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I. GENERAL PRINCIPLES OF EU LAW: PROCEDURAL AUTONOMY OF NATIONAL COURTS – PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

Judgment of the Court of Justice (Grand Chamber), 9 April 2024, Profi Credit Polska (Reopening of proceedings concluded with a final judicial decision), C-582/21

Link to the full text of the judgment

Reference for a preliminary ruling – Principles of EU law – Article 4(3) TEU – Principle of sincere cooperation – Procedural autonomy – Principles of equivalence and effectiveness – Principle of interpreting national law in conformity with EU law – National legislation providing for an extraordinary remedy allowing the reopening of civil proceedings closed by a final judgment – Grounds – Subsequent decision of a constitutional court declaring that a provision of national law on the basis of which that judgment was given is incompatible with the Constitution – Loss of the opportunity to take action on account of a breach of the law – Broad application of that remedy – Alleged infringement of EU law resulting from a subsequent judgment of the Court of Justice ruling under Article 267 TFEU on the interpretation of EU law – Directive 93/13/EEC – Unfair terms in consumer contracts – Default judgment – Failure of the court hearing the case to ascertain of its own motion whether contractual terms are unfair

Hearing a reference for a preliminary ruling from the Sąd Okręgowy Warszawa-Praga [1] (Regional Court, Warszawa-Praga, Warsaw, Poland), the Court of Justice, sitting as the Grand Chamber, interprets Article 4(3) TEU, [2] the principle of equivalence and the principle that national law must be interpreted in conformity with EU law, in connection with the protection of consumers against unfair contract terms, in a situation in which a national court which has upheld an application by a seller or supplier based on a contract concluded with a consumer, by a final default judgment, failed to examine of its own motion whether that contract contained unfair terms, in breach of its obligations under Directive 93/13. [3]

In the main proceedings, FY concluded a consumer credit agreement with Profi Credit Polska S.A, a credit undertaking. The repayment of the loan was secured by the issuance of a blank promissory note, signed by FY, which was subsequently completed by Profi Credit Polska.

Subsequently, Profi Credit Polska brought an action before the court of first instance having jurisdiction seeking payment of the credit balance due, together with interest. The only documents annexed to the application were that promissory note and the notification of the termination of the credit agreement at issue. The agreement itself was not submitted.

The court of first instance gave a default judgment, ordering FY to pay Profi Credit Polska the amount shown on the promissory note, together with statutory default interest, on the basis solely of that promissory note and the statements in the application.

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1 'The referring court'.

2 That provision enshrines the principle of sincere cooperation, in accordance with which the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). Article 6(1) of that directive states, inter alia, that Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier, as provided for under their national law, are not to be binding on the consumer. Article 7(1) of that directive obliges the Member States to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers'.

FY did not lodge an objection against the default judgment, which became final at the end of the period prescribed for that purpose.

Taking the view that the court of first instance had not taken into consideration Directive 93/13, as interpreted by the Court of Justice, [4] by granting Profi Credit Polska's application on the basis of the promissory note which it had issued, without examining whether terms of the credit agreement were unfair, in particular as regards the non-interest cost of the credit, FY submitted to that court an application for the proceedings to be reopened.

After her application was rejected, FY brought an appeal before the referring court.

Considering that, since the court of first instance did not examine the credit agreement or whether terms it contained were unfair, the default judgment is likely to infringe Directive 93/13, as interpreted by the Court of Justice, the referring court asks whether EU law requires it to grant FY's application to reopen the proceedings, irrespective of the fact that she did not lodge an objection against the default judgment.

That court seeks to ascertain, in particular, whether EU law requires it to interpret broadly the national procedural provisions establishing an exceptional remedy allowing an individual to apply for the reopening of proceedings closed by a final judgment. Under national law, such an application may be successful, inter alia, where (i) the national provision relied upon in the judicial proceedings in question was subsequently declared incompatible with the national Constitution or another higher-ranking rule by the constitutional court, or (ii) the party concerned was unlawfully deprived of the opportunity to take action on account of a breach of the law. [5]

The referring court's first question seeks to ascertain whether the obligation of sincere cooperation and the principle of equivalence require the first of those extraordinary remedies to allow a request for the reopening of proceedings closed by a final judgment also where it is apparent from a preliminary ruling on the interpretation of EU law, given by the Court of Justice [6] after such a final judgment, that that judgment is based on a provision of national law that is incompatible with EU law. By its second question, the referring court asks whether the principle that national law must be interpreted in conformity with EU law requires it to interpret a provision of national law that allows a party to apply for the reopening of proceedings closed by a final judgment if that party has been deprived of the opportunity to take action on account of a breach of the law, so as to include within its scope a situation such as that at issue in the main proceedings.

Findings of the Court

- The first question

After noting that respect for the right to effective judicial protection does not mean that Member States are obliged to provide for extraordinary remedies allowing the reopening of proceedings closed by a final judgment following a preliminary ruling on interpretation, the Court emphasises the importance, in the EU legal order and in national legal systems, of the principle of res judicata. In the absence of EU rules governing the matter, the rules implementing that principle are a matter for the national legal order of the Member States, in accordance with the principle of procedural autonomy, but must be consistent with the principles of equivalence and effectiveness.

If the applicable domestic rules of procedure provide for the possibility, under certain conditions, for a national court to go back on a decision having the authority of res judicata in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is

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4 Judgment of 13 September 2018, Profi Credit Polska (C-176/17, EU:C:2018:711).

5 As provided, in essence, in Article 401[1] and Article 401(2) of the Polish Code of Civil Procedure, respectively.

6 'The preliminary ruling on interpretation'.

brought back into line with EU law. In particular, it is for the national court to determine, in the light of the detailed procedural rules governing actions applicable under national law, whether that principle is observed, having regard to the subject matter, cause of action and essential elements of the actions concerned.

In the present case, that examination involves examining whether, where national law confers on individuals the right to apply for the reopening of a procedure closed by a final judgment based on a provision of national law, the incompatibility of which has subsequently been established by the Trybunał Konstytucyjny (Constitutional Court, Poland), [7] an equivalent right must be granted to individuals where it follows from a preliminary ruling on interpretation, delivered after such a final judgment, that it is based on a provision of national law that is incompatible with EU law.

Such checking leads to the determination of whether equivalence between those two types of decisions can be established.

In that regard, the Court of Justice notes, in particular, that the decisions of the Constitutional Court contain a finding that the provision of national law at issue is incompatible, which does not require the adoption of a subsequent judicial decision, and which has the effect of depriving that provision of its binding force and disapplying it from the national legal order, with the direct consequence of depriving the final judgment delivered on the basis of that provision of its legal basis.

Preliminary rulings on interpretation differ from decisions of the Constitutional Court in that, in interpreting EU law, the Court of Justice does not rule directly on whether a provision of national law is incompatible with EU law. Although the role of the Court of Justice is to provide a binding interpretation of EU law, the consequences of that interpretation for the specific case are the responsibility of the national courts. Because of the clear separation of functions between the national courts and the Court of Justice, which characterises the preliminary ruling procedure, the national court alone has jurisdiction to interpret and apply national law, and to apply, in the case pending before it, the interpretation provided by the Court of Justice in response to its request for a preliminary ruling.

Therefore, where an extraordinary remedy established by a national procedural provision allows an individual to apply for the reopening of a procedure which led to a final judgment by relying on a subsequent decision of the Constitutional Court of the Member State concerned finding that a provision of national law on the basis of which that judgment was delivered is incompatible with the Constitution of that Member State, Article 4(3) TEU and the principle of equivalence do not require that remedy also to be available on account of reliance on a preliminary ruling on interpretation. [8]

- The second question

The Court points out at the outset that, since the national courts alone have jurisdiction to interpret national law, it is for the referring court to determine whether, in view of the limits on the principle that national law must be interpreted in conformity with EU law, the general principles of EU law, and the fact that it is not possible to provide an interpretation that is contra legem, the provision of national law at issue, which allows proceedings closed by a final judgment to be reopened if the party concerned has been deprived of the opportunity to bring proceedings for infringement of the law, may be interpreted broadly so as to bring a situation such as that at issue in the main proceedings within the scope of that ground for reopening the procedure.

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7 That court is hereinafter referred to as the 'Constitutional Court'. The decisions whereby the Constitutional Court finds that a provision of national law, or a certain interpretation of such a provision, is not compatible with the Polish Constitution or with any other higher-ranking rule, are hereinafter referred to as 'decisions of the Constitutional Court'.

8 In so far as the specific consequences of such a decision of that Constitutional Court concerning the provision of national law or the interpretation of that provision, on which that final judgment is based, flow directly from that decision.

However, the Court provides the referring court with some useful guidance in the light of the information contained in the order for reference.

In particular, the Court notes that the proceedings before the court of first instance must be examined as a whole, taking into consideration not only the fact that the default judgment was delivered without that court's examining of its own motion whether the terms of the credit agreement concluded with FY were unfair, but also the detailed procedural rules governing the exercise of the right to lodge an objection to such a judgment.

It is thus for the referring court to determine whether the detailed rules at issue in the main proceedings are capable of '[depriving] a party of the opportunity to take action on account of a breach of the law', within the meaning of the provision of national law at issue, in so far as they do not make it possible to ensure observance of the rights which the consumer derives from Directive 93/13.

