decision notified by email was duly notified to its addressee on a specific date and that, consequently, the time limit for bringing an action began to run from that date, the party alleging that an action is out of time must show not only that that decision was communicated to its addressee, that is to say that it was transmitted to his or her email address and that he or she received it at that address, but also that the addressee was in a position to take cognisance of the content of that decision on that date, that is to say, that he or she was able to open the email containing the decision in question and thus to take cognisance of it on that date.

In that regard, neither a presumption that the addressee of a decision notified by email can, in any event, only have been able to become acquainted with its content on the date on which he or she consulted his or her email inbox, nor a presumption that the addressee of such a decision is in any event able to become acquainted with its contents as soon as it is received in his or her email inbox, can be in conformity with the provisions setting the time limits for bringing an action.

In the present case, the Court finds that, since the contested decision was sent on 6 March 2023, the time limit for seeking its annulment expired, in principle, on 16 May 2023, with the result that, prima facie, the present action is out of time.

Nevertheless, the Court examines the series of arguments on which the applicant relies to claim that the action is not out of time.

In particular, the Court rejects, in the first place, the argument that the email was communicated outside office hours. In accordance with the rules for calculating time limits, 'where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be considered as falling within the period in question'. [167]

First, the Court observes that, by a letter of 31 March 2023 addressed to the Secretariat of the Transparency Register, the applicant's advisers submitted, in response to the contested decision attached to the email of 6 March 2023, a request to reopen the investigation, which may be

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165 Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register (OJ 2021 L 207, p. 1; 'the Interinstitutional Agreement').

166 Decision of the Secretariat of the Transparency Register Ares (2023) 1618717 of 6 March 2023 declaring the removal of the applicant from the Transparency Register of the European Union.

167 Second subparagraph of Article 3(1) of Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ, English Special Edition 1971 (II), p. 354).

considered only up to 20 working days after the parties concerned have been informed of the decision. [168]

Secondly, the Court notes that, in order to show that the request to reopen the investigation relating to the applicant was brought within that time limit, the applicant's advisers made explicit reference, in the letter of 31 March 2023, to the fact that the period of 20 working days had begun to run on 7 March 2023 and expired on 3 April 2023.

The Court infers therefrom that such precise information, coming from the applicant's own advisers, can only be interpreted as their acknowledgement that the email containing the contested decision was indeed communicated to its representatives on 6 March 2023, that that email arrived in their email inboxes on that date and that they took cognisance or, at the very least, were in a position to take cognisance of it on the same day that it was communicated and received. It concludes therefrom that the email containing the contested decision was 'duly notified' to those representatives on 6 March 2023.

In the second place, the Court rejects the argument that the email containing the contested decision was communicated, on 6 March 2023, only to the representatives of the applicant's Belgian subsidiary, not to the applicant itself, and that the applicant was therefore not able to gain knowledge of it on that day.

In that respect, the Court notes, in particular, that, in accordance with the guidelines established by the Secretariat of the Transparency Register concerning that register for applicants for registration and for registrants, to ensure that that agreement is applied consistently ('the guidelines'), interest representatives operating in more than one country (for example multinationals) should, to avoid multiple entries and speed up the administrative handling of an application or registration, register their activities in the register only once and, in doing so, cover the various other entities of a network, corporate group or similar. [169] The guidelines specify that, in practice, this generally falls to the branch or office representing the interests of the entity vis-à-vis the EU institutions.

The Court finds, first, that it is apparent from the extract from the Transparency Register that only the applicant was entered therein. Its Belgian subsidiary did not form the subject of any separate entry and was referred to only as 'office in charge of relations with the Union'. Therefore, in accordance with the Interinstitutional Agreement [170] and in line with the single registration principle established in the guidelines, [171] the indication of the applicant as the sole organisation entered in the Transparency Register covered all the undertakings in the group to which it belonged in all countries where that group was present, including the Belgian subsidiary.

Secondly, regardless of their respective functions in that subsidiary, by referring in the extract from the register to the names of two directors of that subsidiary as 'person legally responsible for the entity' and 'person in charge of relations with the Union', the applicant accepted that those persons may act on its behalf as representatives responsible for its relations with the Secretariat of the Transparency Register. [172]

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168 Under points 7.3 and 7.4 of Annex III to the Interinstitutional Agreement.

169 Point 2 of the guidelines, entitled 'Single registration principle'.

170 Article 8(3)(b) of the Interinstitutional Agreement.

171 Point 2 of the guidelines.

172 Article 6(2) of the Interinstitutional Agreement and point I of Annex II thereto.

4. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Grand Chamber), 30 January 2024 Direktor na Glavna direktsia „Natsionalna politsia" pri MVR – Sofia, C-118/22

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 for the purpose of combating crime – Directive (EU) 2016/680 – Article 4(1)(c) and (e) – Data minimisation – Limitation of storage – Article 5 – Appropriate time limits for erasure or for a periodic review of the need for the storage – Article 10 – Processing of biometric and genetic data – Strict necessity – Article 16(2) and (3) – Right to erasure – Restriction of processing – Article 52(1) of the Charter of Fundamental Rights of the European Union – Natural person convicted by final judgment and subsequently legally rehabilitated – Storage of data until death – No right to erasure or restriction of processing – Proportionality

Following a reference for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), the Grand Chamber of the Court of Justice rules on the time limits for the storage – for the purposes of combating crime – of personal data of persons who have been convicted by final judgment of a criminal offence, in the light of Directive 2016/680. [173]

An entry in the police records was made in respect of NG in the course of a criminal investigation for failing to tell the truth as a witness. Following that investigation, NG was charged with a criminal offence, was subsequently found guilty of that offence and was given a one year suspended sentence. After serving that sentence, NG was legally rehabilitated.

On the basis of that legal rehabilitation, NG applied for the erasure of the entry concerning him in the police records. That application was refused on the ground that a final criminal conviction, even in the event of legal rehabilitation, is not one of the grounds for erasure of an entry in the police records, which are exhaustively listed in national law. The action brought by NG against that decision having been dismissed, NG brought an appeal before the referring court, arguing that it follows from Directive 2016/680 that the storage of personal data cannot be carried on indefinitely. According to NG, that is de facto the case where the data subject can never obtain the erasure of personal data collected in connection with a criminal offence for which he or she was convicted by final judgment, even after serving his or her sentence and having been legally rehabilitated.

In those circumstances, the Court was asked to give a preliminary ruling on whether Directive 2016/680, [174] read in the light of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, [175] precludes national legislation which provides for the storage, by police authorities, for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, of personal data, including biometric and genetic data, concerning persons who have been convicted by final judgment of an intentional criminal offence

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173 Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

174 More specifically, Article 4(1)(c) and (e) of Directive 2016/680, read in conjunction with Articles 5 and 10, Article 13(2)(b) and Article 16(2) and (3) thereof.

175 Articles 7 and 8 of the Charter of Fundamental Rights of the European Union enshrine, respectively, the right to respect for family and private life, and the right to the protection of personal data.

subject to public prosecution, until the death of the data subject, even in the event of his or her legal rehabilitation, without also granting that person the right to have those data erased or, where appropriate, to have their processing restricted.

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

Findings of the Court

In the first place, the Court states that Directive 2016/680 establishes a general framework to ensure, inter alia, that the storage of personal data and, more specifically, the period of storage, are limited to what is necessary for the purposes for which those data are stored, while leaving it to the Member States to determine, in compliance with that framework, the specific situations in which the protection of the fundamental rights of the data subject requires the erasure of those data and the time at which those data must be erased. However, that directive does not require the Member States to define absolute time limits for the storage of personal data, beyond which those data must be automatically erased.

More specifically, first of all, Article 4(1)(c) of Directive 2016/680 establishes the principle of 'data minimisation', according to which Member States must provide for personal data to be adequate, relevant and not excessive in relation to the purposes for which they are processed. In addition, under Article 4(1)(e) of that directive, Member States must provide that those data are to be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are processed. In that context, Article 5 of that directive requires the Member States to provide for, inter alia, the establishment of appropriate time limits for the erasure of personal data or for a periodic review of the need for the storage of those data. The 'appropriate' nature of those periods requires, in any event, that those time limits allow the erasure of the data concerned where their storage is no longer necessary for the purposes which justified the processing.

Next, Article 10 of Directive 2016/680, which governs the processing of special categories of personal data, including biometric and genetic data, authorises the processing of such data 'only where strictly necessary'.

Lastly, Article 16(2) of Directive 2016/680 establishes a right to erasure of personal data where the processing infringes the provisions adopted pursuant to that directive [176] or where those data must be erased in order to comply with a legal obligation to which the data controller is subject. [177] It follows that that right to erasure may be exercised, inter alia, where the storage of the personal data in question is not or is no longer necessary for the purposes for which they are processed or where that erasure is required in order to comply with the time limit set, for that purpose, by national law.

In the second place, the Court notes that, in the present case, the personal data entered in the police records concerning persons prosecuted for an intentional offence subject to public prosecution are stored only for operational investigation purposes and, more specifically, for the purpose of comparison with other data collected during investigations into other offences. In that regard, however, the concept of an 'intentional criminal offence subject to public prosecution' is particularly general and is liable to apply to a large number of criminal offences, irrespective of their nature and gravity. However, persons convicted by final judgment of such an offence do not all present the same degree of risk of being involved in other criminal offences, justifying a uniform period of storage of the data relating to them. Thus, in certain cases, in the light of factors such as the nature and seriousness of the offence committed or the absence of recidivism, the risk represented by the convicted person will not necessarily justify maintaining the data relating to him in the national police records provided for that purpose until his death, with the result that there will no longer be a

176 More specifically Article 4, 8 or 10.

177 However, pursuant to Article 16(3) of Directive 2016/680, national law must provide that the data controller is to restrict the processing of those data instead of erasing them where the accuracy of the personal data is contested by the data subject and their accuracy or inaccuracy cannot be ascertained, or where the personal data must be maintained for the purposes of evidence.

necessary connection between the data stored and the objective pursued. Accordingly, in such cases, the storage of such data will not comply with the principle of data minimisation and will exceed the period necessary for the purposes for which they are processed.

