COURT OF JUSTICE
OF THE EUROPEAN UNION

EN

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I. FUNDAMENTAL RIGHTS: LEGAL PROFESSIONAL PRIVILEGE

Judgment of the Court of Justice (Second Chamber), 26 September 2024, Ordre des avocats du barreau de Luxembourg, C-432/23

Link to the full text of the judgment

Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Directive 2011/16/EU – Exchange of information on request – Decision ordering a lawyer to communicate information – Legal professional privilege – Article 7 and Article 52(1) of the Charter of Fundamental Rights of the European Union

On a reference for a preliminary ruling, the Court of Justice has ruled that a decision ordering a lawyer to provide the authorities with all documentation and information relating to that lawyer's relationship with his or her client in connection with advice on company law infringes the fundamental right to respect for communications between lawyers and their clients.

In 2022, following a request from the Spanish tax authorities based on Directive 2011/16, [1] the administration des contributions directes (Luxembourg Inland Revenue) sent F SCS, a law firm incorporated as a limited partnership in Luxembourg, decisions requiring that undertaking to provide all available documents and information concerning the services it provided to K, a company incorporated under Spanish law, in connection with the acquisition of a business and a majority shareholding in a company. F replied that it did not have any information not covered by legal professional privilege. It also stated that the instruction from its client in the case to which the decision relates did not cover tax matters but concerned only company law. [2] The tax authorities imposed a fine on F for failing to comply with the most recent decision. F subsequently brought an action for annulment of that decision.

On appeal from the judgment of the tribunal administratif (Administrative Court, Luxembourg) dismissing F's action as inadmissible, the Cour administrative (Higher Administrative Court, Luxembourg) decided to refer certain questions to the Court of Justice for a preliminary ruling concerning, first, the applicability of Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') to legal advice given by a lawyer in company law matters, second, the validity of Directive 2011/16 in the light of Article 7 and Article 52(1) of the Charter, having regard to the absence of provisions relating to the protection of the confidentiality of communications between lawyers and their clients and, third, the compatibility of a decision such as that issued to F ('the decision at issue') with Article 7 and Article 52(1) of the Charter.

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1 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

2 Article 177(2) of the loi générale des impôts du 22 mai 1931 (General Tax Law of 22 May 1931) (Mémorial A 1931, No 900) prohibits a lawyer who is the subject of a request for disclosure of information to the authorities from refusing access to information entrusted to him or her in the exercise of his or her profession in so far as it concerns facts of which that lawyer has become aware in the course of providing advice or representation in tax matters and unless it concerns questions where the answers would expose his or her client to the risk of criminal proceedings.

Findings of the Court

First, as regards the scope of the strengthened protection guaranteed by Article 7 of the Charter, the Court notes that, like Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, [3] Article 7 of the Charter also guarantees the confidentiality of legal advice, both as regards its content and its existence. The specific protection afforded by those two articles to legal professional privilege is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. That fundamental task entails, on the one hand, the requirement that any person must be able, without constraint, to consult a lawyer and, on the other, the correlative duty of the lawyer to act in good faith towards his or her client. It follows that, whatever the area of law to which it relates, legal advice given by a lawyer enjoys the strengthened protection guaranteed by Article 7 of the Charter to communications between lawyers and their clients. Thus, a decision ordering a lawyer to provide the authorities with all documentation and information relating to that lawyer's relationship with his or her client in connection with advice on company law constitutes an interference with the right to respect for communications between lawyers and their clients guaranteed by that article.

Second, as regards the validity of Directive 2011/16 in the light of Article 7 and Article 52(1) of the Charter, the Court observes that, for the purposes of the exchange of information on request provided for by Directive 2011/16, [4] the EU legislature has merely determined the obligations that the Member States have towards each other, while authorising them not to comply with a request for information if carrying out the investigations requested or gathering the information in question would be contrary to their legislation. Thus, the EU legislature has, inter alia, left it to the Member States to ensure that their national procedures for gathering information for the purposes of that exchange comply with the Charter, and in particular Article 7 thereof. It follows that the fact that the system for exchange of information on request established by Directive 2011/16 does not include provisions relating to the protection of the confidentiality of communications between lawyers and their clients – in the context of the information gathering that is the responsibility of the requested Member State – does not mean that that directive infringes Article 7 and Article 52(1) of the Charter.

Finally, third, as regards the compatibility of a decision such as that at issue in the main proceedings with Article 7 and Article 52(1) of the Charter, the Court points out that Article 7 of the Charter guarantees the confidentiality of legal advice given by a lawyer, as regards both its existence and content. Thus, people who consult lawyers can reasonably expect their communications to remain private and confidential and, apart from exceptional situations, have confidence in the fact that their lawyers will not disclose the fact that they are consulting them to anyone without their agreement. That said, the rights enshrined in Article 7 of the Charter do not appear to be absolute rights, but must be considered in relation to their function in society. Indeed, as can be seen from Article 52(1) of the Charter, that provision allows limitations to be placed on the exercise of those rights, provided that those limitations respect the essence of those rights.

In this case, the decision at issue is based on national legislation under which advice and representation by a lawyer in tax matters do not enjoy – except where there is a risk of criminal prosecution against the client – the strengthened protection of communications between lawyers and their clients guaranteed by Article 7 of the Charter. By excluding the content of advice given by lawyers in tax matters – and thus an entire branch of law in which lawyers are likely to advise their clients – almost entirely from that protection, that legislation renders that protection devoid of its very substance in that branch of law. As for the decision at issue, which concerns an entire file not related to tax matters, it further extends the scope of the infringement of the substance of the right protected by Article 7 of the Charter. In those circumstances, it must be held that such national legislation – and

3 Signed in Rome on 4 November 1950.

4 Section I of Chapter II of Directive 2011/16.

its application in the present case by means of the decision at issue – far from being confined to exceptional situations, infringes the essence of the right guaranteed by Article 7 of the Charter by reason of the very extent of the derogation from legal professional privilege that it authorises in respect of communications between lawyers and their clients. It follows that a decision such as that at issue in the main proceedings undermines the essence of the right to respect for communications between lawyers and their clients, and therefore constitutes an interference with that right that cannot be justified.

II. PROCEEDINGS OF THE EUROPEAN UNION: ACTION TO ESTABLISH NON-CONTRACTUAL LIABILITY OF THE EUROPEAN UNION

Judgment of the General Court (Ninth Chamber, Extended Composition), 4 September 2024, IMG v Commission, T-381/15 RENV II

Link to the full text of the judgment

Non-contractual liability – EU financial legislation – Implementation of the EU budget under indirect management by an international organisation – Decision refusing to recognise a legal person as an international organisation – Sufficiently serious breach of a rule of law conferring rights on individuals – Duty of diligence – Material damage – Loss of opportunity to conclude indirect management agreements with the Commission as an international organisation and to receive the corresponding administrative costs – Causal link – Requirement of a direct and certain causal link – Unlawful act found has no bearing on the status of international organisation necessary for compensation – Occurrence of an event subsequent to the unlawful act which may be taken into account by the EU Courts – Retroactive decision finding that the status of international organisation necessary for compensation had not been achieved during the period in question

Sitting in extended composition, the General Court dismisses as unfounded the action for damages brought by International Management Group (IMG) and seeking compensation for the financial damage it claims to have suffered as a result of the European Commission's decision of 8 May 2015 to no longer enter into new delegation agreements with it using the indirect management method provided for by the EU financial legislation [5] in force at the time, for the benefit of international organisations until its legal status has been definitively clarified ('the decision of 8 May 2015'). By its judgment, the Court recognises, for the first time, the possibility for an international organisation faced with an unlawful refusal by the Commission to conclude a delegation agreement for the management of the EU budget using the indirect management method to seek compensation for the loss of the opportunity to conclude such an agreement.

The applicant, International Management Group (IMG), was created on 25 November 1994 to provide the Member States and international organisations participating in the reconstruction of Bosnia and Herzegovina with an entity specifically created for that purpose.

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5 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1).

On 7 November 2013, the Commission adopted the implementing decision on the Annual Action Programme 2013 in favour of Myanmar/Burma [6] to be financed from the general budget of the European Union, on the basis of Regulation No 966/2012. [7] That decision provided, inter alia, for a trade development programme, the cost of which was to be financed by the European Union and implemented by joint management with the applicant.

On 17 February 2014, the European Anti-Fraud Office (OLAF) informed the Commission that it had opened an investigation into the applicant's status. In its final report, OLAF stated, in essence, that the applicant was not an international organisation within the meaning of Regulations No 1605/2002 [8] and No 966/2012.