Furthermore, the Court states that the recognition of a right to reopen proceedings closed by a final judgment in accordance with the principle that national law must be interpreted in conformity with EU law is not the only means capable of guaranteeing a consumer, in circumstances such as those in the main proceedings, the protection intended by Directive 93/13.

The obligation on the part of the Member States to ensure the effectiveness of the rights which individuals derive from EU law implies a requirement of effective judicial protection, in particular as regards the detailed procedural rules governing actions based on such rights. Thus, although the procedural rules governing the exercise of the right to lodge an objection against the default judgment do not enable observance of the rights that consumers derive from Directive 93/13, that procedure is not consistent with the consumer's right to an effective remedy.

Therefore, if the referring court were to take the view that the broad interpretation which it envisages is unfeasible, a consumer such as FY must have another legal remedy available to him or her in order to ensure that the protection intended by Directive 93/13 is effectively guaranteed.

In such a situation, the principle of effectiveness requires that observance of the rights guaranteed by Directive 93/13 be ensured in the context of enforcement proceedings, or even after those proceedings have come to an end. Where the enforcement proceedings have come to an end, the consumer must be able to rely, in separate subsequent proceedings, on the unfairness of terms of the contract in order to be able to exercise effectively and fully his or her rights under that directive, with a view to obtaining compensation for the financial loss caused by those terms.

Judgment of the Court of Justice (Fifth Chamber), 11 April 2024, Gabel Industria Tessile and Canavesi, C-316/22

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2008/118/EC – Article 1(2) – Excise duties – Electricity – National legislation creating an additional tax on electricity excise duties – Lack of specific purposes – Additional tax deemed contrary to Directive 2008/118/EC by the national courts – Recovery by the final consumer of the tax unduly paid from the supplier alone – Article 288 TFEU – Direct effect – Principle of effectiveness

In proceedings concerning the reimbursement to final consumers of sums unduly paid in respect of an additional excise duty contrary to EU law, the Court recalls its case-law interpreting the third paragraph of Article 288 TFEU and the principle of effectiveness.

Gabel Industria Tessile and Canavesi are two companies governed by Italian law which have signed contracts with A2A Energia and Energit, respectively, for the supply of electricity to their production sites.

Under those contracts, in 2010 and 2011, Gabel Industria Tessile and Canavesi paid an additional tax on electricity excise duties provided for at that time by the Italian legislation.

In 2020, considering that that additional tax was contrary to EU law, they brought proceedings against their suppliers before the Tribunale di Como (District Court, Como, Italy), the referring court in this case, seeking reimbursement thereof.

The referring court, while pointing out that the tax had been found to be contrary to Directive 2008/118 [9] by the Corte suprema di cassazione (Supreme Court of Cassation, Italy), questions the consequences of that unlawfulness for the treatment of sums unduly paid, given the absence of horizontal effect of a directive, as well as with regard to the application of the principle of effectiveness.

In that context, it referred two questions to the Court for a preliminary ruling, and asks, first, whether the third paragraph of Article 288 TFEU must be interpreted as precluding the disapplication by a national court, in a dispute between private parties, of a provision of national law establishing a tax contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed.

Secondly, the referring court asks, in essence, whether the principle of effectiveness must be interpreted as precluding national legislation that does not allow a final consumer to seek directly from the State reimbursement of a tax contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed, paid to his or her supplier, whereas it is impossible, due to the absence of horizontal direct effect of a directive, for the final consumer to rely on the fact that the tax is contrary to EU law against that supplier, which has itself repaid the tax, and therefore to obtain reimbursement of the sums unduly paid to the latter.

Findings of the Court

As regards the first question, the Court points out first of all that, under the third paragraph of Article 288 TFEU, a directive may not be relied on as such against a private party before a national court.

In principle, such a court cannot disapply, in a dispute between private parties, a provision of national law establishing an indirect tax contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed.

However, there are two exceptions to that principle.

First, national law may provide otherwise as regards such disapplication. A Member State may confer on the national courts the power to disapply, on the basis of its domestic law, any provision of national law which is contrary to a provision of EU law that does not have direct effect. Thus, notwithstanding the absence of horizontal effect of a directive, a national court may allow a private party to rely on the unlawfulness of a tax which has been wrongly passed on to it by a supplier, if such a possibility is provided for by national legislation.

Secondly, according to the case-law of the Court, provisions of a directive that are unconditional and sufficiently precise may be relied upon by private parties against organisations or bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between private parties. A private party may therefore rely on the fact that an indirect tax is contrary to EU law, as against an entity that meets those characteristics, which is for the referring court to determine.

As regards the second question, the Court considers that national legislation that does not allow a final consumer to seek directly from the Member State concerned reimbursement of a tax contrary to a clear, precise and unconditional provision of a directive that has not been transposed or has been incorrectly transposed infringes the principle of effectiveness.

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9 Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

In accordance with the principle of effectiveness, where the supplier required to pay unlawful taxes has passed them on directly to a final consumer, who has ultimately unduly borne that additional economic burden, the latter must have the possibility of obtaining reimbursement from the supplier and, if such reimbursement were to prove impossible or excessively difficult to obtain, he or she should be able to direct his or her application for reimbursement to the Member State concerned directly.

In the present case, as the final consumer is prevented from relying on the incompatibility of the tax with the provisions of Directive 2008/118 in the context of an action for reimbursement brought against its supplier, due to the absence of direct horizontal effect of that directive, reimbursement of that tax from that supplier is in actual fact legally impossible. However, the national legislation allows final consumers to bring an action for recovery of sums paid but not due only against the supplier, without the possibility of applying directly to the Member State concerned, which therefore infringes the principle of effectiveness.

II. COMPETITION

1. STATE AID

Judgment of the General Court (First Chamber), 10 April 2024, Danske Slagtermestre v Commission, T- 486/18 RENV

Link to the full text of the judgment

State aid – Contributions scheme for the collection of waste water – Complaint from a competitor – Decision finding no State aid at the end of the preliminary examination stage – Requirement of impartiality – Objective impartiality – Concept of 'advantage' – Market economy operator principle – Ex ante incremental profitability analysis – Commission Notice on the notion of State aid

The General Court, hearing the case on referral back from the Court of Justice, annuls the decision of the European Commission [10] by which the latter found that the Danish legislation regarding fees payable to waste water treatment operators did not give rise to State aid in favour of large slaughterhouses. In that context, the General Court provides clarification regarding, first, the requirement of impartiality on the part of the Commission and, second, the application of the market economy operator principle in a context such as that of the present case. On the second point, the Court draws attention, in addition, to the obligation on the Commission to comply with the criteria laid down in its Notice on the notion of State aid. [11]

By a law adopted in 2013 [12] ('the 2013 law'), Denmark replaced the system under which there was a single charge per cubic metre of water for all water consumers connected to the same waste water

10 Commission Decision C(2018) 2259 final of 19 April 2018 relating to State aid SA.37433 (2017/FC) – Denmark ('the contested decision').

11 Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1).

12 Law No 902/2013 amending the law establishing the rules relating to contributions payable to waste water treatment operators (structure of the contributions for the drainage of waste water, authorising special contributions for the treatment of particularly polluted waste water, etc.).

treatment plant with a degressive 'staircase' model providing for a rate on the basis of the volume of waste water discharged ('the staircase pricing model'). This new pricing model provides, in essence, for a reduction in the rate per cubic metre from a certain volume of waste water discharged, which has the effect of reducing the charges payable by the biggest water consumers.

Danske Slagtermestre, a trade association which claims to represent small butcher's shops, slaughterhouses, wholesalers and processing undertakings in Denmark, brought a complaint before the Commission alleging that the 2013 law had granted State aid to large slaughterhouses in the form of a reduction in contributions for the treatment of waste water.

By decision of 19 April 2018, the Commission held that the staircase pricing model introduced by the 2013 law did not confer any special advantage on specific undertakings and did not therefore constitute State aid within the meaning of Article 107(1) TFEU. In support of that conclusion, the Commission, referring to its Notice on State aid, took the view that a market economy operator would also have implemented the staircase model.

Danske Slagtermestre brought an action for the annulment of that decision before the General Court.

By order of 1 December 2020, [13] the General Court dismissed the action as inadmissible on the ground that Danske Slagtermestre lacked standing to bring proceedings. On appeal, the Court of Justice held that that professional association did have standing to bring proceedings; it annulled the abovementioned order and referred the case back to the General Court for it to examine it as to the substance. [14]

Findings of the Court

In the first place, the General Court examines the plea for annulment alleging that the Commission infringed the requirement of impartiality laid down in Article 41(1) of the Charter of Fundamental Rights of the European Union. According to the applicant, that requirement was infringed when the contested decision was adopted, since the Commissioner responsible for competition, who signed it, had also cooperated, as a minister of the Danish Government, in the adoption of the 2013 law.

In that regard, the Court recalls that it is for the institutions, bodies, offices and agencies of the European Union to comply with the requirement of impartiality, in particular as regards its component relating to objective impartiality, according to which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned, appearances possibly also being of importance.