Next, since the personal data stored in the police records at issue includes biometric and genetic data, the Court notes that the storage of the biometric and genetic data of persons who have already been convicted by final judgment, even until the death of those persons, may indeed be strictly necessary, [178] in particular in order to enable the possible involvement of those persons in other criminal offences to be verified and, accordingly, to prosecute and convict the perpetrators of those offences. However, the storage of those data meets that requirement only if it takes into consideration the nature and seriousness of the offence which led to the final criminal conviction, or other circumstances such as the particular context in which that offence was committed, its possible connection with other ongoing proceedings or the background or profile of the convicted person. Accordingly, where, as provided for by national law in the main proceedings, the biometric and genetic data of data subjects entered in the police records is – in the event that those persons are convicted by final judgment – to be stored until the death of those persons, the scope of that storage is excessively broad with regard to the purposes for which those data are processed.

Lastly, as regards, first, the obligation to provide for the establishment of appropriate time limits, [179] a time limit can be regarded as 'appropriate', in particular as regards the storage of the biometric and genetic data of any person convicted by final judgment of an intentional criminal offence subject to public prosecution, only if it takes into consideration the relevant circumstances which might require such a storage period. Consequently, even if the reference to the death of the data subject may constitute a 'time limit' for the erasure of stored data, such a time limit can be regarded as 'appropriate' only in specific circumstances which duly justify it. That is clearly not the case where it is applicable generally and indiscriminately to any person convicted by final judgment. It is true that it is for the Member States to decide whether time limits must be established concerning the erasure of those data or the periodic review of the need for their storage. [180] However, the 'appropriate' nature of the time limits for such a periodic review requires that they allow the erasure of the data at issue, where their storage is no longer necessary. That requirement is not satisfied where such erasure is provided for only in the event of that person's death.

Secondly, the provisions of Directive 2016/680 laying down guarantees concerning the conditions relating to the rights to erasure and to the restriction of processing also preclude national legislation which does not allow a person convicted by final judgment of an intentional criminal offence subject to public prosecution to exercise those rights.

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178 See Article 10 of Directive 2016/680.

179 See Article 5 of Directive 2016/680.

180 See Article 5 of Directive 2016/680.

5. BORDER CONTROLS, ASYLUM AND IMMIGRATION: IMMIGRATION POLICY

Judgment of the Court of Justice (Grand Chamber), 30 January 2024 Landeshauptmann von Wien (Family reunification with a minor refugee), C-560/20

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Immigration policy – Right to family reunification – Directive 2003/86/EC – Article 10(3)(a) – Family reunification of an unaccompanied minor refugee with his or her first-degree relatives in the direct ascending line – Article 2(f) – Concept of 'unaccompanied minor' – Minor sponsor at the time of submission of the application but who attained majority during the family reunification procedure – Relevant date for assessing minor status – Period for submitting an application for family reunification – Adult sister of the sponsor requiring the permanent assistance of her parents on account of a serious illness – Effectiveness of the right to family reunification of an unaccompanied minor refugee – Article 7(1) – Article 12(1), first and third subparagraphs – Possibility of making family reunification subject to additional conditions

Ruling on questions referred for a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, specifies the conditions of eligibility for family reunification, pursuant to Directive 2003/86, [181] of the parents and seriously ill sister of an unaccompanied minor refugee who reached majority during the family reunification procedure.

Having arrived in Austria in 2015 as an unaccompanied minor, RI was granted refugee status there in January 2017. Three months and one day after notification of that decision, when RI was still a minor, CR and GF, his parents, and TY, his adult sister suffering from cerebral palsy, submitted, for the first time, to the Embassy of the Republic of Austria in Syria, applications for entry and residence for the purposes of family reunification with RI. Those applications were rejected by a final decision on the ground that RI had become an adult during the family reunification procedure.

In July 2018, CR, GF and TY again submitted, to the Landeshauptmann von Wien (Governor of the Province of Vienna, Austria), applications for entry and residence for the purposes of family reunification with RI. Those were, once again, rejected on the ground that they had not been submitted within three months of the date on which RI's refugee status had been recognised.

Hearing a challenge by CR, GF and TY against that rejection, the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria), that court decided to refer questions to the Court of Justice on the interpretation of Directive 2003/86. In particular, the referring court asks whether the submission of an application for family reunification with an unaccompanied minor refugee can be subject to a specified period where the refugee reaches majority during the family reunification procedure. It also questions the scope of the possibility of the Member States to require the refugee to have, for him or herself and the members of his or her family, accommodation, sickness insurance and sufficient resources, as is provided for by Directive 2003/86 [182] and transposed into Austrian law. In addition, that court notes that Austrian law does not provide for a right to family reunification for the sponsor's sister. However, TY being totally and permanently dependent on the assistance of her parents, they cannot join their son in Austria without taking TY with them.

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181 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

182 See Article 7(1) and the third subparagraph of Article 12(1) of Directive 2003/86.

Findings of the Court

In the first place, as regards the requirement laid down in the judgment in A and S [183] that an application for family reunification of an unaccompanied minor refugee with his or her parents, [184] pursuant to Article 10(3)(a) of Directive 2003/86, must be submitted within three months of the grant of refugee status to the minor, the Court emphasises that that period is intended to avoid the risk that the right to family reunification may be relied on without any time limit in the situation where the refugee has already reached majority during the asylum procedure and thus even before the application for family reunification has been submitted.

However, there is no such risk where the refugee reaches majority during the family reunification procedure. Moreover, in the light of the objective of Article 10(3)(a) of Directive 2003/86, which is to promote the reunification of unaccompanied minor refugees with their parents and guarantee them an additional protection, an application for family reunification under that provision cannot be regarded as being out of time if it was submitted when the refugee concerned was still a minor. Thus, a period for the submission of such an application cannot begin to run before the refugee has reached the age of majority. Consequently, as long as the refugee is a minor, his or her parents may submit an application for entry and residence for the purposes of family reunification with that refugee, without being required to comply with a specified period.

In the second place, the Court notes that it is apparent from the order for reference that, on account of her illness, TY is totally and permanently dependent on the material assistance of her parents, who cannot therefore leave her alone in Syria. In those circumstances, if TY were not approved for family reunification with RI at the same time as her parents, RI would, de facto, be deprived of his right to family reunification with his parents. Such an outcome would be incompatible with the unconditional nature of that right and would undermine its effectiveness, disregarding both the objective of Article 10(3)(a) of Directive 2003/86 and the requirements arising from Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, and from Article 24(2) and (3) of the Charter, [185] relating to the rights of the child, which that directive is obliged to guarantee.

It follows that, in the light of the exceptional circumstances of the case in the main proceedings, the effectiveness of RI's right to family reunification with his parents and compliance with the said provisions of the Charter require that an entry and residence permit be granted in Austria also to RI's adult sister, who requires the permanent assistance of her parents on account of a serious illness.

In the last place, in the light of Directive 2003/86 and of the aforementioned fundamental rights, the Court concludes that a Member State cannot require that, in order to be able to benefit from the right to family reunification with his or her parents under Article 10(3)(a) of Directive 2003/86, an unaccompanied minor refugee or his or her parents must have, within the meaning of Article 7(1) of that directive, accommodation, sickness insurance and stable, regular and sufficient resources, irrespective of whether the application for family reunification has been submitted within three months of the grant of refugee status. [186]

It is practically impossible for an unaccompanied minor refugee to meet those conditions. Likewise, it is extremely difficult for the parents of such a minor to meet them before even having joined their child in the Member State concerned. Thus, to make the possibility of family reunification of

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183 Judgment of 12 April 2018, A and S (C-550/16, EU:C:2018:248, paragraph 61).

184 In the wording of Article 10(3)(a) of Directive 2003/86, 'first-degree relatives in the direct ascending line'.

185 Obligation to have regard to the child's best interests and recognition of the need for the child to maintain on a regular basis a personal relationship with both parents.

186 In accordance with the third subparagraph of Article 12(1) of Directive 2003/86, Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within that period.

unaccompanied minor refugees with their parents dependent on compliance with those conditions would, in reality, be tantamount to depriving those minors of their right to such reunification.

Furthermore, in so far as the effectiveness of RI's right to family reunification with his parents requires, in the light of TY's situation, an entry and residence permit to be granted also to her, the Member State concerned also cannot require RI or his parents to meet the conditions laid down in Article 7(1) of that directive with regard to the seriously ill sister of that minor refugee.

6. COMPETITION: STATE AID

Judgment of the General Court (Tenth Chamber, Extended Composition), 20 December 2023, Autorità di sistema portuale del Mar Ligure occidentale and Others v Commission, T-166/21

Link to the full text of the judgment

Ruling in extended composition of five judges, the General Court dismisses in part the action brought by a number of Italian port authorities seeking annulment of the European Commission decision of 4 December 2020 on the aid scheme [187] benefiting the autorità di sistema portuale (Port System Authorities, Italy; 'PSA'). By that judgment, the Court sets out, in particular, the criteria on the basis of which the economic nature of the activities pursued by a not-for-profit public entity entrusted with the management of port infrastructures is to be assessed.

Adopted following a survey conducted in 2013 in all the Member States in order to obtain an overview of the functioning and tax treatment of their ports, the contested decision found that the measure exempting operators active in the port sector from corporate tax constitutes an existing State aid scheme that is incompatible with the internal market. Accordingly, it orders that that measure be abolished and that the income from the economic activities of the scheme's beneficiaries be subject to corporate tax from the start of the tax year following the date of its adoption.

More specifically, the Italian corporate income tax legislation ('IRES') exempts therefrom a large number of State entities and public bodies, including bodies managing collective property. According to the Italian authorities, the latter include PSA.

PSA are public entities with legal personality established by law in order to ensure autonomous management of the port infrastructures for which they are responsible. To that end, PSA have various financial resources at their disposal, including the proceeds from fees they are entitled to charge in return for the grant of access to ports ('port fees'), for the grant of authorisations for port operations ('authorisation fees') and for the grant of concessions for State-owned areas and docks ('concession fees').

In the contested decision, the Commission found that PSA engage in non-economic activities and economic activities, the latter of which come within the three categories of activities giving rise to the abovementioned fees. In those circumstances, the Commission found that the IRES exemption constitutes State aid within the meaning of Article 107(1) TFEU in so far as PSA engage in economic activities.

187 Aid scheme SA.38399 – 2019/C (ex 2018/E) which Italy implemented – Corporate Taxation of Ports in Italy (OJ 2021 L 354, p. 1; 'the contested decision').