Lastly, the Commission adopted the decision of 8 May 2015 by which it decided that, until there was absolute certainty regarding the applicant's status as an international organisation, its department would no longer enter into any new delegation agreement with it using the indirect management method provided for in Regulation No 966/2012.

The applicant brought an action before the Court seeking annulment of the decision of 8 May 2015 and for compensation for the damage caused by that decision. That action having been dismissed, by a judgment of 2 February 2017, IMG v Commission, [9] the applicant lodged an appeal with the Court of Justice. By judgment of 31 January 2019, International Management Group v Commission, [10] the Court of Justice set aside the judgment of the General Court and annulled the decision of 8 May 2015 and referred Case T-381/15 back to the General Court for a ruling on the claim for damages submitted by the applicant in respect of the harm allegedly caused by that decision.

By judgment of 9 September 2020, IMG v Commission, [11] the General Court rejected the applicant's claim for damages. The applicant brought an appeal before the Court of Justice.

On 8 June 2021, the Commission adopted a decision refusing to accord the applicant, with retroactive effect from 16 December 2014, [12] the status of an international organisation provided for by the EU financial legislation for the implementation of EU funds using the indirect management method ('the decision of 8 June 2021').

By judgment of 22 September 2022, IMG v Commission, [13] the Court of Justice set aside the initial judgment in part and referred Case T-381/15 RENV back to the General Court for a ruling on the applicant's claim for damages for the material harm allegedly caused by the decision of 8 May 2015.

Findings of the Court

As a preliminary point, it must be recalled that, when a decision of the General Court has been set aside by the Court of Justice and the case has been referred back to the General Court, the General Court is seised of the case by the judgment of the Court of Justice [14] and must rule on all the claims submitted by the applicant, apart from those reflected in the elements of the operative part of the

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6 Implementing Decision C(2013) 7682 final.

7 Article 84 of Regulation No 966/2012.

8 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

9 Judgment of 2 February 2017, IMG v Commission (T-381/15, not published, EU:T:2017:57).

10 Judgment of 31 January 2019, International Management Group v Commission (C-183/17 P and C-184/17 P, EU:C:2019:78).

11 Judgment of 9 September 2020, IMG v Commission (T-381/15 RENV, EU:T:2020:406; 'the initial judgment').

12 On that date, 16 December 2014, the Commission decided to entrust the implementation, by indirect management, of the trade development programme provided for in the abovementioned implementing decision to an organisation other than the applicant.

13 Judgment of 22 September 2022, IMG v Commission (C-619/20 P and C-620/20 P; 'the judgment on appeal', EU:C:2022:722).

14 In accordance with Article 215 of the Rules of Procedure of the General Court.

initial decision of the General Court that were not set aside by the Court of Justice and the grounds constituting the necessary basis of those findings, which have acquired the force of res judicata [15].

The Court begins by recalling that the European Union may incur non-contractual liability only if a number of conditions are fulfilled, namely the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the fact of damage and the existence of a causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties.

In the first place, as regards the condition relating to the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the Court notes that the Commission enjoys a broad discretion when exercising its responsibility for implementing the EU budget using the indirect management method, which allows that institution to entrust budget implementation tasks to international organisations. [16] Moreover, the Court also points out that the duty of diligence, which is inherent to the principle of good administration [17] and which applies generally to the action of the EU administration in its relations with the public, requires the EU institutions to act with care and caution by examining all the relevant aspects of the individual case.

In the present case, it follows from the judgment on appeal [18] that the Court of Justice found that there had been a sufficiently serious breach of the Commission's duty of diligence when adopting the decision of 8 May 2015. Consequently, the General Court finds that, by adopting the decision of 8 May 2015, the Commission failed to comply with its duty of diligence, and, in so doing, committed a sufficiently serious breach of EU law such as to render it liable.

In the second place, any damage for which compensation is sought in an action for non-contractual liability of the European Union under the second paragraph of Article 340 TFEU must be actual and certain. Moreover, in order for the non-contractual liability of the European Union to be capable of being established, the damage must flow in a sufficiently direct manner from the unlawful conduct of the institutions.

In any event, it is for the party seeking to establish the European Union's non-contractual liability to adduce conclusive proof as to the existence and extent of the damage it alleges and as to the existence of a sufficiently direct causal nexus between the conduct of the institution concerned and the damage alleged. Furthermore, the existence of actual and certain damage cannot be considered in the abstract by the EU Courts but must be assessed in relation to the specific facts characterising each particular case in point.

In particular, the Court finds that, where the Commission unlawfully refuses to conclude a delegation agreement using the indirect management method with an international organisation, it is possible that the organisation concerned may thereby suffer damage corresponding to the lost opportunity to obtain that delegation. The total exclusion, in respect of the damage for which compensation may be granted, of the loss of opportunity to conclude a delegation agreement using the indirect management method, cannot be accepted in the event of an infringement of EU law since, especially in the case of economic disputes, such total exclusion of that loss of opportunity would be such as to make it practically impossible to make good the damage suffered.

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15 Under the second paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where a case is referred back to the General Court, the General Court is to be bound by the decision of the Court of Justice on points of law.

16 In accordance with Article 58(1)(c) of Regulation No 966/2012 and Article 62 of Financial Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

17 Enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.

18 Paragraphs 189 to 194 of the judgment on appeal.

Thus, it follows from foregoing considerations that, in circumstances such as those in the present case, where the Commission unlawfully refuses to conclude a delegation agreement using the indirect management method with an international organisation, the organisation concerned may seek compensation for harm corresponding not to financial compensation for the indirect costs which the implementation of such an agreement would have entailed, but to the loss of the opportunity to obtain such compensation.

In that respect, as regards, first, the question of whether there is a sufficiently direct causal link between the legal defect vitiating the decision of 8 May 2015 and the loss of opportunity relied on by the applicant, the Court recalls that that illegality consists of the breach of the duty of diligence incumbent on the Commission in the exercise of its discretion. The unlawfulness resulting, when a decision is adopted by an EU institution, from a breach of the duty of diligence does not necessarily affect the merits of the decision concerned. That is true of the legal defect affecting the decision of 8 May 2015.

It follows from the judgment on appeal [19] that the finding that the decision of 8 May 2015 was unlawful did not entail any obligation for the Commission to recognise the applicant's status as an international organisation, which it claimed, even though such recognition was, under the EU financial legislation and in the applicant's case, a mandatory condition for it to be able to continue to implement the EU budget using the indirect management method and, therefore, for the Court to be in a position to find, in the context of the present action for damages, that it justifies a loss of opportunity to conclude new management agreements under that method with the Commission.

Consequently, the breach of the duty of diligence vitiating the decision of 8 May 2015 cannot be regarded as the direct and certain cause of the financial harm which it alleges, namely the loss of the opportunity to conclude, after that date, as an international organisation, new delegation agreements for the management of the EU budget using the indirect management method and to receive the sums set out by way of compensation for indirect costs.

As regards, second, the question whether the harm alleged by the applicant is actual and certain, it follows from the decision of 8 June 2021, the legality of which the Court has confirmed by judgment of 4 September 2024, IMG v Commission, [20] by dismissing as unfounded the action for annulment brought by the applicant against that decision, that the applicant has been unable to claim the status of international organisation since 16 December 2014.

Thus, since, in accordance with the decision of 8 June 2021, the applicant did not satisfy, on the date of adoption of the decision of 8 May 2015 and subsequently, the condition of holding the status of an international organisation provided for by the EU Financial Regulations, it did not have the slightest chance of continuing to implement the EU budget using the indirect management method and of receiving, as a result, the sums set out by way of compensation for indirect costs.

In the light of the foregoing considerations, the present action for damages, which is based on the premiss that the applicant constituted an international organisation within the meaning of the EU Financial Regulations and, to that end, had a serious chance of continuing to implement the EU budget using the indirect management method, cannot succeed.

The annulment of a decision by the EU Courts does not imply a right to compensation for the financial harm alleged by the addressee of that decision if, after the judgment ordering the annulment, the institution concerned adopts a retroactive decision the operative part of which is identical and if the EU Courts consider that the operative part of that new decision is lawful.

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19 In particular, paragraphs 113 and 156 of the judgment on appeal.