Having clarified that matter, the Court notes, first, that at the time of the submission of the draft giving rise to the 2013 law and at the time of its adoption, the Commissioner responsible for competition who signed the contested decision was Minister for the Economy and the Interior and Deputy Prime Minister of the Kingdom of Denmark. Second, since the staircase pricing model was expected to have an impact on the expenditure of individuals and undertakings, it is reasonable to consider that it could have been proposed in agreement with that minister. Third, the Commissioner in question had taken a position at national level, publicly and explicitly, in favour of the staircase pricing model.

In the light of those factors, the Court takes the view that it may legitimately be considered that the Commissioner in question had an interest in the contribution for the treatment of waste water provided for by the 2013 law not being called into question on the ground that it was unlawful under the rules of EU law concerning State aid.

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13 Order of 1 December 2020, Danske Slagtermestre v Commission (T-486/18, not published, EU:T:2020:576).

14 Judgment of 30 June 2022, Danske Slagtermestre v Commission (C-99/21 P, EU:C:2022:510).

The Court examines, next, whether the procedure for the adoption of the contested decision offered sufficient guarantees to prevent such an interest from vitiating that procedure by an infringement of the requirement of impartiality.

Regarding that matter, the Court points out that, despite the collegiate nature of the method of adopting decisions within the Commission, the Commissioner in question was not only responsible for the preparation of the contested decision but was also the sole signatory of that decision.

Such a situation is such as to give rise, in the eyes of third parties, to a legitimate doubt with respect to possible bias on the part of that Commissioner, irrespective of her conduct. Therefore, the procedure leading to the adoption of the contested decision did not offer sufficient guarantees of objective impartiality.

In the second place, the Court examines, for the sake of completeness, the plea for annulment alleging that the Commission infringed Article 107(1) TFEU by wrongly concluding that there was no advantage conferred on certain undertakings by the introduction of the staircase pricing model.

After confirming that the Commission was right to have examined the existence of an advantage in the light of the market economy operator test, the Court observes, first of all, that it was thus for the Commission to determine whether the undertakings that benefited from reduced tariffs for the treatment of waste water would have obtained a comparable advantage from a normally prudent and diligent private operator, particularly taking account of its prospects for profitability.

Since the Commission applied, for the purposes of that examination, the ex ante profitability analysis method set out in paragraph 228 of its Notice on the notion of State aid, the Court points out, furthermore, that, in adopting that notice, the Commission imposed a limit on the exercise of its own discretion as regards the clarifications it provided in that notice on the concepts linked to the notion of State aid. In accordance with paragraph 228 of that notice, the Commission was therefore required to examine, for each undertaking connected to a waste water treatment plant, whether the contribution paid under the staircase pricing model was capable of covering the costs arising from its use of the infrastructure in question.

Given that the Commission based its examination solely on average data on total costs and revenues of 6 out of the 98 Danish municipalities, it failed to have regard to paragraph 228 of its Notice on the notion of State aid and, consequently, to the limits which it imposed on its discretion in adopting that notice.

In any event, even if the Commission could have applied the ex ante profitability analysis method without carrying out an examination of each user, it should at the very least have been able to verify that the staircase pricing model in all probability made it possible to allocate to users the marginal costs, that is to say, the costs directly incurred by their use of a waste water treatment plant.

Yet, in the contested decision, all the costs which were not linked to the quantity of water consumed were considered to be fixed costs and, therefore, were shared among all the various users, even if such costs existed merely because of the presence of a specific user on the network. The Commission could not therefore assert that it had verified that the contribution for the treatment of waste water, determined on the basis of the staircase model, enabled the plants to cover the incremental costs in the medium term.

Consequently, the Commission disregarded the limits that it had imposed on its discretion in adopting the Notice on the notion of State aid when it considered that the contribution for the treatment of waste water was consistent with the market economy operator principle.

Next, the Court recalls that, where an intervention by a public operator disregards any prospect of profitability, even in the long term, it cannot be regarded as complying with the market economy operator principle. Despite this, in the contested decision, the Commission found that the discounts introduced by the staircase pricing model could comply with the market economy operator principle on the sole condition that the contribution for the treatment of waste water covered the costs incurred by the operators of waste water treatment plants.

Moreover, by failing to examine whether the application of the staircase pricing model enabled the operators of waste water treatment plants to retain a profit margin, even though it was common ground that that new pricing system leads, on the whole, to a reduction in the amount of the

contribution for the treatment of waste water compared with the unitary fee system which it replaced, the Commission, for a second time, disregarded the requirement of profitability and, therefore, misapplied the market economy operator principle. Thus, the Court notes that the ex ante profitability analysis defined in paragraph 228 of the Notice on the notion of State aid involves the national measure under examination by the Commission contributing 'incrementally' to the profitability of the operator of an infrastructure, so that, in order to comply with the market economy operator principle, that measure must increase such profitability, even in the long term, and not decrease it.

Lastly, the Commission was wrong to take the view, in the contested decision, that a market economy operator would have taken account of the fact that the maintenance of high charges for water treatment entailed a risk that the largest water consumers would choose to disconnect from the centralised waste water treatment network, since the risk of such disconnection was hypothetical and not sufficiently substantiated.

Therefore, the Court concludes that the Commission infringed Article 107(1) TFEU and paragraph 228 of the Notice on the notion of State aid by finding that the contribution for the treatment of waste water did not confer any advantage on the ground that it would have been decided upon by a market economy operator.

In the light of all the foregoing, the Court annuls the contested decision.

Judgment of the General Court (Fourth Chamber, Extended Composition), 17 April 2024, Svenska Bankföreningen and Länsförsäkringar Bank v Commission, T-112/22

Link to the full text of the judgment

State aid – Swedish tax law – Tax on the systemic risk of credit institutions – Decision not to raise any objections – Selective nature – Objective of the measure – Derogation from the reference system

Sitting in extended composition, the Court dismisses the action for annulment brought against the decision of the European Commission by which it decided that a Swedish tax on systemic risk payable by credit institutions does not constitute State aid within the meaning of Article 107(1) TFEU. [15] In its judgment, the Court examines in detail the Commission's conclusion that that tax does not fulfil the selectivity criterion laid down by that provision.

In 2021, the Kingdom of Sweden notified the Commission of a draft law on a systemic risk tax on credit institutions ('the tax'), which was to be payable by all Swedish credit institutions whose liabilities exceed the threshold of 150 thousand million Swedish kronor (SEK) for tax years beginning in 2022. For tax years starting in 2023 or later, that threshold is to be multiplied by a factor. The draft law notified also provides that foreign credit institutions are also to be taxed where they have liabilities attributable to commercial activities carried out from a Swedish branch and the sum of those liabilities exceeds the value of the abovementioned thresholds. In total, nine credit institutions have a level of liabilities that exceeds the prescribed thresholds.

For the 2022 tax year, the tax rate was set at 0.05% of the sum of the liabilities of the credit institutions liable to the tax. For the 2023 tax year, that rate was to be increased to 0.06%.

15 European Commission Decision COM(2021) 8637 final of 24 November 2021 on State aid SA.56348 (2021/N) – Sweden: Swedish tax on credit institutions ('the contested decision').

Without initiating the formal investigation procedure, the Commission found that the tax did not constitute State aid, within the meaning of Article 107(1) TFEU, as it did not satisfy the selectivity criterion.

Taking the view that the Commission had infringed their procedural rights by adopting that decision without initiating the formal investigation procedure, a Swedish association of bankers and a financial entity which was a member of that association brought an action for annulment before the Court.

Findings of the Court

Since the Commission is obliged to initiate the formal investigation procedure provided for in Article 108(2) TFEU if, in the light of the information obtained during the preliminary examination stage, it still faces serious difficulties in assessing the notified measure in the light of Article 107(1) TFEU, the applicants claim that the Commission should have experienced such serious difficulties as regards the selective nature of the tax.

According to settled case-law, in order to classify a national tax measure as selective within the meaning of Article 107(1) TFEU, the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation. As a third step, the Commission must ascertain whether that differentiation is justified since it flows from the nature or general structure of the system of which the measure forms part.

As regards the first two steps set out above, it is apparent from the contested decision that the Commission defined the reference system as being restricted to the tax, something which the applicants do not dispute.

On that basis, it concluded, first, that the reference system had not been configured according to manifestly discriminatory parameters and, second, that the fact that certain types of operators and operators whose aggregate liabilities were below the threshold set in the draft law were not liable to pay the tax did not constitute a derogation from the reference system.

In support of their action, the applicants dispute that conclusion reached by the Commission.

As regards, in the first place, the Commission's finding that the reference system and, consequently, the tax had not been configured according to manifestly discriminatory parameters, the Court rejects the applicants' various arguments that the Commission should have encountered serious difficulties on that point since the parameters of the tax were manifestly not consistent with its objective.

In that regard, the Court starts by stating that it is apparent from the draft Swedish law that the objective of the tax is to strengthen public finances in order to provide room to cope with future financial crises by requiring the tax to be paid by large credit institutions, the failure or serious disruption of which would, on an individual basis and because of their size and importance for the functioning of the financial system, present a systemic risk and would have a very negative impact on the financial system and on the economy in general, thus causing significant indirect costs for society.