Findings of the Court

First of all, the Court examines the plea alleging infringement of Article 107(1) TFEU, by which the applicants complain, in essence, that the Commission found, incorrectly, that certain of the activities engaged in by PSA are economic in nature.

In that regard, the Court observes, first, that the Commission's assessment cannot be criticised for having failed to take account of the legal status of the entities in question. According to settled case-law, Article 107(1) TFEU is applicable to any undertaking, understood as meaning an undertaking engaging in economic activity, irrespective of its legal status and how it is financed.

Next, there has been no breach of the principle of equal treatment in the light of the Commission's previous decision-making practice relied on by the applicants on that point. In that regard, the Court considers that the Commission treated comparable situations equally as regards the activities subject to concession fees and port fees, since it had found that equivalent activities engaged in by Belgian and French port authorities referred to in earlier decisions were economic in nature. Authorisation fees, by contrast, have not yet been examined by the Commission.

Lastly, the Court examines, in turn, the complaints relating to the assessment of the economic nature of the activities engaged in by PSA and their classification as undertakings, based on the absence of market on which PSA offer their services and the nature of the fees charged by PSA. It should be borne in mind in that regard that the concept of undertaking encompasses any entity engaging in an economic activity, irrespective of its legal status and the manner in which it is financed, it being understood that any activity consisting in offering goods or services in a given market constitutes an economic activity.

In the present case, as regards, first, the alleged absence of market on which PSA offer their services, the Court notes at the outset that the applicants are incorrect in claiming that PSA are not exposed to any competition, given their legal monopoly. As observed, correctly, by the Commission, there is in fact competition between certain Italian ports and certain ports situated in other Member States, with the result that it was correct in finding that the grant of access to ports and the grant of concessions for State-owned areas and docks constituted services provided on a given market. However, as regards the grant of authorisations for port operations, the Court takes the view, in the light of the statements set out in the contested decision in that regard, that the tasks performed within that remit appear to constitute a supervisory function consisting in verifying compliance with statutory requirements forming part of a power of a public authority which is non-economic in nature. In those circumstances, the Court finds that the Commission has not established that the grant of authorisations constituted a service provided on a market.

Secondly, as regards the criticism of the Commission for having disregarded the fact that the fees charged by PSA were taxes and not remuneration for services of an economic nature, the Court finds that the Commission has demonstrated to the requisite legal standard that the concession fees and port fees constitute consideration for the activities of an economic nature carried out by PSA. However, as regards the authorisation fees, the Court observes that, according to settled case-law, the fact that a product or a service supplied by a public body and connected to the exercise by it of public powers in return for remuneration laid down by law is not sufficient for the activity carried out to be classified as an economic activity and the entity which carries it out as an undertaking. Moreover, in the present case, given that the Commission did not examine either the method of calculation, the amount of the authorisation fees or the level of supervision carried out by the State in that regard, it follows that the Commission has not demonstrated to the requisite legal standard that the authorisation fees constitute consideration for a service of an economic nature.

In the light of the foregoing considerations, the Court upholds the first plea concerning the grant of authorisations and dismisses the action as to the remainder, and examines the second to fourth pleas only in so far as they concern the concession fees and the port fees.

In a second stage, in so far as they concern concession fees and port fees, the Court examines in turn the pleas alleging infringement of Article 107(1) TFEU, contesting, in essence, the Commission's findings that the IRES exemption gave rise to a transfer of State resources and conferred a selective advantage on PSA which was, furthermore, liable to distort competition and affect trade between Member States.

In that regard, the Court finds, in the first place, that the Commission was correct in finding that, by exempting PSA from IRES despite the fact that they are engaged in an economic activity, the Italian tax authorities forgo revenue which constitutes State resources, thereby giving rise to a transfer of State resources for the purposes of Article 107 TFEU. In that context, it does not matter that PSA are public undertakings and that the advantage conferred remains in the economic sphere of the State in the broad sense. Otherwise, such an approach could undermine the effectiveness of the State aid rules and introduce unjustified discrimination between public beneficiaries and private beneficiaries, contrary to the principle of neutrality laid down in Article 345 TFEU.

In the second place, the Court endorses the Commission's finding that the IRES exemption confers a selective advantage on the entities benefiting from it.

In that regard, the Court considers, first, that the Commission determined the reference system correctly in finding that the provisions of the Italian legislation setting out the principle that all income, including income of commercial companies and other public or private entities, is subject to IRES, whether or not they have as their exclusive or principal object the exercise of commercial activities. Without such a principle, the exemption for the State and public entities in question would be devoid of any purpose.

Second, the Court finds that the IRES exemption derogates without any valid justification from the reference system, to the benefit of PSA. In the light of the principle underlying the abovementioned reference system, the factual and legal position of PSA, in so far as they engage in economic activities, is comparable, if not identical, to that of other entities subject to IRES.

In the third place, the Commission was also correct in finding that the IRES exemption is liable to distort competition by affecting trade between Member States, given the abovementioned existence of competition between certain Italian ports and certain ports of other Member States. In that context, the Court points out that the Commission's assessment of the distortion of competition is not necessarily limited to undertakings or productions of the Member State concerned, even in the absence of harmonisation in the field of direct taxation. Hence, the fact that the port sector is characterised by cross-border exchanges is sufficient for the Commission to be able to include competition from certain ports of other Member States in its analysis.

In the light of the foregoing considerations, the Court annuls the contested decision in so far as it classifies the grant of authorisations for port operations as an economic activity, and dismisses the action as to the remainder.

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

Link to the full text of the judgment

State aid – Aid granted by the Netherlands to KLM in the context of the COVID19 pandemic – State guarantee for a bank loan and a subordinated loan by the State – Decision declaring the aid compatible with the internal market – Action for annulment – Locus standi – Substantial adverse effect on the applicant's position on the market – Admissibility – Determination of the beneficiary of the aid in the context of a group of companies

In April 2020, the French Republic notified the European Commission of a plan to grant aid to the airline Air France, a subsidiary of the Air France-KLM holding. The notified aid consisted of (i) a State loan guarantee covering 90% of a loan of EUR 4 billion granted by a consortium of banks and (ii) a shareholder loan of up to EUR 3 billion.

Subsequently, in March 2021, the French Republic notified the Commission of a plan to grant aid to Air France and the Air France-KLM holding for the recapitalisation of those two companies in the amount of EUR 4 billion, by means of a share capital increase and the conversion of the shareholder

loan referred to above into a hybrid instrument equivalent to an equity participation in the Air France-KLM holding.

Those measures, which form part of a series of other aid measures aimed at supporting the companies forming part of the Air France-KLM group, were intended to finance the immediate liquidity needs of Air France and the Air France-KLM holding in order to help them overcome the adverse effects of the COVID-19 pandemic.

By decision of 4 May 2020 ('the Air France decision'), [188] corrected on two separate occasions in December 2020 and July 2021, and by decision of 5 April 2021 ('the Air France-KLM and Air France decision'), [189] the Commission concluded that the notified measures constituted State aid compatible with the internal market under (i) Article 107(3)(b) TFEU [190] and (ii) its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [191]

In the Air France decision, the Commission considered that the beneficiaries of the notified aid were Air France and its subsidiaries. Accordingly, neither the Air France-KLM holding nor its other subsidiaries, including KLM and the companies controlled by that company, were considered to be beneficiaries of that measure. In the Air France-KLM and Air France decision, the Commission identified both Air France and its subsidiaries and the Air France-KLM holding and its subsidiaries – with the sole exception of KLM and its subsidiaries – as beneficiaries of the notified aid.

The airlines Ryanair and Malta Air have brought actions seeking the annulment of the abovementioned Commission decisions. The Eighth Chamber (Extended Composition) of the General Court upholds those actions and finds that the Commission committed a manifest error of assessment in determining the beneficiaries of the notified aid and, therefore, acted in breach of Article 107(3)(b) TFEU. In that context, the Court clarifies how the beneficiaries of an aid measure should be determined in the context of a group of companies.

Findings of the Court

In support of their actions, the applicants challenged, inter alia, the exclusion of, on the one hand, the Air France-KLM holding and KLM (the Air France decision) and, on the other, KLM (the Air France-KLM and Air France decision) from the scope of the beneficiaries of the notified measures.

In that regard, the Court recalls that, although the Commission has a broad discretion when it is called upon to identify the beneficiaries of a notified aid measure, the fact remains that the EU judicature must establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account and whether it is capable of substantiating the conclusions drawn from it.

Furthermore, it is apparent from the case-law and from the Commission Notice on the notion of State aid [192] that several separate legal entities may be considered to form one economic unit for the

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188 Commission Decision C(2020) 2983 final of 4 May 2020 on State Aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Decisions C(2020) 9384 final of 17 December 2020 and C(2021) 5701 final of 26 July 2021.

189 Commission Decision C(2021) 2488 final of 5 April 2021 on State Aid SA.59913 – France – COVID19 – Recapitalisation of Air France and the Air France-KLM holding company, and Commission Decision C(2020) 2983 final of 4 May 2020 on State aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Decisions C(2020) 9384 final of 17 December 2020 and C(2021) 5701 final of 26 July 2021 ('the contested decisions').

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

191 Communication from the Commission of 20 March 2020 regarding the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1), amended on 4 April 2020 (OJ 2020 C 112 I, p. 1), 13 May 2020 (OJ 2020 C 164, p. 3) and 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework').

192 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

purposes of the application of the rules on State aid. The factors taken into account in order to determine whether such an economic unit exists include, inter alia, the capital, organic, functional and economic links between the entities concerned, the agreements providing for the grant of the notified aid and the context in which that aid is granted.

In the light of those clarifications, the Court notes, first of all, that the capital and organic links within the Air France-KLM group as described in the contested decisions indicate that the separate legal entities within that group form a single economic unit for the purposes of the application of the rules on State aid. In that regard, the Court emphasises that it follows from the Commission's findings that the Air France-KLM holding actually exercises control over Air France and KLM by involving itself directly or indirectly in their management and thus takes part in the economic activity carried out by them. Moreover, according to those findings, there is, at the level of the Air France-KLM group, a centralised decision-making procedure and a certain degree of coordination, carried out through joint bodies bringing together high-level representatives of the Air France-KLM holding, Air France and KLM, at least as regards the way in which certain important decisions are taken.