20 Judgment of 4 September 2024, IMG v Commission (T-509/21, EU:T:2024:590).

III. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (First Chamber), 26 September 2024, Land Hessen (Obligation to act by the data protection authority), C-768/21

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 57(1)(a) and (f) – Tasks of the supervisory authority – Article 58(2) – Corrective powers – Administrative fine – Discretion of the supervisory authority – Limits

Hearing a request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany), the Court of Justice rules on the discretion enjoyed by a supervisory authority for the purposes of adopting corrective measures, including, inter alia, an administrative fine, where a breach of provisions relating to the protection of personal data is established.

An employee of the savings bank, a communal institution governed by public law, whose tasks include the settlement of banking and credit transactions, had, on several occasions, unlawfully accessed personal data of TR, one of the customers of that institution. After incidentally becoming aware of that consultation, TR lodged a complaint with the competent supervisory authority, namely the Hessischer Beauftragte für Datenschutz und Informationsfreiheit (Hessen Commissioner for Data Protection and Freedom of Information, Germany) ('the HBDI'). In that complaint, he complained that the savings bank had failed to inform him of the breach of his data.

By decision of 3 September 2020, the HBDI informed TR that, by not communicating to him the breach of his personal data, the savings bank had not infringed the GDPR, [21] since that breach was unlikely to result in a high risk to TR's rights and freedoms. Furthermore, the HBDI considered that there was no need to take corrective measures in respect of that institution.

TR lodged an action against that decision before the referring court, asking it to order the HBDI to take action against the savings bank. In support of his action, he claimed, inter alia, that the HBDI had failed to handle his complaint in accordance with the requirements of the GDPR and that the HBDI should have imposed a fine on the savings bank.

Having doubts as to the obligation of that supervisory authority to adopt corrective measures in the present case, the referring court asked the Court about the interpretation of the GDPR. [22]

Findings of the Court

First of all, the Court observes that the GDPR leaves the supervisory authority a discretion as to the manner in which it must remedy the shortcoming found, since that regulation confers on that authority the power to adopt various corrective measures. [23] The supervisory authority must determine which action is appropriate and necessary, and must do so taking into consideration all the

21 Under Article 34 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

22 Article 57(1)(a) and (f), Article 58(2), and Article 77(1) of the GDPR.

23 Pursuant to Article 58(2) of the GDPR.

circumstances of the specific case and executing its responsibility for ensuring that the GDPR is fully enforced with all due diligence. [24] However, that discretion is limited by the need to ensure a consistent and high level of protection of personal data through strong enforcement of the rules.

Next, as regards, more specifically, administrative fines, [25] the Court notes that they are imposed, depending on the circumstances of each individual case, in addition to, or instead of, the other corrective measures. Moreover, when deciding whether to impose an administrative fine and deciding on the amount thereof, the supervisory authority must have due regard, in each individual case, to various factors, such as the nature, gravity and duration of the infringement. [26]

Thus, the system of sanctions provided for by the EU legislature allows supervisory authorities to impose the most appropriate and justified penalties depending on the circumstances of each individual case, taking into consideration the need to ensure that the GDPR is fully enforced and to ensure a consistent and high level of protection of personal data. Therefore, it cannot be inferred from the GDPR that the supervisory authority is under an obligation to exercise, in all cases where it finds a breach of personal data, a corrective power, in particular the power to impose an administrative fine, its obligation being, in such circumstances, to react appropriately in order to remedy the shortcoming found. In those circumstances, a complainant whose rights have been infringed does not have a subjective right to seek the imposition by the supervisory authority of an administrative fine on the controller.

Lastly, the Court states that, however, the supervisory authority is required to take action where the exercise of one or more of the corrective powers is, taking into account all the circumstances of the specific case, appropriate, necessary and proportionate to remedy the shortcoming found and ensure that the GDPR is fully enforced. In that regard, it cannot be ruled out that, exceptionally and in the light of the particular circumstances of the specific case, the supervisory authority may refrain from exercising a corrective power even though a breach of personal data has been established. That could be the case, inter alia, where the breach established has not continued, for example where the controller, which had, in principle, implemented appropriate technical and organisational measures, [27] has, as soon as it became aware of that breach, taken appropriate and necessary measures to ensure that that breach is brought to an end and does not recur, in view of its obligations under the GDPR. [28]

In the light of those considerations, the Court concludes that, when a breach of personal data has been established, the supervisory authority is not required to exercise a corrective power, including the power to impose an administrative fine, where such action is not appropriate, necessary or proportionate to remedy the shortcoming found and to ensure that that regulation is fully enforced.

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24 See, to effect, judgment of 16 July 2020, Facebook Ireland and Schrems (C-311/18, EU:C:2020:559, paragraph 112).

25 Referred to in Article 58(2)(i) and Article 83 of the GDPR.

26 According to Article 83(2) of the GDPR.

27 Within the meaning of Article 24 of the GDPR.

28 In particular, under Article 5(2) and Article 24 of the GDPR.

IV. FREEDOM OF MOVEMENT: FREEDOM TO PROVIDE SERVICES

Judgment of the Court of Justice (Fourth Chamber), 5 September 2024, Novo Banco and Others, C-498/22 to C-500/22

Link to the full text of the judgment

Reference for a preliminary ruling – Reorganisation and winding up of credit institutions – Directive 2001/24/EC – Articles 3 and 6 – Reorganisation measure taken in respect of a credit institution – Transfer of the obligations and responsibilities of that credit institution to a 'bridge bank' prior to the bringing of a legal action seeking payment of a claim held against that credit institution – Transfer back to the same credit institution of certain of those obligations and responsibilities – Law of the Member State where the proceedings concerned were brought (lex concursus) – Effects of a reorganisation measure in other Member States – Mutual recognition – Effects of a failure to comply with the obligation to publish the reorganisation measure – Articles 17, 21, 38 and 47 of the Charter of Fundamental Rights of the European Union – Right to property – Effective judicial protection – Consumer protection – Directive 93/13/EC – Article 6(1) – Unfair terms – Principles of legal certainty and the protection of legitimate expectations – Whether the 'bridge bank' can be sued

Hearing a reference for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain) in three separate cases, the Court of Justice rules on the interpretation of certain provisions of Directive 2001/24 on the reorganisation and winding up of credit institutions, [29] of Directive 93/13 on unfair terms in consumer contracts and of the Charter of Fundamental Rights of the European Union ('the Charter'), as well as the principles of legal certainty and the protection of legitimate expectations.

The references were made in proceedings between Novo Banco SA - Sucursal en España ('Novo Banco') and a number of its customers concerning the effects, on various contracts for financial products and services, of the reorganisation measures taken by the Banco de Portugal (Bank of Portugal) in 2014 and 2015 in respect of Banco Espíritu Santo SA ('BES'), a Portuguese credit institution, and its Spanish branch ('BES Spain'), which Novo Banco succeeded, as a bridge bank, and to which certain assets, liabilities and off-balance sheet items of BES were transferred.

In Case C-498/22, the applicant applied for a declaration of invalidity in respect of a 'floor' clause, in a loan contract secured by way of a mortgage concluded initially with BES Spain and then transferred to Novo Banco as a result of the reorganisation measures, taking the view that the clause was unfair, and for reimbursement of sums unduly paid pursuant to that clause. In Case C-499/22, the applicants applied for the annulment of their financial contracts, the return of the sums received by each party and compensation for the losses incurred as a result of the acquisition of those financial products, on the grounds of an error of consent associated with the provision of deficient information by BES Spain. Novo Banco nevertheless disputed that all the liabilities of BES Spain had been transferred, in particular the liability for claims and compensation associated with the applications for the annulment of certain clauses in contracts concluded by BES Spain. In Case C-500/22, the applicant, for its part, claimed from Novo Banco, in addition to the return of the nominal value of a senior bond the term of which had ended, payment of the mandatory return on that bond, which had been purchased from BES and had been transferred to Novo Banco as a result of the reorganisation measures taken in 2014. Novo Banco nevertheless took the view that in 2015 the Bank of Portugal had 'transferred back'

29 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 15).

to BES the liabilities associated with that bond, and that it was therefore entitled to refuse to make that payment.