Having made that clear, the Court rejects, first, the arguments that the Swedish legislature's decision to establish the tax base on the basis of the liabilities of credit institutions was contrary to the objective of the tax. In that regard, the Court states that the tax was intended to strengthen national public finances in order to provide room to cope with future financial crises, it being understood that, the higher the level of a credit institution's indebtedness, the greater the risk to the financial system. It follows that defining the tax base according to the level of liabilities of institutions liable to the tax, in order to distinguish between credit institutions according to whether their impact on the financial system is greater or lesser, is consistent with the objective pursued.

Second, the Court rejects the applicants' arguments disputing the determination of which establishments are liable to the tax.

Since the applicants relied, in that context, on an alleged inconsistency between the identification of establishments liable to the tax and the schemes established by Directive 2014/59 [16] and Regulation No 575/2013 [17] respectively, the Court notes that the objectives pursued by those schemes differ from the objective pursued by the tax notified.

Nor is the Court convinced by the criticisms levelled at the manner in which the institutions liable to the tax are selected that relate to the competitive environment of the Swedish financial sector and to the fact that many financial institutions that are not liable to the tax, which are in competition with credit institutions that are liable to the tax, also cause indirect costs.

In that regard, the Court notes, first, that the Kingdom of Sweden was entitled to determine, by exercising its own powers in the field of direct taxation and in compliance with its fiscal autonomy and EU law, the chargeable event for the tax and the tax base. Second, the applicants have not called into question that only large credit institutions, on an individual basis, by their failure, are capable of creating a systemic risk and of having a very negative impact on the financial system and on the economy in general and of causing significant indirect costs for society. Moreover, nor have they shown that the failure of establishments not liable to the tax, even taken collectively, would have the same consequences.

Third, the Court holds that the applicants have not put forward any arguments which would make it possible to regard the threshold for credit institutions to be liable to the tax as being manifestly inappropriate in the light of the objectives of the tax.

Since the determination of the tax threshold and of the methods for calculating the basis of assessment comes within the discretion of the national legislature, the Kingdom of Sweden cannot be prevented, on the one hand, from introducing a tax with a tax threshold and, on the other hand, from establishing a variation mechanism that goes as far as to exempt credit institutions below that threshold, provided that those elements do not run counter to the objective of the tax. According to the Court, the threshold of SEK 150 thousand million, which is not manifestly discriminatory, is consistent with the objective of the tax, especially since the application of that threshold ensures that those liable to pay the tax represent 90% of the aggregated balance sheet total of all credit institutions in Sweden. Furthermore, it is clear from the file before the Court that there was no credit institution not liable to the tax whose level of liabilities was close to the threshold of SEK 150 thousand million.

Fourth, the Court rejects the applicants' arguments challenging the consolidation mechanism provided for intra-group situations, under which the liabilities of branches are counted towards the tax liability threshold for credit institutions. Since the branches of a Swedish credit institution are connected to that institution and, therefore, their default would also produce effects in Sweden, the Court cannot find that the Commission should have had doubts as to that mechanism.

As regards, in the second place, the Commission's finding that the fact that certain types of financial operators and credit institutions whose aggregate liabilities were below the threshold of SEK 150 thousand million were not liable to pay the tax did not constitute a derogation from the reference system, the Court points out that a tax is not selective if the differences in taxation and the advantages which may flow therefrom stem from the straightforward application, without derogation,

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

17 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).

of the 'normal' regime, if comparable situations are treated comparably and if those variation mechanisms do not misconstrue the objective of the tax concerned.

With regard to the fact that credit institutions whose liabilities did not exceed the threshold of SEK 150 thousand million were not liable to the tax, the Court holds that the applicants have not demonstrated the existence of a body of consistent evidence capable of showing that the credit institutions whose liabilities exceeded that threshold were, in the light of the objective of the tax, in a factual and legal situation comparable to that of credit institutions whose liabilities did not exceed that threshold. As regards the fact that other financial institutions, such as mortgage funds, were not liable to the tax, the Court also points out that a mere competitive relationship cannot in itself lead to the conclusion that those institutions are, in the light of the objective of the tax, in a factual and legal situation comparable to that of credit institutions liable to the tax.

Therefore, the applicants' arguments concerning the existence of derogations from the reference system do not show that the Commission should have encountered serious difficulties in its assessment in that regard.

In the light of all the findings above, the Court concludes that the applicants have not established that the Commission should have had doubts as to the classification of the tax within the meaning of Article 107(1) TFEU, which should have led it to initiate the formal investigation procedure. The Court therefore dismisses the action in its entirety.

2. ACTIONS FOR DAMAGES FOR LOSS CAUSED BY INFRINGEMENTS OF COMPETITION LAW PROVISIONS

Judgment of the Court of Justice (Grand Chamber), 18 April 2024, Heureka Group (Online price comparison services), C-605/21

Link to the full text of the judgment

Reference for a preliminary ruling – Article 102 TFEU – Principle of effectiveness – Actions for damages under national law for infringements of competition law provisions – Directive 2014/104/EU – Late transposition of the directive – Temporal application – Article 10 – Limitation period – Detailed rules for the *dies a quo* – Cessation of the infringement – Knowledge of the information necessary for bringing an action for damages – Publication in the Official Journal of the European Union of the summary of the European Commission's decision finding an infringement of the competition rules – Binding effect of a Commission decision that is not yet final – Suspension or interruption of the limitation period for the duration of the Commission's investigation or until the date when its decision becomes final

Having received a reference for a preliminary ruling, the Grand Chamber of the Court of Justice rules on the requirements to be met by the national rules on limitation applicable to actions for damages brought before national courts for infringements of EU competition law. That clarification is provided in the context of an action for damages brought by a Czech undertaking against Google LLC for abuse of a dominant position allegedly committed in the Czech Republic by Google and its parent company, Alphabet Inc.

By decision of 27 June 2017, [18] the European Commission found that, since February 2013, Google had infringed Article 102 TFEU by abusing its dominant position in 13 national markets for general search services, including that of the Czech Republic, by decreasing traffic from its general search results pages to competing comparison shopping services and increasing that traffic to its own comparison shopping service. A summary of the decision was published on 12 January 2018 in the *Official Journal of the European Union*. [19]

Google and Alphabet brought an action against that decision before the General Court, which was essentially dismissed. [20] However, since the appeal against that judgment of the General Court is still pending before the Court of Justice, the Commission's decision is not yet final.

In June 2020, Heureka Group a.s. ('Heureka'), a Czech company active on the market for sales price comparison services, brought an action before the Městský soud v Praze (Prague City Court, Czech Republic) seeking an order that Google pay compensation for the harm resulting from the infringement of Article 102 TFEU found in the Commission's decision and committed in the Czech Republic during the period from February 2013 to 27 June 2017. In Heureka's submission, Google's anticompetitive conduct reduced the number of visits to its portal, Heureka.cz.

In its defence, Google claimed that Heureka's right to compensation was, at least in part, time-barred.

In that regard, the Prague City Court states that the national rules applicable to Heureka's action provide for a limitation period of three years which starts to run, independently and separately for each partial occurrence of harm resulting from an infringement of the competition rules, from the moment when the injured party knew, or is deemed to have known, of the fact that it suffered such partial harm and the identity of the party liable to pay compensation for that harm. However, in order for that period to start to run, the injured party is not required to know of the fact that the behaviour concerned constitutes an infringement of competition law or that that infringement has come to an end. Moreover, the applicable national rules do not require the suspension or interruption of that period during the Commission's investigation into the infringement. That limitation period may not be suspended, at the very least, until one year after the date on which the Commission's decision finding that infringement becomes final.

According to the Prague City Court, it follows that, in the present case, every general search on Google's web page which led to a positioning and display of results more favourable to Google's price comparison service would have set a new and separate limitation period running.

Furthermore, since Directive 2014/104 [21] was transposed belatedly into Czech law, the Prague City Court notes that the infringement alleged against Google ceased after the expiry of the period for transposition of that directive, namely 27 December 2016, but apparently before the date of entry into force of the transposing legislation on 1 September 2017.

In the light of the foregoing, the Prague City Court referred a number of questions to the Court for a preliminary ruling seeking to ascertain, in essence, whether Article 10 of Directive 2014/104 and/or Article 102 TFEU and the principle of effectiveness preclude national legislation on limitation such as that at issue in the main proceedings for actions for damages relating to continuing infringements of EU competition law rules.

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18 Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 [TFEU] and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)).

19 OJ 2018 C 9, p. 11.

20 Judgment of 10 November 2021, Google and Alphabet v Commission (Google Shopping) (T-612/17, EU:T:2021:763).

21 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

Findings of the Court

In order to answer the questions referred for a preliminary ruling, the Court examines first of all the temporal applicability of Article 10 of Directive 2014/104, which determines the minimum duration of the limitation period applicable to actions for damages for infringements of competition law and the earliest point in time at which it may begin to run, and the circumstances in which that limitation period must be suspended or interrupted.

In that regard, the Court recalls that Article 10 of Directive 2014/104 is a substantive provision, so that, in accordance with Article 22(1) of that directive, Member States must ensure that the measures transposing that article do not apply retroactively. However, as from the expiry of the period prescribed for transposition of that directive, namely 27 December 2016, national law must be interpreted in conformity with any provision of that directive.