The Commission's conclusion that the Air France-KLM holding, Air France and KLM do not constitute an economic unit for the purpose of identifying the beneficiaries of the notified aid measures is also undermined by the functional and economic links between those entities. The description of those links in the contested decisions and the various examples relied on in that regard by Ryanair and Malta Air demonstrate a degree of functional, commercial and financial integration and cooperation between those entities.

Next, the Court notes that, contrary to the Commission's arguments, the contractual framework on the basis of which the notified measures are granted and the commitments given by the French Republic in the context of the Air France-KLM and Air France decision do not preclude the Air France-KLM holding, Air France and KLM from being classified as an economic unit. In that regard, the Court states that neither the contractual clauses cited by the Commission nor the commitments given by the French Republic allow the circle of beneficiaries of the measures notified to Air France to be restricted to the Air France-KLM holding and Air France respectively. With regard to the Air France-KLM and Air France decision, the Court also notes that the improvement of the financial position of the Air France-KLM holding following the notified measure has the effect, in any event, of excluding the risk of its default and, by extension, the default of its subsidiary KLM and the companies controlled by KLM.

Furthermore, in view of the chronological and structural link between the measures forming the subject matter of the contested decisions, and noting that the Air France-KLM and Air France decision was adopted before the second corrigendum to the Air France decision, the Court finds that the existence of each of those decisions should have been taken into account by the Commission in its examination of the notified measures. Accordingly, the Commission failed to explain why it defined the beneficiaries of the notified aid measures differently in the contested decisions.

Lastly, the Court rejects the Commission's line of argument according to which the notified aid measures have, at most, merely secondary economic effects vis-à-vis the Air France-KLM holding and its other subsidiaries (the Air France decision) and vis-à-vis KLM and its subsidiaries (the Air France-KLM and Air France decision). In that regard, the Court recalls that the foreseeable effects of those measures from an ex ante perspective suggest that the financing solution provided for was likely to benefit the Air France-KLM group as a whole, by improving its overall financial position. In accordance with the Commission Notice on the notion of State aid, such a financing solution indicates the existence, at the very least, of an indirect advantage in favour of the Air France-KLM group, including KLM and its subsidiaries.

In the light of all of those factors, the Court concludes that the Commission committed a manifest error of assessment in excluding, on the one hand, the Air France-KLM holding and its other subsidiaries, including KLM and KLM's subsidiaries (the Air France decision), and, on the other, KLM and its subsidiaries (the Air France-KLM and Air France decision) from the scope of the beneficiaries of the notified aid measures. Since that incorrect identification of the beneficiaries is likely to have an impact on the entire analysis of the compatibility of the notified measures with the internal market under Article 107(3)(b) TFEU and the Temporary Framework, the Court annuls the contested decisions.

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

Link to the full text of the judgment

State aid – Aid granted by France to Air France and Air France-KLM in the context of the COVID-19 pandemic – Recapitalisation – Decision declaring the aid compatible with the internal market – Action for annulment – Locus standi – Substantial adverse effect on the applicant's position on the market – Admissibility – Determination of the beneficiary of the aid in the context of a group of companies

In April 2020, the French Republic notified the European Commission of a plan to grant aid to the airline Air France, a subsidiary of the Air France-KLM holding. The notified aid consisted of (i) a State loan guarantee covering 90% of a loan of EUR 4 billion granted by a consortium of banks and (ii) a shareholder loan of up to EUR 3 billion.

Subsequently, in March 2021, the French Republic notified the Commission of a plan to grant aid to Air France and the Air France-KLM holding for the recapitalisation of those two companies in the amount of EUR 4 billion, by means of a share capital increase and the conversion of the shareholder loan referred to above into a hybrid instrument equivalent to an equity participation in the Air France-KLM holding.

Those measures, which form part of a series of other aid measures aimed at supporting the companies forming part of the Air France-KLM group, were intended to finance the immediate liquidity needs of Air France and the Air France-KLM holding in order to help them overcome the adverse effects of the COVID-19 pandemic.

By decision of 4 May 2020 ('the Air France decision'), [193] corrected on two separate occasions in December 2020 and July 2021, and by decision of 5 April 2021 ('the Air France-KLM and Air France decision'), [194] the Commission concluded that the notified measures constituted State aid compatible with the internal market under (i) Article 107(3)(b) TFEU [195] and (ii) its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [196]

In the Air France decision, the Commission considered that the beneficiaries of the notified aid were Air France and its subsidiaries. Accordingly, neither the Air France-KLM holding nor its other subsidiaries, including KLM and the companies controlled by that company, were considered to be beneficiaries of that measure. In the Air France-KLM and Air France decision, the Commission

193 Commission Decision C(2020) 2983 final of 4 May 2020 on State Aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Decisions C(2020) 9384 final of 17 December 2020 and C(2021) 5701 final of 26 July 2021.

194 Commission Decision C(2021) 2488 final of 5 April 2021 on State Aid SA.59913 – France – COVID19 – Recapitalisation of Air France and the Air France-KLM holding company, and Commission Decision C(2020) 2983 final of 4 May 2020 on State aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Decisions C(2020) 9384 final of 17 December 2020 and C(2021) 5701 final of 26 July 2021 ('the contested decisions').

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

196 Communication from the Commission of 20 March 2020 regarding the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1), amended on 4 April 2020 (OJ 2020 C 112 I, p. 1), 13 May 2020 (OJ 2020 C 164, p. 3) and 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework').

identified both Air France and its subsidiaries and the Air France-KLM holding and its subsidiaries – with the sole exception of KLM and its subsidiaries – as beneficiaries of the notified aid.

The airlines Ryanair and Malta Air have brought actions seeking the annulment of the abovementioned Commission decisions. The Eighth Chamber (Extended Composition) of the General Court upholds those actions and finds that the Commission committed a manifest error of assessment in determining the beneficiaries of the notified aid and, therefore, acted in breach of Article 107(3)(b) TFEU. In that context, the Court clarifies how the beneficiaries of an aid measure should be determined in the context of a group of companies.

Findings of the Court

In support of their actions, the applicants challenged, inter alia, the exclusion of, on the one hand, the Air France-KLM holding and KLM (the Air France decision) and, on the other, KLM (the Air France-KLM and Air France decision) from the scope of the beneficiaries of the notified measures.

In that regard, the Court recalls that, although the Commission has a broad discretion when it is called upon to identify the beneficiaries of a notified aid measure, the fact remains that the EU judicature must establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account and whether it is capable of substantiating the conclusions drawn from it.

Furthermore, it is apparent from the case-law and from the Commission Notice on the notion of State aid [197] that several separate legal entities may be considered to form one economic unit for the purposes of the application of the rules on State aid. The factors taken into account in order to determine whether such an economic unit exists include, inter alia, the capital, organic, functional and economic links between the entities concerned, the agreements providing for the grant of the notified aid and the context in which that aid is granted.

In the light of those clarifications, the Court notes, first of all, that the capital and organic links within the Air France-KLM group as described in the contested decisions indicate that the separate legal entities within that group form a single economic unit for the purposes of the application of the rules on State aid. In that regard, the Court emphasises that it follows from the Commission's findings that the Air France-KLM holding actually exercises control over Air France and KLM by involving itself directly or indirectly in their management and thus takes part in the economic activity carried out by them. Moreover, according to those findings, there is, at the level of the Air France-KLM group, a centralised decision-making procedure and a certain degree of coordination, carried out through joint bodies bringing together high-level representatives of the Air France-KLM holding, Air France and KLM, at least as regards the way in which certain important decisions are taken.

The Commission's conclusion that the Air France-KLM holding, Air France and KLM do not constitute an economic unit for the purpose of identifying the beneficiaries of the notified aid measures is also undermined by the functional and economic links between those entities. The description of those links in the contested decisions and the various examples relied on in that regard by Ryanair and Malta Air demonstrate a degree of functional, commercial and financial integration and cooperation between those entities.

Next, the Court notes that, contrary to the Commission's arguments, the contractual framework on the basis of which the notified measures are granted and the commitments given by the French Republic in the context of the Air France-KLM and Air France decision do not preclude the Air France-KLM holding, Air France and KLM from being classified as an economic unit. In that regard, the Court states that neither the contractual clauses cited by the Commission nor the commitments given by the French Republic allow the circle of beneficiaries of the measures notified to Air France to be

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197 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

restricted to the Air France-KLM holding and Air France respectively. With regard to the Air France-KLM and Air France decision, the Court also notes that the improvement of the financial position of the Air France-KLM holding following the notified measure has the effect, in any event, of excluding the risk of its default and, by extension, the default of its subsidiary KLM and the companies controlled by KLM.

Furthermore, in view of the chronological and structural link between the measures forming the subject matter of the contested decisions, and noting that the Air France-KLM and Air France decision was adopted before the second corrigendum to the Air France decision, the Court finds that the existence of each of those decisions should have been taken into account by the Commission in its examination of the notified measures. Accordingly, the Commission failed to explain why it defined the beneficiaries of the notified aid measures differently in the contested decisions.

Lastly, the Court rejects the Commission's line of argument according to which the notified aid measures have, at most, merely secondary economic effects vis-à-vis the Air France-KLM holding and its other subsidiaries (the Air France decision) and vis-à-vis KLM and its subsidiaries (the Air France-KLM and Air France decision). In that regard, the Court recalls that the foreseeable effects of those measures from an ex ante perspective suggest that the financing solution provided for was likely to benefit the Air France-KLM group as a whole, by improving its overall financial position. In accordance with the Commission Notice on the notion of State aid, such a financing solution indicates the existence, at the very least, of an indirect advantage in favour of the Air France-KLM group, including KLM and its subsidiaries.

In the light of all of those factors, the Court concludes that the Commission committed a manifest error of assessment in excluding, on the one hand, the Air France-KLM holding and its other subsidiaries, including KLM and KLM's subsidiaries (the Air France decision), and, on the other, KLM and its subsidiaries (the Air France-KLM and Air France decision) from the scope of the beneficiaries of the notified aid measures. Since that incorrect identification of the beneficiaries is likely to have an impact on the entire analysis of the compatibility of the notified measures with the internal market under Article 107(3)(b) TFEU and the Temporary Framework, the Court annuls the contested decisions.