Pointing out that the reorganisation measures taken in respect of BES are a matter of EU law and that they were not published as required in Article 6(1) to (4) of Directive 2001/24, whereas they are likely to affect third parties and in particular to prevent third parties from bringing an appeal against them, the referring court is uncertain, first of all, whether the obligation to recognise the effects of those reorganisation measures in the host Member State is compatible with the principle of effective judicial protection, the principle of equal treatment, the prohibition on any discrimination on grounds of nationality, the principle of legal certainty and the principle of the protection of legitimate expectations. It then raises the question of whether the recognition of the effects of the reorganisation measures constitutes disproportionate interference with the right to property of Novo Banco's customers. It is uncertain, last, in Case C-498/22, whether the 'fragmentation' of the contractual relationship between the consumer and Novo Banco, resulting from the reorganisation measures at issue effectively requires that consumer to bear the financial consequences of the 'floor' clause that a court has found to be unfair, thereby infringing Article 6(1) of Directive 93/13. It therefore referred a number of questions to the Court for a preliminary ruling.

Findings of the Court

In the first place, as regards whether, where the publication provided for in Article 6(1) of Directive 2001/24 has not taken place, EU law [30] precludes the recognition, by a court in a Member State other than the home Member State, of the effects of a reorganisation measure, adopted in respect of a credit institution before proceedings were brought before that court, which transferred the obligations and responsibilities of that credit institution, in part, to a bridge bank, the Court notes first of all that, under Article 3(2) of that directive, reorganisation measures are, in principle, to be applied in accordance with the law of the home Member State and are to produce their effects in accordance with the legislation of that Member State throughout the Union without further formalities. That directive is therefore based on the principles of unity and universality and establishes as a principle the mutual recognition of reorganisation measures and of their effects. The obligation to publish reorganisation measures is, [31] for its part, subject to two cumulative conditions. First, those measures must be likely to affect the rights of third parties in the host Member State and, second, an appeal must be available in the home Member State against the decision ordering those measures. [32]

The Court finds that the purpose of Article 6(1) to (4) of Directive 2001/24 is to regulate the information provided to creditors of the credit institution concerned by the reorganisation measures, so that they can, in the home Member State, exercise their right of appeal against decisions ordering reorganisation measures in respect of that institution, in compliance with the principle of equal treatment between creditors. [33] Since the reorganisation measures apply irrespective of the publication measures required under Article 6, [34] failure to publish the reorganisation measures adopted in the home Member State does not call into question the principles of unity and universality or the principle of the mutual recognition of the effects of those measures in the host Member State. Such a failure to publish therefore does not lead to those measures being invalid or their effects being unenforceable in the host Member State.

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30 Specifically, Article 3(2) and Article 6 of Directive 2001/24, read in the light of Article 21(2) and the first paragraph of Article 47 of the Charter and the principle of legal certainty.

31 Pursuant to Article 6(4) of Directive 2001/24, it is for the competent authorities of the home Member State to publish an extract of the decision taken, its purpose and legal basis, the time limits for lodging appeals, specifically a clearly understandable indication of the date of expiry of the time limits, and the full address of the authorities or court competent to hear an appeal.

32 Article 6(1) to (3) of Directive 2001/24.

33 See recital 12 of Directive 2001/24.

34 Article 6(5) of Directive 2001/24.

However, it is for the national legal system of each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law, in compliance with the principle of equivalence, the principle of effectiveness and the right to an effective remedy enshrined in the first paragraph of Article 47 of the Charter.

The publication required under Article 6 of Directive 2001/24 is intended to ensure the protection, in the home Member State, of the right of the persons concerned to lodge an appeal against decisions ordering reorganisation measures in respect of a credit institution, including in particular the right of appeal of creditors of that institution established in the host Member State. Accordingly, where the reorganisation measures have not been published in accordance with the requirements laid down in that article, the law of the home Member State must enable the persons whose rights guaranteed by EU law are affected by those measures, where those persons reside in the host Member State, to lodge an appeal against those measures within a reasonable period from the time at which they were notified of them or from the time at which they became aware of or should reasonably have become aware of them.

As regards the principle of non-discrimination on grounds of nationality, guaranteed in Article 21(2) of the Charter, the Court finds that it has neither been claimed nor demonstrated that recognition of the effects of the reorganisation measures in the host Member State, as required under Article 3(2) of Directive 2001/24, is applied differently depending on the nationality of the person subject to the law. Last, as regards the principle of legal certainty, the Court notes that it requires that the rules of law be clear and precise and that their application be foreseeable for those subject to the law, in particular where those rules may have adverse consequences for individuals and undertakings.

In the circumstances of the present case, according to the provisions of Directive 2001/24, the host Member State must ensure that the effects of the reorganisation measures adopted in the home Member State are recognised in its territory, notwithstanding the fact that they have not been published as required by that directive. Since those measures had been the subject of various publicity measures at the time when Novo Banco's customers brought their respective actions before the Spanish courts, those customers were in possession of all the information necessary to make a decision on whether to bring those actions, in full knowledge of the facts, and to identify with certainty the entity against which those actions should be brought.

EU law [35] therefore does not preclude, where the publication provided for in Article 6(1) of directive 2001/24 has not taken place, the recognition, by a court of a Member State other than the home Member State, of the effects of a reorganisation measure, adopted in respect of a credit institution before proceedings were brought before that court, which transferred the obligations and responsibilities of that credit institution, in part, to a bridge bank.

In the second place, the Court examines whether EU law [36] precludes the recognition, in the host Member State, of the effects of a reorganisation measure taken in the home Member State in respect of a credit institution, which transferred the obligations and responsibilities of that credit institution, in part, to a bridge bank acting under the control of a public authority applying EU law, where the customers of that bridge bank claim that they had a legitimate expectation that that bridge bank had subsequently also assumed the liabilities corresponding to all of the obligations and responsibilities of that credit institution in relation to those customers. [37]

In that regard, the Court notes that, since the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union which must be observed by the EU

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35 Article 3(2) and Article 6 of Directive 2001/24, read in the light of Article 21(2) and the first paragraph of Article 47 of the Charter and the principle of legal certainty.

36 Specifically, Article 3(2) of Directive 2001/24, read in the light of the first paragraph of Article 47 of the Charter and of the principle of legal certainty.

37 The second question in Cases C-498/22 and C-499/22.

institutions, and by the Member States when they implement EU law, the right to rely on that principle extends to any person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise assurances provided to him or her. Nevertheless, in EU law, the right to rely on that principle extends to a person only in respect of precise assurances provided to that person by a public authority.

In the present case, Novo Banco was set up in the form of a credit institution governed by private law and operating in the competitive market for banking and financial services, without any power falling outside the scope of the ordinary law for the purpose of performing a public service mission. The Court finds that it cannot therefore be regarded as an administrative authority implementing EU law, with the effect that an individual cannot, in the present case, rely on the principle of the protection of legitimate expectations.

Consequently, individuals cannot rely on the principle of the protection of legitimate expectations against a bridge bank, a body governed by private law with no powers going beyond the ordinary law, set up in the context of reorganisation measures in respect of a credit institution of which those individuals were initially customers, in order to hold that bridge bank liable in respect of pre-contractual and contractual obligations related to contracts previously concluded with that credit institution. [38] The mere fact that that credit institution was temporarily controlled by a public authority, with a view to its privatisation, cannot turn that credit institution, which operates on the competitive market for banking and financial services, into a national administrative authority.

In the third and last place, the Court addresses the question of whether Article 17 of the Charter and the principle of legal certainty preclude the recognition, in the host Member State, of the effects of reorganisation measures adopted in the home Member State under Directive 2001/24, which provide for the setting up of a bridge bank and the retention in the liabilities of the bank subject to those measures of the obligation to pay sums payable in connection with pre-contractual or contractual liability. [39] The referring court was also uncertain whether such recognition is compatible with Article 38 of the Charter [40] and with Article 6(1) of Directive 93/13. [41]

As regards the right to property enshrined in Article 17(1) of the Charter, the Court states, first, that the protection conferred by that provision concerns rights with an asset value creating an established legal position enabling the holder to exercise those rights autonomously and for the holder's own benefit. Shares and bonds tradeable on capital markets can be rights of that nature capable of enjoying the protection guaranteed by Article 17(1) of the Charter. In that regard, the claim and the bond at issue in Cases C-498/22 and C-500/22 each has an asset value, and their holders can therefore argue that they have a 'legitimate expectation' of obtaining effective enjoyment of a property right, and can therefore enjoy the protection guaranteed by Article 17(1) of the Charter. As regards the claim at issue in Case C-499/22, it will be for the referring court to examine whether that claim satisfies the conditions set out above and, in particular, whether the national case-law recognising the obligation on a credit institution to provide pre-contractual information is sufficiently established to enable a person invoking an infringement of that obligation to have a 'legitimate expectation' of obtaining effective enjoyment of that claim.