In that context, in order to determine the temporal applicability of Article 10 of Directive 2014/104 in the present case, the Court ascertains whether the legal situation at issue in the main proceedings arose before 27 December 2016 or whether it continued to produce effects thereafter.

To that end, it is necessary to examine whether, on 27 December 2016, the national limitation period applicable to the situation at issue in the main proceedings had elapsed. In that context, however, account must be taken of the fact that, even before the expiry of the time limit for transposition of Directive 2014/104, the applicable national limitation rules had to comply with the principles of equivalence and effectiveness, and cannot undermine completely the full effectiveness of Article 102 TFEU.

The full effectiveness of Article 102 TFEU and, in particular, the effectiveness of the prohibition laid down therein require that the national limitation periods applicable to actions for damages for infringements of that article do not begin to run before the infringement has come to an end and the injured party does not know, or cannot reasonably be expected to know, the information necessary for bringing its action for damages.

As regards the first condition relating to the cessation of the infringement, the Court considers that, in view of the fact that disputes concerning infringements of the rules on competition law are characterised, in principle, by information asymmetry to the detriment of the injured party and that it is often particularly difficult for such a party to establish the existence and scope of such an infringement and the harm resulting from that infringement before it comes to an end, the requirement that the limitation period cannot begin to run before the infringement concerned has come to an end is necessary in order to enable the injured party to be effectively able to exercise its right to claim full compensation under Article 102 TFEU. Moreover, since it is generally difficult for the injured party to adduce evidence of an infringement of that article in the absence of a decision by the Commission or by a national authority finding that infringement, rules on limitation which could have the consequence that the limitation period expires well before the adoption of such a decision would render the exercise of that party's right to seek full compensation excessively difficult.

As regards the second condition relating to knowledge of the information necessary for bringing an action for damages, the Court recalls that the existence of an infringement of competition law, the existence of harm, the causal link between that harm and that infringement and the identity of the infringer form part of that information.

Although it is for the referring court to determine, in the present case, the date on which Heureka knew that information, the Court nevertheless considers it appropriate to point out that, in principle, the moment when that information is known coincides with the date of publication in the *Official Journal of the European Union* of the summary of the Commission's decision finding the infringement, irrespective of whether or not that decision has become final.

The Court also states that Article 102 TFEU and the principle of effectiveness require the suspension or interruption of the limitation period for the duration of an investigation conducted by the Commission. However, that article and that principle do not require the limitation period to continue to be suspended until the moment the Commission's decision becomes final. An injured party may, in order to substantiate its action for damages, rely on the findings in a Commission decision which has not become final, where that decision has binding effect for as long as it has not been annulled.

In view of the foregoing, the Court finds that national rules on limitation, such as those at issue in the main proceedings, under which, first, the three-year limitation period begins to run independently and separately for each partial occurrence of harm resulting from an infringement of Article 102 TFEU from the moment when the injured party knows, or can reasonably be expected to know, of the fact that it suffered partial harm and the identity of the party who is liable to pay compensation for that harm, without it being necessary for the infringement to have come to an end and for that person to have knowledge of the fact that the behaviour concerned constitutes an infringement of the competition rules, and, second, that period may not be suspended or interrupted during the Commission's investigation into such an infringement are incompatible with Article 102 TFEU and the principle of effectiveness, in that they make the exercise of the right to claim compensation for the harm suffered as a result of that infringement practically impossible or excessively difficult.

Consequently, it is by disregarding the elements of those rules on limitation which are incompatible with Article 102 TFEU and the principle of effectiveness that it is necessary to examine whether, on the date the period for transposing Directive 2014/104 expired, namely 27 December 2016, the limitation period laid down by national law, applicable to the situation at issue in the main proceedings until that date, had expired.

In that regard, it is apparent from the Commission's decision finding Google's abuse of a dominant position that that infringement had not yet come to an end on the date that decision was adopted, namely 27 June 2017. It follows that, on the date on which the period for transposing Directive 2014/104 expired, not only had the limitation period not expired but it had not even started to run.

Since the situation at issue in the main proceedings had not arisen before the expiry of the period for transposing Directive 2014/104, Article 10 of that directive is applicable ratione temporis in the present case. However, the Court holds that it follows from the clear wording of Article 10(2) and (4) of that directive that the national rules on limitation at issue are also incompatible with that provision. It states, in particular, that Article 10(4) of that directive now requires that the suspension of the limitation period following action taken by a competition authority for the purpose of the investigation or proceedings in respect of an infringement of competition law to which the action for damages relates is to end at the earliest one year after the date on which the decision finding that infringement became final or after the proceedings are otherwise terminated. In that respect, that provision therefore exceeds the requirements under Article 102 TFEU and the principle of effectiveness.

Lastly, the Court points out that, although an untransposed directive cannot be relied on directly in a dispute between individuals, the national court hearing such a dispute is nevertheless required to interpret national law in conformity with that directive as soon as the time limit for its transposition expires, without however interpreting national law contra legem.

III. APPROXIMATION OF LAWS

1. EUROPEAN UNION TRADEMARK

Judgment of the General Court (Eighth Chamber), 24 April 2024, Kneipp v EUIPO – Patou (Joyful by nature), T-157/23

Link to the judgment as published in extract form

EU trade mark – Opposition proceedings – Application for EU word mark Joyful by nature – Earlier EU word mark JOY – Relative ground for refusal – Damage to reputation – Article 8(5) of Regulation (EU) 2017/1001 – Evidence in support of the reputation – Taking unfair advantage of the distinctive character or repute of the earlier mark

By its judgment, the General Court dismisses the action of the applicant, Kneipp GmbH, the applicant for a trade mark, and rules on the question of the burden of proof in relation to the reputation of a mark. It considers that, while the burden of proof in relation to the reputation of a mark lies with the proprietor of that mark, reputation is lost gradually and it was therefore for the applicant to prove that the reputation, acquired progressively by the earlier mark over many years, suddenly disappeared during the last year under examination.

On 29 November 2019, the applicant filed an application for registration of an EU trade mark in respect of the word sign Joyful by nature with the European Union Intellectual Property Office (EUIPO). [22]

Jean Patou filed a notice of opposition to the registration of that mark, claiming a likelihood of confusion and detriment to the reputation of several of its earlier rights, including the EU word mark JOY, registered in 2016.

The Opposition Division of EUIPO upheld the opposition on the basis of Article 8(5) of Regulation 2017/1001, in the light of the reputation of that earlier word mark. [23]

Following an appeal by the applicant, the Board of Appeal of EUIPO partially annulled the Opposition Division's decision in respect of certain services. However, it dismissed the appeal concerning the other goods and services, finding in particular that Jean Patou had demonstrated that the earlier mark had a strong reputation for perfumery and fragrances.

It is in that context that the applicant brought its action, alleging infringement of Article 8(5) of Regulation 2017/1001.

Findings of the Court

In the context of the assessment of whether the earlier mark has a reputation, the Court points out, at the outset, that reputation must be established as at the filing date of the application for registration of the mark applied for, that is to say 29 November 2019 in the present case.

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22 The mark applied for designated, inter alia, goods and services in Classes 3, 4, 35 and 44 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

23 Under Article 8(5) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1: 'Upon opposition by the proprietor of a registered earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with, or similar to, an earlier trade mark, irrespective of whether the goods or services for which it is applied are identical with, similar to or not similar to those for which the earlier trade mark is registered, where, in the case of an earlier EU trade mark, the trade mark has a reputation in the Union or, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned, and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark'.

In the first place, the Court finds that the evidence submitted by Jean Patou establishes that the earlier mark had, on that date, a reputation in a substantial part of the territory of the European Union, so far as concerns perfumery and fragrances. The earlier mark is widely known by the general public concerned, even though the prestigious awards won by the perfume Joy referred to in that evidence date back several years and sales figures fell between 2013 and 2018. In any event, the Court finds that the earlier mark enjoyed a high degree of reputation in the past, which, even if it were to be assumed that it may have diminished over the years, still survived at the date of filing the application for registration of the mark applied for; accordingly, a certain 'surviving' reputation remained at that date.

In the second place, the Court rules on the burden of proof in relation to reputation, recalling that a document drawn up some time before or after the filing date of the application for registration of the mark at issue may contain useful information in view of the fact that the reputation of a trade mark is, in general, acquired progressively. It specifies that the same reasoning applies to the loss of such a reputation, which is also, in general, lost gradually. The evidential value of such a document is likely to vary depending on whether the period covered is close to or distant from the filing date. In that regard, it is apparent from the case-law that even the mere fact that evidence bears a date which predates that filing date by five years cannot, in itself, deprive it of its probative value. Furthermore, according to the case-law, the burden of proof in relation to reputation lies with the proprietor of the earlier mark.

In the present case, the Board of Appeal emphasised that most of the evidence submitted related to the period between 2013 and 2017 and that some of that evidence dated back to 1990, 2000 or 2006 but that the evidence in fact contained indications concerning the continuous efforts of Jean Patou to maintain its market share in 2018. It added that the loss of reputation rarely happens as a single occurrence but is rather a continuing process over a long period of time, as reputation is usually built up over a period of years and cannot simply be switched on and off. Thus, according to the Board of Appeal, it was for the applicant to prove such a drastic loss of reputation over a short period of time.