Judgment of the General Court (Eighth Chamber, Extended Composition), 24 January 2024 Germany v Commission, T-409/21

State aid – Aid granted by certain provisions of the amended German Law on the cogeneration of heat and electricity – Reform of the arrangements for support for cogeneration – Decision declaring the aid compatible with the internal market – Concept of 'State aid' – State resources

In an action for annulment brought by the Federal Republic of Germany, the General Court annuls the decision of the European Commission classifying as State aid various measures adopted by that Member State in support of electricity production by combined heat and power ('CHP') plants. [198] In doing so, the Court clarifies the condition, laid down in Article 107(1) TFEU, that only interventions by the State or through State resources can be classified as State aid within the meaning of that provision.

[198] Commission Decision C(2021) 3918 final of 3 June 2021 concerning State aid SA.56826 (2020/N) – Germany – 2020 reform of support for cogeneration and State aid SA.53308 (2019/N) – Germany – Change of support to existing CHP plants [Paragraph 13 of the Gesetz zur Neuregelung des Kraft-Wärme-Kopplungsgesetzes (Law introducing new rules for the Combined Heat and Power Generation Act) of 21 December 2015 (BGBl. 2015 I, p. 2498)] ('the contested decision').

Between 2019 and 2021, the Federal Republic of Germany notified the Commission of certain legislative amendments providing, first, for measures of financial support for the operators of CHP plants and other installations connected with the cogeneration of heat and electricity (together, 'the CHP operators') and, secondly, for capping a surcharge that could be imposed, in that context, on hydrogen producers.

In the contested decision, the Commission concluded that those measures constituted State aid within the meaning of Article 107(1) TFEU that were nonetheless compatible with the internal market under Article 107(3)(c) TFEU.

In support of its classification of the notified measures as State aid, the Commission considered, in particular, that those measures were granted through State resources. By its action for annulment, the Federal Republic of Germany challenges the Commission's conclusion.

Findings of the Court

The Court observes that the classification of a measure as State aid, within the meaning of Article 107(1) TFEU, requires that a number of conditions be satisfied, including that there be intervention by the State or through State resources.

According to the case-law, funds financed by a levy or other compulsory surcharges under the national legislation and managed and apportioned in accordance with that legislation (first criterion) and sums that constantly remain under public control, and therefore available to the competent national authorities (second criterion), may be categorised as State resources. Those two criteria are alternative criteria of the concept of 'State resources' within the meaning of Article 107(1) TFEU.

First, as regards the measures of financial support for the CHP operators, the Commission considered in the contested decision that those measures were financed from the proceeds of a de jure mandatory levy imposed by the State, managed and apportioned in accordance with the provisions of the legislation (first criterion).

In that regard, the Court observes that the measures of support for the CHP operators notified by the Federal Republic of Germany are characterised by the existence of 'two levels' in the electricity supply chain, the 'first level' corresponding to the relationship between the CHP operators and the network operators, and the 'second level' to the relationship between those network operators and their customers.

In the context of the 'first level' of the supply chain, the notified measures establish a legal obligation for the network operators, which are private entities, to pay financial support to the CHP operators. In the context of the 'second level', those network operators may, without being required to do so by law, pass on the financial burden resulting from that obligation to their customers by means of a surcharge.

In the light of those clarifications, the Court finds that the Commission erred in law in considering that the obligation imposed on the network operators to pay sums to the CHP operators, at the 'first level' of the supply chain, was sufficient to substantiate the finding of a levy or other mandatory surcharge of such a kind as to establish the involvement of State resources, without it being necessary to identify a further mandatory contribution at another 'level' of the supply chain, as the surcharge at the 'second level' of the supply chain is not a de jure mandatory surcharge.

The existence of a levy or of another de jure mandatory surcharge concerns the origin of the funds used in order to grant an advantage, in that it permits the finding that State funds were used to finance that advantage. It is not to be confused with the allocation of those funds in accordance with the law. The de jure obligation imposed on the network operators at the 'first level' of the supply chain concerns only the allocation of the funds in accordance with the law, but gives no indication of the origin of the funds used by the network operators in order to comply with that obligation.

In that context, the Commission cannot claim that the State takes ownership of the network operators' resources, since the latter are not necessarily the ultimate debtors of the financial burden occasioned by the measures to support the CHP operators.

In addition, the fact that the German law sets out in detail the procedure for the allocation of the financial support to the CHP operators is not capable of establishing a transfer of State resources, only the imputability of those support measures to the State.

Consequently, the Court finds that the Commission was wrong to rely on the first criterion set out above, relating to the existence of a levy or of other mandatory surcharges, to conclude that the measures of financial support to the CHP operators were financed through State resources.

The Court also finds that the Commission erred in law in precluding the application of the case-law resulting from the judgment of 13 March 2001, PreussenElektra. [199]

In the contested decision, the Commission had precluded the application of that case-law on the ground that the measures to support the CHP operators did not constitute a measure of 'mere price regulation'. Contrary to the Commission's conclusion, however, the decisive factor for precluding the existence of a transfer of State resources, according to the case-law resulting from the judgment in PreussenElektra, is not whether the measures at issue constitute a measure of 'mere price regulation', but the fact that the private entities in question were appointed by the State to manage a State resource.

Thus, in order to preclude the application of the case-law resulting from the judgment in PreussenElektra, the Commission ought to have established that the advantage for the CHP operators was not granted by the network operators from their own financial resources, but that they were appointed by the State to manage a State resource, which the Commission failed to demonstrate.

Nor could the Commission properly rely on the practical effect of Article 107(1) TFEU to restrict the application of the case-law resulting from the judgment in PreussenElektra to cases of 'mere price regulation', since that article cannot be applied to State conduct which is not covered by that article, such as, in the present case, a measure decided upon by the State but financed by private undertakings.

Secondly, as regards capping the surcharge that can be imposed on hydrogen producers by the network operators, the Commission considered that it constituted a renouncement of State resources that could be characterised as a transfer of State resources.

However, the Court notes that the surcharge in question does not constitute a State resource according to the first criterion set out above, as it is not de jure mandatory. It follows that the reduction of that surcharge for hydrogen producers is also incapable of constituting a renouncement of State resources.

In the light of the foregoing, the Court upholds the action for annulment in so far as the Commission incorrectly found that the set of measures notified by the Federal Republic of Germany constituted State aid financed through State resources.

199 C-379/98, EU:C:2001:160.

7. APPROXIMATION OF LAWS

7.1. EUROPEAN UNION TRADEMARK

Judgment of the Court of Justice (Fourth Chamber), 25 January 2024 Audi (Emblem support on a radiator grille), C-334/22

Link to the full text of the judgment

Reference for a preliminary ruling – EU trade mark – Regulation (EU) 2017/1001 – Article 9(2) and (3)(a) to (c) – Right conferred by an EU trade mark – Concept of 'using in the course of trade any sign' – Article 14(1)(c) – Limitations on the effects of an EU trade mark – Right of the proprietor of an EU trade mark to oppose the use by a third party of a sign identical with, or similar to, the trade mark for motor vehicle spare parts – Component of a radiator grille designed for the attachment of an emblem representing the trade mark of a motor vehicle manufacturer

In the context of a reference for a preliminary ruling, the Court of Justice provides clarification of the concept of using in the course of trade any sign, where a third party imports and offers for sale spare parts for motor vehicles without the consent of the motor vehicle manufacturer which is the proprietor of an EU trade mark. In addition, the Court clarifies the scope of that manufacturer's exclusive right to prohibit that third party from using a sign identical with, or similar to, that trade mark in respect of such spare parts.

GQ is a natural person engaged in the business of selling spare parts for motor vehicles via an internet site. As part of that business, GQ advertised and offered for sale radiator grilles that had been adapted and designed for older Audi models. Those radiator grilles included an element designed for the attachment of an emblem of the motor vehicle manufacturer Audi.

Audi, the proprietor of the figurative EU trade mark representing four overlapping circles ('the AUDI trade mark'), brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), the referring court, seeking an injunction to prohibit GQ from advertising, importing, offering for sale or placing on the market non-original radiator grilles bearing a sign identical with, or similar to, the AUDI trade mark.

The referring court decided to refer a question to the Court on the interpretation of Regulation 2017/1001, [200] asking it to clarify the concept of use of a sign in the course of trade and the scope of the right of a motor vehicle manufacturer, which is the proprietor of an EU trade mark, to prohibit a third party from using a sign identical with, or similar to, that trade mark for spare parts.

Findings of the Court

First, the Court notes that the EU legislature did not provide for a so-called 'repair' clause, such as that which exists in design law, [201] in Regulation 2017/1001 and points out that that clause applies without prejudice to the provisions of EU law relating to trade marks.

Consequently, the so-called 'repair' clause cannot be applied by analogy in order to pursue the objective of preserving undistorted competition between manufacturers of motor vehicles and sellers

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200 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

201 Article 110 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1). According to that article, 'protection as a Community design shall not exist for a design which constitutes a component part of a complex product used within the meaning of Article 19(1) for the purpose of the repair of that complex product so as to restore its original appearance'.

of non-original spare parts, that objective having been taken into account by the EU legislature in the context of Regulation 2017/1001, [202] and the right conferred on the proprietor of an EU trade mark cannot be limited on the basis of that clause. [203]

Secondly, the Court observes that the referring court considers that the shape of the element of those radiator grilles designed for the attachment of the emblem representing the AUDI trade mark is identical with, or similar to, that trade mark. That shape thus constitutes a sign within the meaning of Regulation 2017/1001. [204] Furthermore, the affixing of that sign on or incorporated into those radiator grilles, for the purposes of marketing them, represents use falling within that regulation [205] and, in so far as GQ imports and offers for sale radiator grilles incorporating that sign, it may be regarded as fulfilling the types of use falling within that regulation. The fact that that element is placed on the spare part, namely the radiator grille, in such a way that the sign identical with, or similar to, the trade mark of the vehicle manufacturer is visible to the relevant public when it sees that part is such as to establish the existence of a material link between that part, which a third party imports, advertises and offers for sale, and the proprietor of the AUDI trade mark.

Accordingly, the Court holds that a third party which, without the consent of the manufacturer of motor vehicles which is the proprietor of an EU trade mark, imports and offers for sale spare parts, namely radiator grilles for those motor vehicles, containing an element which is designed for the attachment of the emblem representing that trade mark and the shape of which is identical with, or similar to, that trade mark, is using a sign in the course of trade in a manner liable to impair one or more of the functions of that trade mark, which is a matter for the national court to determine.