The Court notes, second, that, according to its own case-law, the adoption, by the home Member State, of reorganisation measures which provide, inter alia, for the transfer of a credit institution's

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38 The Court infers that finding from Article 3(2) of Directive 2001/24, read in the light of the first paragraph of Article 47 of the Charter and of the principle of legal certainty.

39 The third questions in Cases C-498/22 and C-499/22 and the second question in Case C-500/22.

40 In Cases C-498/22 and C-499/22.

41 In Case C-498/22. Under Article 6(1) of Directive 93/12, 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

assets to a bridge bank amounts to regulating the use of property within the meaning of the third sentence of Article 17(1) of the Charter, in a manner liable to infringe the right to property of the creditors of that credit institution, such as the bondholders, whose debt instruments were not transferred to that bridge bank. Accordingly, the Court examines whether, in the light of the conditions set out in that article, read in conjunction with Article 52(1) of the Charter, the effects in the host Member State of the reorganisation measures under which the claims at issue were assigned to the liabilities of BES Spain are provided for by law, respect the essence of the right to property and are proportionate, having regard, inter alia, to the objective of general interest to be met by the reorganisation measures and the recognition of their effects, which is also pursued by the European Union, namely the objective of ensuring the stability of the banking system, in particular that of the euro area, and of preventing a systemic risk.

As regards the alleged infringement of the principle of legal certainty, the Court confirms that the reorganisation measures at issue fall under the seventh indent of Article 2 of Directive 2001/24. The Court also finds that the creditors in the cases in the main proceedings were entitled to expect that certain responsibilities, such as those deriving from the deficiency of the pre-contractual information given by BES Spain, at issue in Case C-499/22, and certain risks, such as those forming the subject matter of the disputes in Cases C-498/22 and C-500/22, would not be transferred to the bridge bank concerned. [42]

As regards, last, whether those measures are compatible with consumers' right to enjoy a high level of protection, as guaranteed by Article 38 of the Charter and Directive 93/13, the Court notes that, given the nature and significance of the public interest constituted by the protection of consumers, Directive 93/13 obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. To do this, it is for the national courts to exclude the application of the unfair terms so that they do not produce binding effects with regard to the consumer concerned, unless the consumer objects. A contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer concerned. However, consumer protection is not absolute. Accordingly, although there is a clear public interest in ensuring, throughout the European Union, a strong and consistent protection of investors and creditors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the banking system and preventing a systemic risk.

In the present case, the protection of consumers against the use of unfair terms in contracts concluded with a seller or supplier, as established in Article 6(1) of Directive 93/13, cannot go so far as to ignore the allocation of financial liabilities between a failing credit institution and a bridge bank, as such allocation has been determined in the reorganisation measures adopted by the home Member State. If the protection afforded by Directive 93/13 were required to authorise each consumer in the host Member State who is a creditor of the failing credit institution to frustrate recognition of the measures by which the allocation of financial liabilities between that institution and the bridge bank has been decided by the home Member State, the intervention by the public authorities of the home Member State could be rendered ineffective in all the Member States in which the failing credit institution has branches.

Accordingly, Article 6(1) of Directive 93/13, read in the light of Article 38 of the Charter, and Article 17 of the Charter and the principle of legal certainty do not preclude, in principle, the recognition, in the host Member State, of the effects of reorganisation measures adopted in the home Member State under Directive 2001/24, which provide for the setting up of a bridge bank and the retention in the

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42 In Case C-500/22, the Court finds that the retroactive change in the identity of the debtor in relation to the claim at issue can reasonably be justified by the objective of general interest consisting in ensuring the stability of the banking system and avoiding a systemic risk, but that it is nevertheless for the referring court, in the light of the specific circumstances that gave rise to that case, to determine whether the principle of proportionality has been complied with.

liabilities of the credit institution subject to those measures of the obligation to pay sums payable in connection with pre-contractual or contractual liability.

V. JUDICIAL COOPERATION IN CIVIL MATTERS: ROME II REGULATION

Judgment of the Court of Justice (Fourth Chamber), 5 September 2024, HUK-COBURG-Allgemeine Versicherung II, C-86/23

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Law applicable to non-contractual obligations – Regulation (EC) No 864/2007 – Article 16 – Overriding mandatory provisions – Road traffic accident – Rights to compensation recognised in respect of the family members of the deceased person – Principle of fairness for the purposes of compensation for non-material damage suffered – Assessment criteria

Ruling on a request for a preliminary ruling from the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), the Court of Justice clarifies the concept of 'overriding mandatory provisions', within the meaning of Article 16 of Regulation No 864/2007 [43] on the law applicable to non-contractual obligations.

In 2014, the daughter of Bulgarian nationals died in a road traffic accident in Germany. The person responsible for the accident was insured on the basis of compulsory civil liability with HUK-COBURG-Allgemeine Versicherung AG, an insurance company established in Germany.

In 2017, the parents brought an action against that company before a Bulgarian court, seeking compensation of 250 000 Bulgarian leva (BGN) (approximately EUR 125 000) for each of them in respect of the non-material damage suffered as a result of the death of their daughter.

While that court upheld their action in part, the appellate court dismissed the parents' claim in its entirety, taking the view that they had not established that the mental pain and suffering sustained had caused pathological damage, which would be necessary under the German law designated pursuant to Article 4 [44] of the Rome II Regulation. Furthermore, the appellate court rejected their argument that, pursuant to Article 16 of the Rome II Regulation, the law of the forum, namely Article 52 of the Law on obligations and contracts (the ZZD), was applicable. [45]

The referring court, ruling on an appeal on a point of law against that judgment, is uncertain whether that Bulgarian provision, in so far as it is based on a fundamental principle of Bulgarian law, namely the principle of fairness, so as to determine compensation for non-material damage in cases where the death of a close person has occurred as a result of a tort or delict, may justify departure from the German law designated pursuant to Article 4 of the Rome II Regulation.

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43 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

44 According to Article 4(1) of the Rome II Regulation, the law applicable to a non-contractual obligation arising out of a tort or delict is, unless otherwise provided for in that regulation, the law of the country in which the damage occurs.

45 Article 52 of the Zakon za zadalzheniyata i dogovorite (Law on obligations and contracts) (DV No 275 of 22 November 1950) provides that 'compensation for non-material damage shall be determined by the court on the basis of fairness'.

Findings of the Court

In the first place, the Court states that Article 16 of the Rome II Regulation derogates from the conflict-of-law rules laid down by that regulation, in so far as it authorises the application of the provisions of the law of the forum where they are mandatory, irrespective of the law otherwise applicable to the non-contractual obligation. Accordingly, that provision must be interpreted restrictively. Furthermore, in order to be able to depart from the foreign law designated pursuant to Article 4 of the Rome II Regulation, the national court must first of all ascertain whether the legal situation submitted for its examination has sufficiently close links with the Member State of the forum.

In the second place, relying on case-law relating to the identical concept of 'loi de police' ('overriding mandatory provision'), [46] within the meaning of Article 9 of the Rome I Regulation, [47] the Court finds that, in order to identify the existence of a 'disposition impérative dérogatoire' ('overriding mandatory provision'), within the meaning of Article 16 of the Rome II Regulation, the national court must find, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted, that it is of such importance in the national legal order that it justifies a departure from the law designated pursuant to Article 4 of the Rome II Regulation.

Thus, the national court must, first, examine whether the national legislature intended to confer on it a mandatory nature and, second, find that the application of that provision is absolutely necessary in order to protect the essential interest concerned in the particular case. Consequently, if the objective of protecting the interest at issue can also be achieved by applying the law designated pursuant to the conflict-of-law rules of the Rome II Regulation, that court cannot have recourse to Article 16 of that regulation.

In the third place, the Court observes that an 'overriding mandatory provision' must necessarily envisage the protection of public interests of particular importance, judged to be essential by the Member State of the forum, such as those relating to its political, social or economic organisation. National provisions intended to protect individual interests may be classified as 'overriding mandatory provisions', within the meaning of that provision, if it is apparent from the detailed analysis of the national court that a sufficient link exists with public interests judged to be essential in the legal order of the Member State of the forum.