The Court finds that that assessment does not constitute a reversal of the burden of proof and is consistent with the case-law referred to. In the absence of concrete evidence showing that the reputation progressively acquired by the earlier mark over many years suddenly disappeared during the last year under examination, the Board of Appeal was entitled to conclude that the earlier mark still had a reputation on the relevant date.

Accordingly, the Court continues its analysis, ruling that the Board of Appeal did not make an error of assessment in finding that the relevant public was likely to establish a link between the marks at issue. Thus, after having found, first, that there is a future risk, which is non-hypothetical, that the applicant would take unfair advantage of the reputation of the earlier mark and, second, that there was no due cause for the use of the mark applied for, the Court dismisses the action in its entirety.

Judgment of the General Court (Eighth Chamber), 17 April 2024, Insider v EUIPO – Alaj (in Insajderi), T-119/23

Link to the full text of the judgment

EU trade mark – Opposition proceedings – Application for EU figurative mark in Insajderi – Earlier national word mark INSAJDERI and earlier national figurative mark in Insajderi Gazetë online – Relative ground for refusal – Article 8(3) of Regulation (EU) 2017/1001 – Extent of the examination to be carried out by the Board of Appeal – Article 27(2) of Delegated Regulation (EU) 2018/625 – Failure to submit evidence – Translation – Article 7 of Delegated Regulation 2018/625 – Right to be heard – Article 41 of the Charter of Fundamental Rights – Article 94(1) of Regulation 2017/1001 – Possibility for the Board of Appeal to accept evidence submitted for the first time before it – Article 27(4) of Delegated Regulation 2018/625 – Article 95(2) of Regulation 2017/1001

By its judgment, the General Court annuls the decision of the Board of Appeal of the European Union Intellectual Property Office (EUIPO) [24] on the basis of Article 41(2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter'), on the ground that the applicant was not heard on matters raised by the Board of Appeal of its own motion which affected him adversely.

Mr Florim Alaj applied, to EUIPO, for registration of the figurative sign 'in Insajderi' for services relating to the provision of information, news, and commentary in the field of current events via the internet. [25] Insider LLC, the applicant, filed a notice of opposition to that registration [26] on the basis of two earlier marks registered in Kosovo. The Opposition Division upheld that opposition.

Nevertheless, the Board of Appeal annulled the Opposition Division's decision and rejected the opposition on the ground that the applicant had not demonstrated the existence of the earlier marks claimed and its proprietorship of them. It noted, inter alia, the absence of original versions of the registration certificates for the earlier marks and found that the certified translations, provided by the applicant as evidence, constituted unofficial translations in which the original text was not visible, which made it impossible to verify whether essential information was mentioned in the original certificate.

Findings of the Court

As a preliminary point, the Court recalls that the obligation to state reasons laid down in the second sentence of Article 94(1) of Regulation 2017/1001 constitutes a specific application of the general principle of protection of the rights of the defence, enshrined in Article 41(2)(a) of the Charter. All EU acts must respect fundamental rights, as recognised by the Charter, that respect constituting a condition of their lawfulness which it is for the EU Courts to review in the framework of the complete system of legal remedies. As regards, more specifically, the right to be heard in all proceedings, it guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of a decision in relation to that person that is liable to affect his or her interests adversely. That right extends to all the factual and legal material which forms the basis of the decision, but not to the final position which the authority intends to adopt. EUIPO is therefore under an obligation, in proceedings pending before its departments, to afford the parties the opportunity to express their point of view on all matters which form the basis of the decisions of those departments.

In the case at hand, the Court considers that the fact that the Board of Appeal raised of its own motion the absence of original versions of the registration certificates for the earlier marks and expressed doubts as to the authenticity of their translations, without having heard the applicant on that point, constitutes a procedural irregularity. An infringement of the rights of the defence may, however, be held to exist only provided that the failure to take into account the view of an interested party has had a concrete effect on the ability of that party to defend itself. That being so, the applicant cannot, however, be required to show that the contested decision would have been different in content had it not been for the infringement found, but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error.

It is in the light of those considerations that the Court comes to the conclusion that, in this case, it cannot be entirely ruled out that the outcome of the proceedings would have been different had it not been for the procedural irregularity. Had the Board of Appeal given the applicant the opportunity effectively to make known its views on the absence of the original versions of the registration certificates for the earlier marks, the latter would have been in a position to provide them, enabling

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24 Decision of the Fifth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 5 December 2022 (Case R 1152/2022-5).

25 Those were services falling within Class 41 within the meaning of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

26 Based on Article 8(3) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

the Board of Appeal to examine them and to ascertain the authenticity of the translations. Accordingly, the Board of Appeal's decision was adopted in breach of the right to be heard guaranteed by Article 41(2)(a) of the Charter.

2. COMMUNITY DESIGNS

Judgment of the General Court (Seventh Chamber), 10 April 2024, M&T 1997 v EUIPO – VDS Czmyr Kowalik (Door and window handles), T-654/22

Link to the judgment as published in extract form

Community design – Invalidity proceedings – Registered Community design representing door and window handles – Earlier design – Ground for invalidity – Individual character – Article 25(1)(b) and Article 6 of Regulation (EC) No 6/2002

In the context of the annulment of a decision of the Board of Appeal of the European Union Intellectual Property Office (EUIPO), [27] the General Court, in this judgment, highlights the principle that the overall impression produced on the informed user by a design must be determined having regard to the manner of use of the product in question and the impact of the visible features of the product on the ease with which it can be used.

On 17 November 2012, the predecessor in law of M&T 1997, a.s., the applicant, filed an application with EUIPO for registration of the Community design representing door and window handles. [28] On 23 October 2020, VDS Czmyr Kowalik sp.k. filed an application for a declaration of invalidity based on that design's lack of individual character. [29]

The Cancellation Division upheld that application on the ground that the contested design did not have individual character.

Subsequently, the Board of Appeal dismissed on the same ground the appeal brought against that decision since the design did not produce a different overall impression on the informed user from that of the earlier design.

Findings of the Court

At the outset, the Court recalls that the overall impression produced by a design on the informed user must be determined in the light of the manner in which the product in question is normally used, taking into account the fact that the informed user's attention is focused rather on the most visible and most important elements when using the product. Thus, the importance of the visible features of the product is assessed on the basis of their impact not only on its appearance, but also on the ease with which it can be used. Furthermore, if the designer enjoys a high degree of freedom in developing a design, that reinforces the conclusion that the designs which do not have significant differences produce the same overall impression on an informed user and, accordingly, the contested design does not display individual character. Conversely, if the designer has a low degree of freedom, that reinforces the conclusion that the sufficiently marked differences between the designs produce a

27 Decision of the Third Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 29 August 2022 (Case R 29/2022-3).

28 The design was registered for goods in Class 08-06 of the Locarno Agreement of 8 October 1968 Establishing an International Classification for Industrial Designs, as amended.

29 Within the meaning of Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

dissimilar overall impression on the informed user and the contested design therefore displays individual character.

As regards the designs at issue, the Court observed that when the informed user approaches the door handle in order to use it normally, that user sees it from above. Accordingly, the most visible elements of the handle are those corresponding to the outward-facing parts, namely the front, side and top parts of the handle. The differences at the back, namely the curvature of the edges and the shape of the neck, will also be visible to the informed user and will not be overlooked by him or her, especially since the rounded curvature of the edges of the contested design is accompanied by a thinner and smoother appearance which the informed user will easily notice. Furthermore, the rounded and thinner shapes of the edges of the contested design constitute differences from the earlier design which will be perceived by the informed user as influencing the manipulation of the handle and are, therefore, important elements in relation to the overall impression produced by the contested design. Those aspects have an impact on the ease of use of the handle, since they correspond to the parts of it which come into direct contact with the hand of the informed user.

In the light of those elements, and of the high level of attention of the informed user in the present case, the Court considers that the differences in the angles of the grip and the neck are neither marginal nor minor variations of one and the same design. A more rounded shape generally results in a softening of the lines of the neck and grip, which has a significant effect both on the overall appearance and on the ease of use of the door handle, so that it is an element which attracts the informed user's attention. Consequently, although the designer's freedom is high, the Court concludes that those differences are sufficiently significant to produce a different overall impression of the designs at issue.

3. PROTECTION OF NEW PLANT VARIETIES

Judgment of the General Court (Third Chamber), 17 April 2024, Romagnoli Fratelli v CPVO (Melrose), T-2/23

Link to the full text of the judgment

Plant varieties – Grant of a Community plant variety right for the potato variety Melrose – Failure to pay the annual fee on time – Cancellation of right – Application for restitutio in integrum – Conditions for notification of decisions and communications of the CPVO

By this judgment, the General Court dismisses the action for annulment brought by Romagnoli Fratelli SpA ('the applicant') against the decision of the Community Plant Variety Office (CPVO) ('the contested decision'). After having examined whether a legal remedy against the decisions taken by the CPVO exists in the wake of the filing of an application for restitutio in integrum, the Court rules, for the first time, on the lawfulness of the user area, known as 'MyPVR', as an official notification of the CPVO.