Thirdly, the Court points out that the impossibility for the proprietor of a trade mark to prohibit a third party from using that trade mark where such use is necessary to indicate the intended purpose of a product or service, in particular as an accessory or spare part, and is done in accordance with honest practices in industrial or commercial matters, is one of the circumstances in which the exclusive right conferred by the trade mark cannot be relied on against a third party.

The purpose of the limitation, referred to in that hypothesis, is to allow suppliers of goods or services which are complementary to goods or services offered by the proprietor of a trade mark to use that trade mark in order to inform the public, in a comprehensible and complete manner, of the intended purpose of the goods they market or of the services they offer or, in other words, of the practical link between their goods or services and those of the proprietor of the trade mark.

However, where a sign identical with, or similar to, an EU trade mark constitutes an element of a spare part for motor vehicles, which is designed for the attachment of the emblem of the manufacturer of those vehicles to it and is not used to designate or refer to goods or services as being those of the proprietor of that trade mark, but to reproduce as faithfully as possible a product of that proprietor, such use of that trade mark does not fall within the aforementioned hypothesis.

The Court therefore holds that a manufacturer of motor vehicles who is the proprietor of an EU trade mark is entitled to prohibit a third party [206] from using a sign identical with, or similar to, that trade mark in relation to spare parts for those motor vehicles, namely radiator grilles, where that sign consists of the shape of an element of the radiator grille, designed for the attachment thereto of the emblem representing that trade mark, regardless of whether or not there is a technical possibility of attaching that emblem to that radiator grille without affixing that sign to it.

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202 Article 14 of Regulation 2017/1001.

203 Article 9 of that regulation.

204 Article 9(2) of that regulation.

205 Article 9(3)(a) to (c) of Regulation 2017/1001.

206 On the basis of Article 14(1)(c) of Regulation 2017/1001.

7.2. PUBLIC PROCUREMENT

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias, C-66/22

Link to the full text of the judgment

Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Point (d) of the first subparagraph of Article 57(4) – Award of public contracts in the transport sector – Directive 2014/25/EU – Article 80(1) – Facultative grounds for exclusion – Obligation to transpose – Economic operator entering into agreements aimed at distorting competition – Competence of the contracting authority – Impact of an earlier decision of a competition authority – Principle of proportionality – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective remedy – Principle of sound administration – Obligation to state reasons

Toscca is an economic operator that submitted a tender in the context of a public procurement procedure organised by Infraestruturas de Portugal for the purchase of creosoted pine sleepers and rods for use in the railway infrastructure sector; the public contract was awarded to Futrifer. Since its action seeking annulment of that award decision was dismissed, Toscca brought an appeal before the Tribunal Central Administrativo Norte (North Central Administrative Court, Portugal). That court gave judgment upholding that appeal, and ordered Infraestruturas de Portugal to award the contract to Toscca. That judgment was set aside, on grounds of a failure to state reasons, by the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), which referred the case back to the Tribunal Central Administrativo Norte (North Central Administrative Court). That court delivered a second judgment, by way of which it confirmed the approach taken in its first judgment.

Appeals were brought against that second judgment by Infraestrutuas de Portugal and Futrifer before the Supremo Tribunal Administrativo (Supreme Administrative Court), which is the referring court. It states that, in 2019, Futrifer was ordered by the Autoridade da Concorrência (Competition Authority, Portugal) to pay a fine in respect of a breach of competition rules in the context of public procurement procedures, organised in 2014 and 2015, by the same contracting authority.

By its judgment, delivered by the Grand Chamber, the Court rules, first, on the existence of an obligation, for the Member States, to transpose the facultative grounds for exclusion provided for by Directives 2014/24 [207] and 2014/25. [208] Next, it clarifies the conditions in which contracting authorities may exercise their competence in order to exclude an economic operator from participating in a public procurement procedure on grounds of lack of reliability, on account of a breach of competition rules unrelated to the public procurement procedure concerned. It clarifies, finally, the obligation on the part of contracting authorities to state reasons for a decision as to the reliability of an economic

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207 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). The first subparagraph of Article 57(4) of Directive 2014/24 makes provision for the situations in which contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure.

208 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243). The third subparagraph of Article 80(1) of Directive 2014/25 provides that, if Member States so request, the objective rules and criteria for exclusion are also to include the exclusion grounds listed in Article 57(4) of Directive 2014/24 on the terms and conditions set out in that article.

operator, in the light of the facultative ground for exclusion linked to the involvement of such an operator in agreements aimed at distorting competition, provided for by Directive 2014/24.

Findings of the Court

As a preliminary point, the Court rules on the question whether Member States are under the obligation to transpose into their national law the facultative grounds for exclusion mentioned in Directive 2014/24, [209] and in the provision of Directive 2014/25 which refers to those grounds.

As regards, on the one hand, the facultative grounds for exclusion provided for by Directive 2014/24, the Court observes that, contrary to what is apparent from certain judgments of the Court, [210] the Member States are under the obligation to transpose those grounds into their national law. That obligation means that they must provide for either the option or the obligation for contracting authorities to apply those grounds. First of all, it is clear from the wording of the provision of Directive 2014/24 on the facultative grounds for exclusion that the choice as to the decision whether or not to exclude an economic operator from a public procurement procedure on one of those grounds falls to the contracting authorities, unless the Member States decide to transform that optional exclusion into an obligation to do so. Consequently, in order not to deprive such contracting authorities of, at the very least, the possibility of applying those grounds for exclusion, a Member State cannot omit those grounds from its national legislation transposing Directive 2014/24. Second, that interpretation is also confirmed by the context of the provision relating to facultative grounds for exclusion, in contrast with other provisions under that directive which offer the Member States a choice as to whether or not to transpose those provisions. Deuxièmement, cette interprétation est également confirmée par le contexte de la disposition relative aux motifs d'exclusion facultatifs, laquelle contraste avec d'autres dispositions de cette directive qui offrent aux États membres un choix pour la transposition, ou non, de ces dispositions. À cet égard, la Cour souligne que le choix qui est laissé aux États membres en ce qui concerne les conditions d'application des motifs d'exclusion facultatifs ne saurait s'étendre à la transposition ou non de ces motifs en droit national. Third, as to the objective pursued by Directive 2014/24 in so far as concerns the facultative grounds for exclusion, the Court points out that the EU legislature intended to confer on the contracting authorities, and on them alone, the task of assessing the integrity and reliability of economic operators participating in a public procurement procedure and, where necessary, to exclude any operators they deem unreliable.

As regards, on the other hand, Directive 2014/25, [211] the Court points out that the Member States must, in accordance with their obligation to transpose the first subparagraph of Article 80(1) of Directive 2014/25, make provision for the possibility for contracting entities to include those exclusion grounds amongst the objective exclusion criteria in procedures which fall within the scope of that directive, without prejudice to any decision on the part of those States consisting in requiring that those entities include those grounds amongst those criteria.

Having set out those clarifications, the Court rules, in the first place, on the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition, provided for by Directive 2014/24. [212] The Court holds that that ground precludes national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the

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209 More specifically, by the first subparagraph of Article 57(4) of that directive.

210 Judgments of 19 June 2019, Meca (C-41/18, EU:C:2019:507, paragraph 33); of 30 January 2020, Tim (C-395/18, EU:C:2020:58, paragraphs 34 and 40); and of 3 June 2021, Rad Service and Others (C-210/20, EU:C:2021:445, paragraph 28). By virtue of those of those judgments, the Member States may decide whether or not to transpose the facultative grounds for exclusion referred to in that provision.

211 More specifically, the third subparagraph of Article 80(1) of that directive.

212 Pursuant to the first subparagraph of Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

public procurement procedure in the context of which that type of conduct has arisen. Such limitation is not apparent from the wording of the provision laying down that ground for exclusion. Furthermore, it is apparent from the context in which that provision occurs [213] that Directive 2014/24 permits, at any time during the procedure, contracting authorities to exclude or to be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations covered by the grounds of exclusion provided for by that directive. Such an interpretation of that provision enables the contracting authority to ascertain the integrity and reliability of each of the economic operators, which integrity and reliability are liable to be cast into doubt not only in the event of the participation of such an operator in anticompetitive conduct in the context of that procedure, but also in the event of that operator's participation in such conduct in the past.

In the second place, the Court points out that the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition, provided for by Directive 2014/24, precludes national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority. Admittedly, where there is a specific procedure regulated by EU law or by national law for pursuing certain offences and in which the national competition authority is entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of the evidence provided, rely in principle on the outcome of such a procedure. In that context, the decision of such a competition authority, finding that such an infringement has been committed and, on that ground, imposing a financial penalty on a tenderer, may take on particular significance, and all the more so if that penalty is accompanied by a temporary prohibition on participation in public procurement procedures. However, where such a decision may lead the contracting authority to exclude that economic operator from the public procurement procedure in question, conversely, the absence of such a decision can neither prevent nor exempt the contracting authority from carrying out such an assessment. That assessment should be carried out having regard to the principle of proportionality and taking into account all the relevant factors in order to determine whether the application of the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition is justified. Accordingly, national legislation which ties the assessment of the integrity and reliability of tenderers to the findings in a decision of the national competition authority in relation to, in particular, future participation in public procurement procedures, undermines the discretion to be afforded to the contracting authority in the context of the application of the facultative grounds for exclusion provided for by Directive 2014/24.

In bringing that analysis to a close, the Court also specifies that the Member States cannot, in their legislation, restrict the scope of the facultative ground for exclusion linked to the participation of the economic operator concerned in anticompetitive conduct.

In the third place, the Court states that, in the light of the principle of sound administration, the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition, provided for by Directive 2014/24, must be reasoned. That obligation concerns, first, decisions by way of which the contracting authority excludes a tenderer by applying, in particular, such facultative ground for exclusion. Second, the contracting authority is subject to that obligation to state reasons for its decision when it finds that a tenderer is concerned by one of the facultative grounds for exclusion, but it nonetheless decides not to exclude that tenderer, for example, on the ground that such an exclusion would constitute a disproportionate measure. Such a decision affects the legal situation of all the other economic operators participating in the public

213 Inter alia, the second subparagraph of Article 57(5) of Directive 2014/24.

procurement procedure in question, who must therefore be able to defend their rights, where applicable, by bringing an action against it.

8. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Eighth Chamber, Extended Composition), 24 January 2024
Dexia Crédit Local v SRB, T-405/21

Link to the judgment as published in extract form

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 ex ante contributions – Obligation to state reasons – Equal treatment – Principle of proportionality – SRB's margin of discretion – Plea of illegality – Legal basis for Regulation (EU) No 806/2014 – Commission's margin of discretion

Hearing an action for annulment, which it upholds, the General Court, rules for the first time on the conformity of Regulation No 806/2014 [214] with Article 114(1) and (2) and Article 352 TFEU, and provides clarification, in particular, on the concept of 'fiscal provisions' with regard to the characteristics of ex ante contributions. Moreover, it reiterates its considerations in respect of the scope of the obligation to state reasons incumbent on the Single Resolution Board (SRB) as regards the determination of the annual target level.

Dexia Crédit Local ('the applicant') is a credit institution established in France.

On 14 April 2021, the SRB adopted a decision in which it set [215] the 2021 ex ante contributions to the Single Resolution Fund ('the SRF') of credit institutions and certain investment firms, one of which was the applicant ('the contested decision'). [216]

Findings of the Court

As regards the pleas alleging that the provisions of Regulation No 806/2014 are unlawful in the light of the provisions of the Treaties, which the Court rejects, the applicant contested, in particular, the legal basis – namely Article 114 TFEU – pursuant to which the provisions of that regulation at issue [217] were adopted and the decision to apply paragraph 1 of that article, whereas the ex ante contributions are fiscal in nature, and therefore fall within the concept of 'fiscal provisions' within the meaning of paragraph 2 of that article.

At the outset, as regards the challenge to the legal basis relied upon, the Court notes that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review, which include the aim and the content of that measure. Legislative acts adopted on the basis of

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214 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

215 In accordance with Article 70(2) of Regulation 806/2014.

216 Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 ex ante contributions to the Single Resolution Fund.

217 Articles 5, 69 and 70 of Regulation No 806/2014.

Article 114(1) TFEU must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as their object the establishment and functioning of the internal market. In the present case, the Court finds that the provisions of Regulation No 806/2014 at issue satisfy those two conditions.

In the first place, the Court notes that Article 114 TFEU may be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market. It is clear from the recitals of Regulation No 806/2014 that that regulation seeks to limit the link between the perceived fiscal position of individual Member States and the funding costs of banks and undertakings operating in those Member States, as well as to place the responsibility of financing the stabilisation of the financial system on the financial industry as a whole. Thus, Regulation No 806/2014 establishes, inter alia, uniform rules and a uniform procedure for the resolution of institutions, which should be applied by the SRB, in order to address the threats encountered. An essential element of those rules and that procedure is the SRF, which makes it possible to ensure the efficient exercise of resolution powers and to contribute to the financing of the resolution tools while ensuring their efficient application. In order to ensure sufficient financial means in the SRF, it is financed, inter alia, by the ex ante contributions paid by the institutions, the amount of which depends on the final target level and the main calculation methods laid down in Articles 69 and 70 of Regulation No 806/2014. Consequently, the payment of those contributions ensures the efficient application of the uniform rules and the uniform procedure for the resolution of institutions.

Furthermore, the EU legislature emphasised that the uniform application of the resolution regime in the participating Member States would be enhanced as a result of the tasks entrusted to the SRB, which was specifically designed to ensure a swift and effective decision-making process in resolution and should also ensure that appropriate account is taken of national financial stability, the financial stability of the Union and the internal market. In that context, that regulation provides that the SRB is to be regarded as a national resolution authority (NRA) where it performs tasks and exercises powers conferred on such an NRA. That provision thus allows the SRB to act fully as a decision-making body in the field of resolution in the banking union and, therefore, has the object of improving the functioning of the internal market.

The Court concludes that the objective of Regulation No 806/2014 is to improve the conditions for the establishment and functioning of the internal market.

In the second place, the Court notes that, by the expression ‘measures for the approximation’ in Article 114 TFEU, the authors of the FEU Treaty intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result. Accordingly, the EU legislature may delegate to a Union body, office or agency powers for the implementation of the harmonisation sought. In those circumstances, the Court concludes that the EU legislature was able to provide that the SRB had to be regarded as an NRA where it performed tasks and exercised powers conferred on such an NRA and could confer on it the powers to determine the amount of the ex ante contributions and to manage the financial means of the SRF. Furthermore, Articles 69 and 70 of Regulation No 806/2014 constitute an essential element of the rules and procedure for the resolution of institutions, which helps to prevent divergent national practices from creating obstacles for the exercise of fundamental freedoms or the distortion of competition in the internal market. Similarly, Article 5 of Regulation No 806/2014 contains a measure for the approximation of resolution laws, which reinforces the uniform application of the rules and the procedure for the resolution of institutions. In those circumstances, those three provisions may be regarded as provisions for the approximation of the provisions of the Member States concerning the resolution of institutions in the banking union. It states that the tasks entrusted to the SRB are closely linked to the subject matter of Regulation No 806/2014.

The Court then moves on to hold that, with regard to the choice to apply Article 114(1) TFEU, whereas the ex ante contributions are fiscal in nature and therefore come within the scope of the provisions of Article 114(2) TFEU, Articles 69 and 70 of Regulation No 806/2014 which require institutions to pay ex ante contributions and specify the methods for their calculation do not constitute ‘fiscal provisions’ within the meaning of Article 114(2) TFEU.

The Court notes that a levy paid by economic operators in a particular sector is not fiscal in nature in a situation where, in particular, it is directly allocated solely to the financing of expenditure in that sector and where that expenditure is necessary for the functioning of that sector in order, in particular, to stabilise it. That reasoning also applies in the case of ex ante contributions, which follow an insurance-based logic and which are paid by economic operators in a particular sector in order to finance exclusively expenditure of that sector.

It is true that, since Regulation No 806/2014 does not establish any automatic link between the payment of the ex ante contribution and the resolution of the institution concerned, the ex ante contributions cannot be regarded as insurance premiums which could be paid monthly and reimbursed. The fact remains that the institutions benefit in two respects from the SRF, which is financed specifically by their ex ante contributions. First, where institutions are failing or are likely to fail, their financial situation may be remedied in the context of a resolution procedure which may be initiated in respect of them. Second, all institutions benefit from their ex ante contributions through the stability of the financial system, which is ensured by the SRF.

It follows that it is from an insurance-based rather than a tax-based perspective that the SRF seeks to ensure the stability of the financial sector as a whole, with the objective of ensuring protection against its own crises for the benefit of all institutions. That insurance-based purpose is also reflected in the calculation of the ex ante contributions, given that they are not the result of applying a certain rate to a basis of assessment but rather they are the result of the setting of a final target level, and thereafter of an annual target level, which is then divided between the institutions.

As regards the plea alleging a failure to meet the obligation to state reasons regarding the determination of the annual target level, which is a plea involving a matter of public policy and which is upheld in the judgment, the Court recalls, first of all, that, in accordance with the applicable legislation, by the end of the initial period of eight years from 1 January 2016 ('the initial period'), the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in the territories of all of the participating Member States. Next, during the initial period, ex ante contributions must be spread out in time as evenly as possible until the final target level is reached. Furthermore, each year, the contributions due by all of the institutions authorised in the territories of all of the participating Member States are not to exceed 12.5% of the final target level. In addition, as regards the methodology for calculating the ex ante contributions, the SRB is to determine the amount of those contributions on the basis of the annual target level by taking into account the final target level, and on the basis of the average amount of covered deposits in the previous year, calculated quarterly, of all the institutions authorised in the territories of the participating Member States. Lastly, the SRB is to calculate the ex ante contribution for each institution on the basis of the annual target level, which must be established with reference to the final target level, and in accordance with the methodology set out in Delegated Regulation 2015/63. [218]

In the present case, as is apparent from the contested decision, the SRB set the amount of the annual target level, for the 2021 contribution period, at EUR 11 287 677 212.56. In that decision, it explained, in essence, that the annual target level was to be determined on the basis of an analysis of the evolution of covered deposits in the previous years, any relevant developments in the economic situation and an analysis of the indicators relating to the phase of the business cycle and the effects that pro-cyclical contributions may have on the financial position of the institutions. The SRB considered it appropriate to set a coefficient based on that analysis and on the financial means available in the SRF ('the coefficient') and applied that coefficient to one eighth of the average amount of covered deposits in 2020, in order to obtain the annual target level. It subsequently set out the approach taken in order to determine the coefficient. In the light of those considerations, the SRB set

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[218] Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

the coefficient value at 1.35%. It then calculated the amount of the annual target level by multiplying the average amount of covered deposits in 2020 by that coefficient, and by dividing the result of that calculation by eight.

In that regard, although the SRB is required to provide the institutions, by means of the contested decision, with explanations concerning the methodology for determining the annual target level, such explanations must be consistent with the explanations provided by the SRB during the judicial proceedings and relating to the methodology actually applied. However, that is not the case in this instance.

It is clear, in essence, from the SRB's explanation at the hearing that it had determined the annual target level for the 2021 contribution period using a methodology based on four stages, the last two of which consisted of deducting from the final target level the financial means available within the SRF, in order to calculate the amount that remained to be received until the end of the initial period, and by dividing that amount by three.

The Court observes that no reference is made to the last two stages of that calculation in the mathematical formula which is presented in the contested decision as the basis for determining the amount of the annual target level.

Furthermore, that finding cannot be called into question by the SRB's assertion that, in May 2021, it published the Fact Sheet, which contained a range indicating the potential amounts of the final target level, and, on its website, the amount of the financial means available in the SRF. Irrespective of whether the applicant was actually aware of those amounts, they were not, in themselves, such as to enable it to understand that the last two stages of the calculation had actually been applied by the SRB, and it should be noted, moreover, that the mathematical formula did not even mention them.

Similar inconsistencies also affect the manner in which the coefficient of 1.35% was set, which nonetheless plays a crucial role in that mathematical formula. It follows from the explanations provided by the SRB at the hearing that that coefficient was set in such a manner as to justify the result of the calculation of the amount of the annual target level, that is to say, after the SRB calculated that amount in accordance with the four stages of the methodology actually applied. That approach is not in any way apparent from the contested decision.