En l'occurrence, même si tant la loi allemande que l'article 52 du ZZD paraissent se fonder sur le principe d'équité, ils semblent reposer sur des conceptions totalement différentes en ce qui concerne les conditions du droit à indemnisation du préjudice immatériel et le montant de celle-ci. Néanmoins, le seul fait que l'application de la loi du for conduise, en ce qui concerne le montant de la réparation, à une solution différente de celle qui aurait résulté de l'application de la loi désignée par la règle de conflit de lois ne permet pas de conclure que l'objectif de protection de l'intérêt public essentiel sauvegardé, le cas échéant, par l'article 52 du ZZD ne peut pas être atteint. It is for the referring court to determine whether the application of the German law, which does not provide for compensation for mental pain and suffering that does not entail pathological harm, makes it possible to attain that objective.

In the fourth place, the Court recalls that national law which meets the requirement for minimum protection laid down by an EU directive may be rejected in favour of the law of the forum due to its mandatory nature, where the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of the transposition of that directive, the legislature of the Member State of the forum judged it to be crucial to grant a higher level of protection.

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46 Resulting in particular from the judgment of 31 January 2019, Da Silva Martins (C-149/18, EU:C:2019:84).

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

VI. COMPETITION

1. ARTICLE 101 TFEU

Judgment of the Court of Justice (Second Chamber), 19 September 2024, Booking.com and Booking.com (Deutschland), C-264/23

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Article 101 TFEU – Agreements between undertakings – Contracts concluded between an online reservation platform and hoteliers – Price parity clauses – Ancillary restraint – Block exemption – Vertical agreements – Regulation (EU) No 330/2010 – Article 3(1) – Definition of the relevant market

Ruling on a reference for a preliminary ruling from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands; 'the referring court'), the Court of Justice provides new clarification on the application of the principle of the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU to the price parity clauses used by Booking.com, like other hotel reservation platforms, in the contracts concluded with accommodation providers. In the case at hand, the Court holds that such clauses cannot be classified as 'ancillary restrictions' falling, as such, outside the scope of that provision, before providing indications on the criteria for defining the relevant product market for the purposes of the application of exemption Regulation No 330/2010. [48]

Booking.com BV, a company incorporated under Netherlands law, connects accommodation establishments and customers via its online hotel reservation platform Booking.com in return for the payment of a commission by those establishments for each reservation made through that platform and not cancelled. Booking.com has been active on the German market since 2006, being supported by its German subsidiary Booking.com (Deutschland).

Until 2015, Booking.com included, in the general terms and conditions of the agreements concluded with accommodation providers, a 'wide parity' clause, pursuant to which those providers could not offer, on their own sales channels or on other channels operated by third parties - including competing platforms - rooms at a price lower than that offered on the Booking.com website.

In 2015, Booking.com undertook, in consultation with the French, Italian and Swedish competition authorities, to remove that wide parity clause in order to replace it with a 'narrow parity' clause which limited the prohibition on accommodation providers from offering their rooms at better prices than those offered on the Booking.com website to offers made through their own sales channels.

By decision of 22 December 2015, taken after consulting the European Commission, the Bundeskartellamt (Federal Cartel Office, Germany) nevertheless found that such a narrow parity clause was also contrary to the prohibition of agreements, decisions and concerted practices in EU and German law and consequently ordered Booking.com to cease using it. By a decision of 18 May 2021, the Bundesgerichtshof (Federal Court of Justice, Germany), hearing an appeal brought by the Federal Cartel Office, annulled the decision of the Oberlandesgericht Düsseldorf (Higher Regional

48 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1).

Court, Düsseldorf, Germany) of 4 June 2019 which had upheld in part the appeal brought by Booking.com against the decision of that authority. It held, without having asked the Court, that the narrow parity clause significantly restricted competition on the market for online hotel reservation platforms and on the market for hotel accommodation. Such a clause could not be classified as an 'ancillary restraint', since it had not been established that, in its absence, Booking.com's profitability would be compromised. Nor could that clause benefit from an exemption under Regulation No 330/2010 or from any other exemption from the prohibition of agreements, decisions and concerted practices in EU and German law.

It is in that context that Booking.com brought an action before the referring court seeking a declaration, inter alia, that the parity clauses that it employs did not infringe Article 101 TFEU. Sixty-three German hotel establishments then, by way of counterclaim, requested that court to declare that Booking.com had infringed Article 101 TFEU and to order it to pay damages for infringement of Article 101 TFEU.

The referring court is uncertain whether the price parity clauses applied by online hotel reservation platforms must be regarded as ancillary restraints within the meaning of Article 101(1) TFEU. In the event that that classification should be rejected, the referring court considers that the question then arises as to whether those clauses may be exempted under Regulation No 330/2010. That leads it to ask the Court how to define the relevant product market in the case at hand for the purposes of the application of that regulation.

Findings of the Court

As a first step, the Court provides the requested clarification on the scope of the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU. In that regard, as is apparent from settled case-law, if a given operation or activity is not covered by the prohibition rule laid down in Article 101(1) TFEU owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation, which may appear on the face of it to be anticompetitive, is not covered by that prohibition rule either if that restriction is ancillary to that operation.

In order for a restriction to be classified as 'ancillary', it is necessary to establish, first, whether the implementation of the main operation would be impossible in the absence of the restriction in question, it being specified that the fact that that operation is simply more difficult to implement or less profitable without the restriction concerned does not make the restriction of 'objective necessity' to the implementation of the main operation. Second, the restriction at issue must be proportionate to the objectives underlying the main operation.

In that context, it is important to specify that a distinction must be made between the concept of 'ancillary restraints' as it is examined in the context of Article 101(1) TFEU and the exemption based on Article 101(3) TFEU. Unlike the latter, the objective necessity of a restriction relating to the main operation does not require balancing the procompetitive and anticompetitive effects of an agreement, but determining whether, in the particular context of that operation, the restriction in question is indispensable to the implementation of that operation. While it is in principle for the referring court alone, taking into account all the facts that are put before it, to determine whether the conditions for establishing the existence of an ancillary restraint have been met, the Court is nevertheless entitled to provide the referring court with indications to guide it in its examination of those conditions.

In the case at hand, the Court notes that, although the provision of online hotel reservation services has had a neutral, or even positive, effect on competition, it has not been established that parity clauses, both wide and narrow, are objectively necessary for the implementation of that main operation and proportionate to the objective pursued by it. Although wide parity clauses clearly produce appreciable restrictive effects, narrow parity clauses, albeit less restrictive, cannot be regarded as objectively necessary to ensure the economic viability of the hotel reservation platform, either.

The fact, assuming it were established, that those clauses tend to combat possible free-riding phenomena and are indispensable in guaranteeing efficiency gains or in ensuring the commercial

success of the said services does not make it possible to classify the said clauses as 'ancillary restraints'.

In that context, the Court recalls that the examination of the objective necessity of a restriction may, in particular, be based on a counterfactual analysis making it possible to examine how the services would have functioned in the absence of the parity clause. It notes in that regard that Booking.com's business has not been compromised in the Member States where those clauses have been prohibited.

In the light of the foregoing considerations, the Court is called upon, as a second step, to clarify the exemption conditions of certain agreements, under Article 101(3) TFEU, referred to in Regulation No 330/2010. The referring court started from the premiss that price parity clauses form part of a 'vertical agreement' between Booking.com and the various accommodation providers. Those agreements are exempted where they fulfil certain conditions, among which is the capping at 30% of the market share held by the operator concerned.

In that regard, the Court recalls that, in order to define the relevant product market, it is necessary to ascertain whether the products or services forming part of the same market are interchangeable or substitutable by consumers.

In the case at hand, it is necessary to examine whether other types of intermediation services and other sales channels are substitutable for the services provided by Booking.com, both from the point of view of accommodation providers and from that of end customers, even if those channels have different characteristics and do not offer the same search and comparison functionalities. The Court emphasises that the definition of the relevant market depends on an in-depth factual examination which only the referring court can carry out, especially where, as in the present case, little information has been provided to the Court.

To that end, it is for the referring court to take account of all the information that has been submitted to it. In that context, the findings of the Federal Cartel Office and the review bodies in Germany on the definition of the relevant product market are among the particularly relevant contextual factors.

It is, however, for the referring court to determine whether such a market definition, which takes account of the particular characteristics of the 'contract services' offered by hotel reservation platforms both from the point of view of accommodation providers and from the point of view of end customers, is vitiated by any error of analysis or is based on erroneous findings.