In December 2009, the applicant applied to the CPVO, pursuant to Regulation No 2100/94, [30] for a Community plant variety right for the potato variety Melrose. That right having been granted, the CPVO sent the applicant, in October 2021, a debit note relating to payment of the annual fee for the Community plant variety right at issue, via its MyPVR user area.

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

That debit note having remained unpaid, a formal reminder was sent to the applicant by the CPVO in January 2022, again via the MyPVR user area, inviting it to pay the amount due in respect of the annual fee within one month. Faced with inactivity in the applicant's user area, the CPVO sent it a final reminder in February 2022 by email. In March 2022, as the annual fee had not been paid within the period prescribed, the CPVO cancelled the Community plant variety right.

Following that cancellation, the applicant filed an application for restitutio in integrum, pursuant to Article 80 of Regulation No 2100/94, and paid the annual fee that had not yet been paid. By the contested decision, the CPVO did not grant the applicant's application on the ground that it did not satisfy the conditions laid down in Article 80(1) and (2) of Regulation No 2100/94.

Findings of the Court

In the first place, the Court examines the plea of inadmissibility raised by the CPVO contending that the action is inadmissible, in the light of several provisions [31] relating to the judicial system of the European Union. The CPVO contends that the fifth paragraph of Article 263 TFEU[32] legitimises its ability to rule on applications for restitutio in integrum without the possibility of an appeal before the Board of Appeal of the CPVO or before the Court, since such an action is not provided for either by Regulation No 2100/94 or by Regulation No 874/2009, [33] which constitute the 'specific conditions and arrangements' within the meaning of the fifth paragraph of that article. Therefore, it submits that the contested decision cannot be the subject of an action before the Court under the fourth paragraph of Article 263 TFEU.

In that regard, the Court finds that, although those 'specific conditions and arrangements' do indeed allow a body, office or agency of the European Union to draw up internal terms and conditions which are prerequisites to legal proceedings and govern, inter alia, the operation of a self-monitoring mechanism or the course of an out-of-court settlement, those conditions and arrangements cannot be interpreted as allowing an institution of the European Union to shield disputes involving the interpretation or application of EU law from the jurisdiction of the EU courts.

Moreover, it follows from Article 81(1) of Regulation No 2100/94 that, in the absence of procedural provisions in that regulation or in provisions adopted pursuant to that regulation, the CPVO is to apply the principles of procedural law which are generally recognised in the Member States. Accordingly, even though Regulation No 2100/94 does not explicitly provide for a remedy before the Board of Appeal of the CPVO or directly before the Court for the decisions taken by the CPVO in the wake of an application for restitutio in integrum, a remedy nevertheless exists by virtue of Article 81(1) of that regulation and of the fourth paragraph of Article 263 TFEU. Consequently, the Court rejects the CPVO's plea of inadmissibility.

In the second place, the Court examines the lawfulness of the MyPVR user area as a means of official notification of documents and decisions sent by the CPVO. First, the Court notes, on the one hand, that communications and notifications from the CPVO from which a time limit is reckoned may be served by electronic means and, on the other hand, that the details of that service are to be determined by the President of the CPVO. [34]

Second, the Court, relying on the decision of the President of the CPVO, finds that that communication by electronic means using the MyPVR user area may be made only if the user has

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31 Articles 2 and 19 TEU, Article 256(1), first sentence, TFEU and Article 263, fourth and fifth paragraphs, TFEU.

32 The fifth paragraph of Article 263 TFEU provides: 'Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.'

33 Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Regulation No 2100/94 as regards proceedings before the [CPVO] (OJ 2009 L 251, p. 3).

34 See Article 79 of Regulation No 2100/94, Article 64(4) of Regulation No 874/2009 and Decision of 20 December 2016 of the President of the CPVO concerning electronic communication with and by the CPVO ('the decision of the President of the CPVO').

opted for that communication. Thus, the CPVO will validly notify him or her of decisions, communications and other documents electronically via his or her user area. [35] In that regard, the Court notes that the parties do not dispute that the applicant had opted for communication by electronic means via MyPVR and that it had accepted version 3.0 of the user area's terms and conditions. There can therefore be no doubt that the applicant agreed to receive communications and notifications from the CPVO via its MyPVR user area.

Consequently, the Court rejects the complaint relating to the unlawfulness of the MyPVR user area as an official channel of notification, given that the option enabling the CPVO to communicate with the user electronically was activated by it.

IV. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Eighth Chamber, Extended Composition), 10 April 2024, Dexia v SRB (2022 ex ante contributions), T-411/22

Link to the full text of the judgment

Economic and monetary union – Banking union – Single Resolution Mechanism of credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the Single Resolution Board (SRB) on the calculation of the ex ante contributions for the 2022 contribution period – Article 70(2) of Regulation (EU) No 806/2014 – Error of law – Limitation of the temporal effects of the judgment

Hearing an action for annulment – which it upholds – the General Court annuls the decision of the Single Resolution Board (SRB) concerning the determination of the ex ante contributions of credit institutions and certain investment firms for 2022 to the Single Resolution Fund (SRF). [36] For the first time, it rules on the rule laid down in the first and fourth subparagraphs of Article 70(2) of Regulation No 806/2014, [37] according to which the ex ante contributions due from 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 of the SRF ('the 12.5% cap').

Dexia, the applicant, was a credit institution established in France. On 11 April 2022, by the contested decision, the SRB determined, in accordance with Article 70(2) of Regulation No 806/2014, the 2022 ex ante contributions to the SRF of credit institutions and certain investment firms, including the applicant. The latter seeks the annulment of the contested decision in so far as that decision concerns it.

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35 That detail is provided for in version 3.0 of MyPVR's general terms and conditions of use, which reaffirm the requirement whereby the use of MyPVR as an official channel of notification is subject to the condition that the user has activated the option enabling the CPVO to communicate with him or her electronically.

36 Decision SRB/ES/2022/18 of the Single Resolution Board (SRB) of 11 April 2022 on the calculation of the 2022 ex ante contributions to the Single Resolution Fund (SRF) ('the contested decision').

37 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 an SRF and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

Findings of the Court

As a preliminary point, the Court points out that Article 69(1) of Regulation No 806/2014 provides that, 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 ('the institutions concerned'). Under Article 69(2) of Regulation No 806/2014, during the initial period, the ex ante contributions must be spread out in time as evenly as possible until the final target level is reached, but with due account being taken of the phase of the business cycle and the impact that pro-cyclical contributions may have on the financial position of institutions. Furthermore, in accordance with the first and fourth subparagraphs of Article 70(2) of Regulation No 806/2014, each year the SRB is to calculate the individual contributions to ensure that the contributions due by all of the institutions concerned do not exceed 12.5% of the final target level of the SRF.

In the first place, as regards the temporal application of the requirement to apply a 12.5% cap, the Court recalls that that requirement is intended to apply during the initial period. As is clear from the provisions of Regulation No 806/2014, each year the SRB must comply with the requirement to apply a 12.5% cap without in any way limiting its application in time to the period following the initial period. [38] Similarly, no other provision of that regulation states that the requirement to apply a 12.5% cap is not to apply during the initial period or that the SRB may derogate from it during that period. That interpretation is confirmed by the origin of that regulation, from which it is apparent that, in the Commission's proposal for a regulation, [39] the initial period for the establishment of the SRF was spread over 10 years. Subsequently, the Parliament and the Council agreed to shorten that period to eight years and at the same time decided to increase that cap to 12.5%. It follows that the EU legislature established a link between the number of years in the initial period and the percentage of the cap. Therefore, the 12.5% cap is to apply during the initial period.

In the second place, as regards the substance of the requirement to apply a 12.5% cap, the Court recalls that the SRB is required to ensure that the contributions due by all of the institutions concerned do not exceed 12.5% of the final target level. [40] In that regard, the legislation at issue [41] is based on a dynamic approach to the final target level, in the sense that that level must be determined with regard to the covered deposits at the end of the initial period. It is in the light of that final target level that the requirement to apply a 12.5% cap applies.

That said, in so far as the calculation of ex ante contributions is an annual exercise based on the definition of a final target level that must be reached at the end of the initial period, then an annual target level to be apportioned between the institutions, it is for the SRB, in respect of each contribution period, to make as precise an estimate as possible of the final target level in the light of the data available at the time of that estimate ('the forecast final target level'). It is the forecast final target level that is decisive for the application of the 12.5% cap.

Consequently, when the SRB calculates the ex ante contributions during a given contribution period, it must ensure that the amount of the ex ante contributions due by all of the institutions concerned does not exceed 12.5% of the forecast final target level.

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38 Article 69(2) and the first subparagraph of Article 70(2) of Regulation No 806/2014.

39 Proposal COM(2013) 520 final of the European Commission of 10 July 2013; proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council.

40 As provided for in Article 69(1) of Regulation No 806/2014.

41 Article 69(1) of Regulation (EU) No 806/2014.

The Court finds that that conclusion is not called into question by the argument of the SRB that the requirement to apply a 12.5% cap should either be disregarded or be interpreted flexibly. First, it states that the meaning of the relevant provisions is absolutely plain from its very wording. [42] Second, the provisions that provide, inter alia, that ex ante contributions must be spread out in time as evenly as possible until the final target level is reached [43] do not allow the 12.5% cap to be interpreted as meaning that it is not binding or is merely indicative.