Moreover, the range within which, according to the Fact Sheet, the amount of the estimated final target level was set is inconsistent with the range of the growth rate of covered deposits, which is between 4% and 7% as set out in the contested decision. The SRB stated at the hearing that, for the purpose of determining the annual target level, it had taken into account the 4% growth rate of covered deposits – which was the lowest rate in the second range – and that it had thus obtained the estimated final target level of EUR 75 billion – which was the highest value in the first range. It is therefore apparent that there is a discrepancy between those two ranges. In those circumstances, the applicant was not in a position to ascertain the manner in which the SRB had used the range relating to the rate of growth of those deposits in order to arrive at the calculation of the estimated final target level.

The Court considers that, as regards the determination of the annual target level, the methodology actually applied by the SRB, as explained at the hearing, does not correspond to the one described in the contested decision, with the result that the actual reasons, in the light of which that target level was set, could not be identified on the basis of the contested decision either by the institutions or by the Court. The contested decision is therefore vitiated by defective reasoning as regards the determination of the annual target level.

In view of the heads of illegality which vitiate the contested decision, the Court annuls the contested decision in so far as it concerns the applicant.

Nonetheless, in the circumstances of the present case, it has decided to maintain the effects of that decision, in so far as it concerns the applicant, until the entry into force, within a reasonable period which cannot exceed six months from the date of delivery of the present judgment, of a new decision of the SRB determining the applicant's ex ante contribution to the SRF for the 2021 contribution period.

9. ENVIRONMENT: REDUCTION OF THE IMPACT OF CERTAIN PLASTIC PRODUCTS ON THE ENVIRONMENT

Judgment of the General Court (First Chamber, Extended Composition), 31 January 2024 Symphony Environmental Technologies and Symphony Environmental v Parliament and Others, T-745/20

Link to the full text of the judgment

Non-contractual liability – Environment – Directive (EU) 2019/904 – Prohibition on the placing on the market of products made from oxo-degradable plastic – Sufficiently serious breach of a rule of law intended to confer rights on individuals – No distinction between products made from oxo-degradable plastic and products made from oxo-biodegradable plastic – Impact assessment – Equal treatment – Proportionality

Hearing an action for non-contractual liability, the First Chamber (Extended Composition) of the General Court finds that the prohibition on the placing on the market of products made from oxo-degradable plastic, laid down in Article 5 of Directive 2019/904, [219] is consistent with (i) Article 191 TFEU, which lays down a series of objectives, principles and criteria which the EU legislature must observe in implementing environmental policy and (ii) the principles of proportionality and of equal treatment.

The applicants, Symphony Environmental Technologies plc and Symphony Environmental Ltd, established in the United Kingdom, are active in the development, production and marketing of certain specialised plastic products together with the additives and masterbatches [220] used for making such products.

One of the masterbatches produced by the applicants contains a pro-oxidant additive which they maintain enables plastic into which it has been incorporated to biodegrade much more quickly than oxo-degradable plastic. [221] Plastic containing such an additive, which they classify as oxo-biodegradable, is therefore to be distinguished from oxo-degradable plastic.

By their action, the applicants accordingly seek compensation for the damage which they believe they have suffered as a result of the prohibition on the placing on the market of products made from oxo-degradable plastic laid down in Article 5 of Directive 2019/904, in so far as that prohibition applies to oxo-biodegradable plastic.

Findings of the Court

As a preliminary point, the Court recalls that the European Union may incur non-contractual liability where three cumulative conditions are fulfilled, namely a sufficiently serious breach of a rule of law intended to confer rights on individuals, the fact of damage and the existence of a causal link between the alleged breach and the damage sustained by the injured parties.

As regards the first of those conditions, the Court clarifies that, in the context of the present case, any sufficiently serious breach of the rules of law at issue must be based on a manifest and serious failure

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219 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (OJ 2019 L 155, p. 1).

220 A masterbatch is a compound of several chemicals in a polymer carrier which is supplied in pellet form to the manufacturers of plastic products for them to incorporate it into the polymer used by them to make their plastic products.

221 Article 3(3) of Directive 2019/904 defines 'oxo-degradable plastic' as plastic materials that include additives which, through oxidation, lead to the fragmentation of the plastic material into micro-fragments or to chemical decomposition.

to have regard to the limits of the broad discretion enjoyed by the EU legislature when exercising its powers in environmental matters under Articles 191 and 192 TFEU. The exercise of that discretionary power implies, first, the need for the EU legislature to anticipate and evaluate ecological, scientific, technical and economic changes of a complex and uncertain nature and, second, the weighing up and arbitration by that legislature of the various objectives, principles and interests set out in Article 191 TFEU.

In the present case, in the context of Article 191 TFEU, the Court considers, first of all, that the European Parliament, the Council of the European Union and the European Commission ('the three institutions concerned') did not commit a manifest error of assessment in adopting the prohibition on the placing on the market of products made from plastic containing a pro-oxidant additive, [222] since they had at their disposal a scientific assessment of the risks to the environment and to human health posed by that type of plastic which was as thorough as possible. According to Directive 2019/904, [223] that prohibition is justified by the fact that that plastic does not biodegrade properly, is not compostable, has a negative impact on the recycling of conventional plastics and fails to deliver a proven environmental benefit.

In the first place, as regards the assertion that plastic containing a pro-oxidant additive does not biodegrade properly, the scientific studies available to the three institutions concerned when Directive 2019/904 was being drawn up and adopted state that the level of biodegradation achieved by that plastic is low to non-existent, whether in an open environment, in landfill or in a marine environment. According to those studies, satisfactory biodegradation was only obtained in laboratory experiments, but never in a real-world situation. Indeed, environmental conditions are variable and make it difficult to estimate the time and degree of fragmentation necessary for biodegradation of that type of plastic to occur.

In the second place, it follows from the scientific data available during the legislative procedure that plastic containing a pro-oxidant additive is not suitable for any form of composting. [224] The plastic concerned does not meet any of the various standards for industrial or domestic composting nor those applicable to packaging recoverable through composting, since its biodegradation takes too long and plastic fragments generated by the process can adversely affect the quality of the compost or be spread in the environment. In addition, the fact that a certain rate of biodegradation was obtained in a laboratory does not establish that the same rate will be obtained, within the same period, in a real-world situation.

In the third place, as regards the assertion that plastic containing a pro-oxidant additive has a negative impact on the recycling of conventional plastics, it is apparent from the scientific studies on which the three institutions concerned state that they relied, when Directive 2019/904 was being adopted, that the fact that the technologies currently available do not enable reprocessors to identify and sort plastic containing a pro-oxidant additive from other types of plastic, with the result that it will necessarily be recycled with conventional plastic. However, the presence of pro-oxidant additives in the recycled material will accelerate its degradation and will accordingly negatively affect the marketability of recycled plastic, its quality and its price. In that regard, while the use of stabilising compounds makes it possible, in certain cases, to avoid a deterioration in the quality of recycled plastic, it is nevertheless difficult to determine the amount of stabilisers needed, which depends on the concentration and type of pro-oxidant additive used.

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222 Since the parties use various terms to refer to plastic to which a pro-oxidant additive has been added, the General Court has chosen to use the most neutral term possible, namely 'plastic containing a pro-oxidant additive'.

223 Recital 15 of Directive 2019/904.

224 Composting is enhanced biodegradation, under managed conditions, predominantly characterised by forced aeration and natural heat production resulting from the biological activity taking place inside the material.

In the fourth place, the information available when Directive 2019/904 was adopted does not reveal any proven environmental benefit of plastic containing a pro-oxidant additive.

Next, after recalling the broad discretion enjoyed by the EU legislature in determining the nature and scope of the measures to be adopted in an area of evolving and complex technology, the Court finds that the prohibition on the placing on the market of products made from plastic containing a pro-oxidant additive does not breach the principle of proportionality. First, that prohibition is appropriate for attaining the objective of protecting the environment and human health pursued by Directive 2019/904, given the risks posed by plastic containing a pro-oxidant additive. Second, the prohibition at issue does not go beyond what is necessary to achieve that objective, since none of the alternatives proposed by the applicants is capable of ensuring that it is achieved. That prohibition also cannot be regarded as disproportionate because it is not accompanied by a transitional period, having regard in particular to the non-complex uses of the plastic in question. The Court also reiterates the importance of protecting human health and the environment, which may justify even substantial negative economic consequences for certain operators.

Finally, the three institutions concerned did not breach the principle of equal treatment by prohibiting the placing on the market of products made from plastic containing a pro-oxidant additive, but not the placing on the market of products made from conventional plastic, with limited exceptions, nor products made from plastic marketed as 'compostable'.

In the first place, products made from plastic containing a pro-oxidant additive cannot be regarded as being in a situation comparable to that of products made from conventional plastic, in relation to which the placing on the market is not prohibited by Directive 2019/904, with the exception of nine single-use products. First, on the basis of the scientific risk assessment available before Directive 2019/904 was adopted, it cannot be ruled out that plastic containing a pro-oxidant additive may, at least in certain respects relating, in particular, to its recycling and its biodegradation in landfill, be more problematic than conventional plastic. In that regard, the faster fragmentation of plastic containing a pro-oxidant additive compared to conventional plastic could have an increased negative impact on the environment, as it is concentrated over a shorter period. Second, account must be taken of the objective of Directive 2019/904, which is, inter alia, to prevent and reduce the impact on the environment and human health of certain plastic products by focusing efforts where they are most necessary. In the light of that objective, those two types of plastic cannot be considered to be in a comparable situation. As regards single-use products manufactured from conventional plastic, the placing of which on the market is prohibited by Directive 2019/904, [225] they cannot, having regard to the objective of the directive, be regarded as being in a situation comparable to that of products made from plastic containing a pro-oxidant additive.

In the second place, products made from plastic containing a pro-oxidant additive and those manufactured from plastic marketed as 'compostable' are also not in a comparable situation. First, the three institutions concerned were entitled to find, without making a manifest error of assessment, that there is a risk that plastic containing a pro-oxidant additive may not be compostable and, second, products made from plastic marketed as 'compostable' do not fall within either the subject matter or the purpose of Directive 2019/904.

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

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[225] Article 9 of Directive 2019/904.