2. ARTICLE 102 TFEU

Judgment of the Court of Justice (Grand Chamber), 10 September 2024, Google and Alphabet v Commission (Google Shopping), C-48/22 P

Link to the full text of the judgment

Appeal – Competition – Abuse of dominant position – Markets for online general search services and specialised product search services – Decision finding an infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA) – Leveraging abuse – Competition on the merits or anticompetitive practice – Dominant undertaking favouring the display of results from its own specialised search service – Potential anticompetitive effects – Causal link between abuse and effects – Burden of proof – Counterfactual scenario – Capability of foreclosing – 'As-efficient competitor' test

The Court of Justice, sitting as the Grand Chamber, dismisses the appeal brought by Google LLC and its parent company Alphabet Inc. against the judgment of the General Court upholding the fine imposed on them by the European Commission for abuse of a dominant position in several national online search markets. On this occasion, the Court provides clarification concerning its case-law on abuse of a dominant position consisting in a refusal to grant access to an essential facility and

concerning the criteria for assessing whether the conduct of an undertaking in a dominant position departs from competition on the merits.

By decision of 27 June 2017, [49] the Commission found that Google had abused its dominant position in 13 national markets for online general search services within the European Economic Area (EEA).

The conduct identified as the source of the abuse was, in essence, the fact that Google displayed its comparison shopping service on its general results pages selected by its search engine in a prominent and eye-catching manner in dedicated 'boxes', without that comparison service being subject to its adjustment algorithms, whereas, at the same time, competing comparison shopping services could appear on those pages only as general search results, and never in rich format, while being prone to being demoted within the ranking of generic results by those adjustment algorithms. Google had, thus, reduced the traffic from its general results pages to competing comparison shopping services while increasing that traffic to its own.

According to the Commission, those practices had produced anticompetitive effects both on the national markets for specialised comparison shopping search services and on the national markets for online general search services.

Concluding therefore that the prohibition of abuse of a dominant position under Article 102 TFEU and Article 54 of the EEA Agreement had been infringed in the 13 countries under examination, the Commission imposed a fine on Google of EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet.

The General Court largely dismissed the action brought by Google and Alphabet against that decision and confirmed the Commission's analysis concerning the market for specialised comparison shopping search services. [50] In the exercise of its unlimited jurisdiction, it furthermore maintained in full the fine imposed by the Commission.

Google and Alphabet brought an appeal before the Court of Justice seeking, principally, to have that judgment set aside and annulment of the Commission's decision.

Findings of the Court

In support of their appeal, the appellants claimed, inter alia, that, by refusing to apply to the present case the conditions laid down by the Court of Justice in the judgment in Bronner [51] relating to abuse of a dominant position consisting in a refusal to grant access to an essential facility, the General Court applied an incorrect legal test in order to assess whether there was an abuse of a dominant position by Google.

As regards that point, the Court of Justice recalls that Article 102 TFEU penalises conduct of undertakings in a dominant position which restricts competition on the merits and which is thus likely to cause direct harm to individual undertakings and consumers, or which hinder or distort competition and are thus likely to cause them indirect harm. That conduct covers any practice which has the effect of hindering, through means other than competition on the merits, the maintenance or growth of competition in a market in which the degree of competition is already weakened, precisely because of the presence of one or more undertakings in a dominant position.

In that context, the Court of Justice held, in the judgment in Bronner, that a refusal to grant access to an infrastructure developed and owned by a dominant undertaking for the purposes of its own business may constitute an abuse of a dominant position provided not only that that refusal is likely

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49 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)) ('the decision at issue').

50 Judgment of the General Court of 10 November 2021, Google and Alphabet v Commission (Google Shopping) (T-612/17, EU:T:2021:763, 'the judgment under appeal').

51 Judgment of 26 November 1998, Bronner (C-7/97, EU:C:1998:569).

to eliminate all competition in the market in question on the part of the entity applying for access and is incapable of being objectively justified, but also that the infrastructure, in itself, is indispensable to carrying on that undertaking's business, inasmuch as there is no actual or potential substitute for that infrastructure. In that regard, the Court of Justice stresses that the imposition of that condition was justified by the specific circumstances of the Bronner case, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct. A finding that a dominant undertaking abused its position due to a refusal to conclude a contract with a competitor has the consequence of forcing that undertaking to conclude a contract with that competitor. Such an obligation is especially detrimental to the freedom of contract and the right to property of the dominant undertaking, which remains, in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs.

By contrast, the present case differs from the Bronner case in so far as Google, of its own volition, gives its competitors access to its infrastructure, namely its general search service and the general results pages. It follows that a finding of abuse of a dominant position committed by Google on account of unfair conditions of access to that infrastructure is not capable of giving rise to measures as detrimental to its freedom of contract and its right to property as those at issue in the Bronner case.

In the light of that clarification, the Court of Justice notes that, where a dominant undertaking such as Google gives access to its infrastructure but makes that access subject to unfair conditions, the conditions laid down in the judgment in Bronner do not apply.

Consequently, the General Court was right to find that the Commission had not erred in law by failing to assess whether the practices in which Google was found to have engaged satisfied the conditions laid down in the judgment in Bronner for the purposes of their classification under Article 102 TFEU.

Next, the Court of Justice rejects the ground of appeal alleging that the General Court erred in law in upholding the decision at issue despite the fact that it failed to identify conduct that deviated from competition on the merits.

The appellants complained, inter alia, that the General Court had confirmed that three specific circumstances relied on by the Commission in the decision at issue were relevant for assessing whether Google competed on the merits. Those circumstances were (i) the importance of traffic generated by Google's general search engine for comparison shopping services, (ii) the behaviour of users when searching online and (iii) the fact that diverted traffic from Google's general results pages accounted for a large proportion of traffic to competing comparison shopping services and could not be effectively replaced by other sources.

The Court of Justice first of all rejects the plea of inadmissibility alleging that that argument had been raised for the first time at the appeal stage, noting that it constitutes an amplification of a plea relied on by the applicants at first instance and that that line of argument also arose from the judgment under appeal itself.

As regards the substance, the Court of Justice recalls that Article 102 TFEU does not sanction the existence per se of a dominant position, but only the abusive exploitation thereof. That provision neither seeks to prevent the creation of a dominant position nor to ensure that less efficient undertakings remain on the market. On the contrary, competition on the merits may, by definition, lead to their disappearance or marginalisation.

In order to find that there has been an 'abuse of a dominant position' within the meaning of Article 102 TFEU, it is necessary, as a general rule, to demonstrate that, through recourse to methods different from those governing competition on the merits, the conduct in question has the actual or potential effect of restricting competition on the market or markets concerned, which may be either the dominated markets or related or neighbouring markets.

That may entail the use of different analytical templates depending on the particular case. It must however still take into account all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). In that regard, an 'abuse of a dominant position' may result not only from conduct capable of producing an exclusionary effect, but also from conduct which either has the actual or

potential effect, or even the object, of preventing the access of potential competitors to the market by using other blocking measures or other means different from those which govern competition on the merits.

It follows that the relevant factual circumstances to assess whether an undertaking in a dominant position is abusing that position include those concerning not only the conduct itself but also the market(s) in question or the functioning of competition on that or those market(s). Thus, circumstances relating to the context in which the conduct of that undertaking is implemented, such as the characteristics of the sector concerned, must be regarded as relevant in order to find that there has been abuse of a dominant position within the meaning of Article 102 TFEU.

In the light of those clarifications, the Court of Justice notes that the three specific circumstances set out in decision at issue constituted elements of the context in which Google's general search engine and comparison shopping services functioned, and in the context of which the conduct in question was implemented. Since they enabled Google's practices to be placed in the context of the two relevant markets and the functioning of competition on those markets, those circumstances were relevant to clarify whether those practices were consistent with competition on the merits.

Similarly, the Court of Justice rejects the appellants' argument that the General Court erred in law in finding that Google had discriminated between Google's own comparison shopping service and competing comparison shopping services on its general search pages, without establishing arbitrary different treatment.

In that regard, the Court of Justice states that it is true that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case. However, in the present case, the General Court correctly established that, in the light of the characteristic of the upstream market and the abovementioned specific circumstances of the case, Google's conduct was discriminatory and did not fall within the scope of competition on the merits.

The Court of Justice observes, moreover, that the General Court neither reversed the burden of proof nor ruled out the usefulness of a counterfactual analysis by finding, first, that the Commission was not required to carry out such an analysis for the purposes of assessing the causal link between the practices at issue and their actual or potential effects, while noting, secondly, that Google could put forward a counterfactual analysis in order to challenge the Commission's findings on that point. In so doing, the General Court merely correctly found that it is permissible for the Commission to rely on a range of evidence, without being required systematically to use any single tool, in order to establish a causal link between the practices examined and their anticompetitive effects on the market.