In the last place, the Court examines whether, in the contested decision, the SRB complied with the requirement to apply a 12.5% cap. In that regard, it is apparent, first of all, that the forecast final target level was estimated at EUR 79 987 450 580. Thus, the SRB was required to ensure that the total amount of the ex ante contributions did not exceed the amount of EUR 9 998 431 322.50. As is apparent from the contested decision, the SRB determined the annual target level for the 2022 contribution period to be EUR 14 253 573 821.46, an amount which was reduced to EUR 13 675 366 302.18 after certain deductions.

Consequently, the Court finds that the contested decision determined the amount of the ex ante contributions due by all of the institutions concerned at an amount which exceeded the cap of 12.5% of the forecast final target level and that the SRB infringed the first and fourth subparagraphs of Article 70(2) of Regulation No 806/2014. It holds that that error in law alone is such as to justify the annulment of the contested decision in so far as it concerns the applicant.

Nevertheless, in the light of the circumstances of the present case, the Court maintains the effects of the contested decision in so far as it concerns the applicant until the SRB has taken the necessary measures resulting from that annulment, which must occur within a reasonable period that cannot exceed six months from the day on which the present judgment becomes final.

V. INTERNATIONAL AGREEMENTS: NEGOTIATION AND CONCLUSION

Judgment of the Court of Justice (Grand Chamber), 9 April 2024, Commission v Council (Signing of international agreements), C-551/21

Link to the full text of the judgment

Action for annulment – Decision (EU) 2021/1117 – Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021-2026) – Signing on behalf of the European Union – Institution competent to designate the person empowered to sign – Article 13(2) TEU – Observance by each institution of the limits of the powers conferred on it – Mutual sincere cooperation between the EU institutions – Article 16(1) and (6) TEU – Power of the Council of the European Union to make policies and plan the EU's external action – Article 17(1) TEU – Power of the European Commission to ensure the external representation of the European Union – Article 218 TFEU

Hearing an application brought by the European Commission for the annulment of Article 2 of Decision 2021/1117 on the signing, on behalf of the European Union, and provisional application of

42 First and fourth subparagraphs of Article 70(2) of Regulation No 806/2014.

43 Article 69(2) of Regulation (EU) No 806/2014.

the Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community, [44] and of the designation by the Council of the European Union of the person empowered to sign that protocol, the Court of Justice, sitting as a Grand Chamber, annuls both that provision and the designation made on the basis of it. The Court finds that Article 218(5) TFEU refers to a Council power to authorise the signing and provisional application of an international agreement but not to designate the signatory thereof, as the Commission is competent to ensure the signing of that agreement, pursuant to the sixth sentence of Article 17(1) TEU. [45]

On 22 October 2015, on a proposal from the Commission, the Council adopted a decision authorising the Commission to conduct, on behalf of the European Union, negotiations with the Gabonese Republic in order to renew, for the period 2021-2026, the Implementing Protocol to the Fisheries Partnership Agreement between the European Union and the Gabonese Republic. It was specified in Article 2 of the proposal for a Council Decision on the signing and provisional application of the Implementing Protocol to the Agreement, submitted by the Commission, that the Secretariat General of the Council was to establish 'the instrument of full powers to sign the aforementioned Protocol, subject to its conclusion, for the person indicated by the Commission'. Article 2 of Decision 2021/1117 provides that 'the President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol on behalf of the Union'. As the Republic of Portugal exercised at that time the rotating Presidency of the Council, the latter designated the Permanent Representative of that Member State to the European Union as the person empowered to sign the Protocol on behalf of the European Union. [46]

The Commission asks the Court to annul Article 2 of Decision 2021/1117 on the ground, inter alia, of an infringement of Article 17(1) TEU, read in combination with Article 13(1) and (2) TEU. [47]

Findings of the Court

The Court recalls, in the first place, that, in accordance with the allocation of powers provided for in Article 17(1) TEU and in Article 218(2) and (5) TFEU, it is for the Council, on a proposal by the negotiator, to authorise the signing of an international agreement on behalf of the European Union, which is an act that is one of the measures by which the European Union's policy is made and its external action planned for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU. However, the decision authorising the signing of an international agreement does not include the later act of the signing itself of that agreement. That signing must, following the authorisation, be done after all the necessary steps have been taken to that end, including in respect of the third country concerned. Those steps include the issuing of full powers designating the person empowered to sign the agreement on behalf of the European Union. In that regard, the Court emphasises that that designation does not require a determination that falls within the scope of the 'policy-making' of the European Union or of the functions of 'coordinating' or of '[elaborating its] external action', within the meaning of Article 16(1) and (6) TEU and it is not therefore part of the policy assessment leading to that decision, at the end of which that institution has

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44 Council Decision (EU) 2021/1117 of 28 June 2021 on the signing, on behalf of the European Union, and provisional application of the Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021-2026) (OJ 2021 L 242, p. 3).

45 Article 17(1) TEU provides: 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.' The institutions shall practice mutual sincere cooperation.'

46 On 29 June 2021, that Permanent Representative signed the Protocol on behalf of the European Union. On 30 June 2021, the Commission and the Member States were informed of that signing and of the provisional application of the Protocol with effect from 29 June 2021.

47 Article 13(2) TEU provides: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

consented to the legal effects which, by the signing, will be produced in accordance with the relevant rules of international law.

In the second place, as to whether the designation of the signatory is an act that '[ensures] the Union's external representation', within the meaning of the sixth sentence of Article 17(1) TEU, the Court finds that, according to its usual meaning, the legal concept of 'representation' implies an action taken on behalf of a subject towards a third party and such an action may be a declaration of the intent of that subject with regard to that third party. The signing, by the person designated for that purpose, of an international agreement on behalf of the European Union properly expresses the declaration of the European Union's intention, as defined by the Council, with regard to the third party with which that agreement has been negotiated. Thus, the wording of the sixth sentence of Article 17(1) TEU, according to which the Commission is to 'ensure the Union's external representation', tends to establish that that provision confers on the Commission the power to take, outside of the common foreign and security policy (CFSP) and unless the Treaties provide for a different allocation of powers on that point, any action that, following a decision of the Council authorising the signing of an international agreement on behalf of the European Union, ensures that that signature is given.

The Court holds, in the third place, that that literal interpretation of the sixth sentence of Article 17(1) TEU is in line with customary international law, [48] according to which any person designated in a document emanating from the competent authority of a State or the competent body of an international organisation for the act of signing must be regarded, pursuant to those full powers, as representing that State or that international organisation. Accordingly, the signing, by such a person, of an international agreement on behalf of the European Union falls within the scope, from the perspective of the rules of customary international law, of the latter's 'representation'. Therefore, having regard to the sixth sentence of Article 17(1) TEU, it must be held that the steps necessary for the purpose of the signing of an international agreement after that signing has been authorised by the Council, including the step of designating the signatory, outside the CFSP, fall within the scope of the Commission's power to 'ensure the Union's external representation', unless the EU Treaty or the FEU Treaty allocate the power to organise that signing to another institution of the European Union.

In that regard, the Court points out that, unlike Article 218(3) TFEU, which, as regards the negotiation of international agreements, confers on the Council the power not only to authorise the opening of negotiations but also to designate the negotiator or the head of the European Union's negotiating team, Article 218(5) TFEU refers to the Council's power to authorise the signing and provisional application of an international agreement but not the power to designate the signatory thereof, with the result that that provision does not contain a derogation from the sixth sentence of Article 17(1) TEU. It follows that, in a situation where the Council has authorised the signing of an international agreement which is not within the scope of the CFSP or of 'other cases provided for in the Treaties' it is for the Commission, pursuant to the sixth sentence of Article 17(1) TEU, to ensure the actual signing of that agreement. The Court observes on that matter that notwithstanding the fact that the Council has continued, since the entry into force of the EU and FEU Treaties, to designate the signatories of international agreements, a practice, however consistent, cannot alter the rules of the Treaties that the institutions are obliged to respect.

In the fourth and last place, the Court recalls that the Commission must also, in accordance with the first sentence of Article 17(1) TEU, exercise its competence relating to the signing of international agreements in the general interest of the European Union and is required to comply with the duty of mutual sincere cooperation provided for in Article 13(2) TEU.

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48 As codified in Article 2(1)(c) and Article 7(1)(a) of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations, Treaty Series, Vol. 1155, p. 331). 1155, p. 331).

Nota bene:

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

- Judgment of the Court of Justice (Second Chamber), 25 April 2024, Doctipharma, C-301/22
- Judgment of the Court of Justice (First Chamber), 25 April 2024, Commission v Poland (Whilsteblowers Directive), C-147/23
- Judgment of the Court of Justice (Full Court), 30 April 2024, La Quadrature du Net and Others (Personal data and action to combat counterfeiting), C-470/21
- Judgment of the Court of Justice (Grand Chamber), 30 April 2024, Procura della Repubblica presso il Tribunale di Bolzano, C-178/22
- Judgment of the Court of Justice (Grand Chamber) of 30 April 2024, M.N. (EncroChat), C-670/22