Lastly, the Court of Justice holds that the General Court did not err in law in finding that, in the context of the analysis of the anticompetitive effects of the practices alleged against Google, the Commission was not required to examine whether those practices were capable of foreclosing competitors as efficient as Google.

Although the objective of Article 102 TFEU is not to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market, it does not follow that any finding of an infringement under that provision is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor.

In the present case, the General Court stated, without that finding being invalidated by the appellants, that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google's competitors in the light of the specific conditions of the market in question. Accordingly, it was justified in finding, first, that the as-efficient competitor test was not mandatory in the context of the application of Article 102 TFEU and, secondly, that, in the circumstances of the present case, that test was not relevant.

Since none of the grounds of appeal were successful, the Court of Justice dismisses the appeal in its entirety.

Judgment of the General Court (Tenth Chamber, Extended Composition), 18 September 2024, Google and Alphabet v Commission (Google AdSense for Search), T-334/19

Link to the full text of the judgment

Competition – Abuse of dominant position – Market for online search advertising intermediation in the EEA – Decision finding an infringement of Article 102 TFEU and of Article 54 of the EEA Agreement – Exclusive supply obligation – Contractual restrictions

By its judgment, the General Court annuls the decision of the European Commission ordering Google [52] to pay a fine for having committed three abuses of a dominant position on the market for online search advertising intermediation. On that occasion, the Court specifies the circumstances to be taken into account in assessing the exclusionary effect of contractual clauses, in particular those imposing an exclusive supply obligation.

Google, an undertaking in the information and communications technology sector which specialises in internet-related products and services, is known in particular for its general search engine, which yields search results presented on pages appearing on internet users' screens. Some of those results are linked to payment commitments from advertisers, made via Google's auction platform, and are indicated by words such as 'ad' or 'sponsored'. Since 2003, Google has also operated an advertising intermediation platform called AdSense, for which it has developed a service called AdSense for Search ('AFS').

AFS, like other online search advertising intermediation services, allows publishers of third-party websites to display online search ads, in this case from Google, when users submit queries on a website containing an integrated search engine. In this way, the providers of such intermediation services ('intermediaries') and publishers share the revenues generated by the display of those ads. As for AFS, advertisers had to associate their ads with keywords that users of the websites concerned were likely to use in a query and, in principle, paid the price resulting from the display of their ads only where users actually clicked on them.

To use AFS, publishers could, inter alia, become either 'online partners' of Google by concluding with it a non-negotiable standard contract called an 'online contract', or 'direct partners' by concluding a 'Google Services Agreement' ('GSA') that was negotiated individually. In order to conclude a GSA, direct partners also had to complete an order form in which they specified the websites for which they wished to use AFS or a different AdSense service.

Although negotiated individually, GSAs were drawn up on the basis of templates containing inter alia the following clauses:

– until March 2009, an 'exclusivity clause' prohibiting the use of services that were the same or substantially similar to, or in direct competition with, those provided by Google under the GSA, for the websites mentioned in the order form;

– from March 2009, first, a 'placement clause' obliging direct partners to display on websites using AFS a minimum number of online search ads from Google and prohibiting the display of competing ads above those from Google or directly adjacent to them and, second, a 'prior authorisation clause' requiring direct partners to obtain Google's approval before changing the display of online search ads, including competing ads.

52 In this case, 'Google' refers jointly to Google LLC, formerly Google Inc., and to its parent company, Alphabet Inc.

By decision of 20 March 2019, [53] the Commission found that Google had committed three abuses of a dominant position resulting, respectively, from the exclusivity clause in GSAs concluded with direct partners that had typically included all of their websites in at least one of their GSAs ('all sites direct partners'), the placement clause and the prior authorisation clause (together, 'the clauses at issue').

According to the Commission, those three clauses pursued the same objective, namely to foreclose Google's competing intermediaries in order to protect and strengthen that company's position on the online search advertising intermediation market and the online search advertising markets and, consequently, its position on the general search market. That common objective and the complementary nature of those clauses led the Commission to consider that the three abuses of a dominant position together constituted a single and continuous infringement of Article 102 TFEU which had lasted from 1 January 2006 until 6 September 2016.

Consequently, the Commission imposed on Google a fine of almost EUR 1.5 billion.

By its action before the Court, Google seeks annulment of the contested decision or, in the alternative, annulment or reduction of the amount of the fine.

Findings of the Court

- *Definition of the relevant markets*

As a first step, the Court rejects Google's plea alleging that the Commission erroneously defined the relevant markets at issue, namely those for online search advertising and search advertising intermediation.

As regards the definition of the market for online search advertising, Google claimed, inter alia, that the Commission had not taken into account all the relevant factors for distinguishing online search ads from online non-search ads ('the two types of ads at issue').

In that regard, the Court notes that, as is apparent from the case-law and from the market definition notice, [54] the substitutability analysis must take into consideration not only the objective characteristics of the products and services at issue, but also the competitive conditions and the structure of supply and demand on the market. However, in order to define a product market, the Commission is not obliged to examine all the elements of assessment set out in that notice or to follow a rigid hierarchy of evidence.

In the case at hand, in addition to the characteristics and uses of the two types of ad at issue, the Commission took into account, in an overall assessment, a series of other factors, such as, inter alia, the price of the ads at issue, the investments necessary for the provision of online search advertising services and the conduct of publishers that had decreased their use of online search ads. In addition, the Commission collected the reasoned views of market participants and relied on those views to define the relevant market.

Accordingly, Google does not demonstrate that the Commission disregarded certain relevant factors in its overall assessment of the substitutability of the two types of ad at issue, or that it committed an error of law by devoting a large part of its analysis to the differences in characteristics and uses between those ads.

Moreover, the Court also rejects Google's arguments that, for the purposes of defining the market for online search advertising, the Commission did not carry out an adequate price analysis by using, in particular, a test analysing the impact of a significant and non-transitory increase of 5 to 10% in the price of online search ads ('the SSNIP test').

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53 Commission Decision C(2019) 2173 final of 20 March 2019 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.40411 - Google Search (AdSense)) ('the contested decision').

54 Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5).

In the case at hand, in its price analysis, the Commission sent to advertisers, publishers and media agencies requests for information and inter alia asked them a question on how they would react in the event of an increase in the price of online search ads or, in the case of publishers, a reduction in revenues from those ads.

In view of the content of that question, the Court finds that the Commission did not carry out a SSNIP test as defined in the Commission's market definition notice. However, the Court recalls that, although the SSNIP test is a recognised tool whose results may be taken into account, with other elements, in an overall market definition assessment, systematic recourse to such a test is not obligatory for the purposes of that definition.

The Court also confirms the adequacy of price analysis carried out by the Commission. The replies from market participants to the Commission's requests for information, accompanied by the reasons underpinning their replies, are among the elements expressly considered relevant in the Commission's market definition notice, in that they make it possible to evaluate customers' and competitors' perspectives and therefore constitute a tool that may be taken into account for the purpose of defining the relevant market.

In conclusion, after having noted that Google neither called into question the accuracy, reliability and consistency of the evidence on which the Commission relied in its overall assessment of substitutability nor demonstrated that the Commission failed to take into account evidence relevant to that end, the Court endorses the definition of the relevant market in the contested decision. It also endorses the finding of Google's dominant position on the market for online search advertising intermediation, in so far as Google disputed that dominant position solely on the ground that the definition of the relevant market was erroneous.

- *Capability of the clauses at issue to restrict competition*

As a second step, the Court examines Google's pleas disputing that the clauses at issue constituted abuses of a dominant position.

As regards, first of all, the exclusivity clause in GSAs concluded with all sites direct partners, Google criticised the Commission for having found that it had not needed to verify that that clause had been capable of restricting competition.

On that point, the Court observes that Google disputed, during the administrative procedure, with supporting evidence, the capability of the abovementioned exclusivity clause to restrict competition. It also maintained that that clause was objectively justified.

In those conditions, in accordance with the case-law, the Commission could not, as it maintained primarily, limit itself to finding, in order to establish an infringement of Article 102 TFEU, that the exclusivity clause in GSAs concluded with all sites direct partners required them to source all or most of their requirements in terms of online search advertising intermediation services exclusively from Google within the meaning of the judgment in Hoffmann-La Roche v Commission. [55] It also had to demonstrate that the said exclusivity clause was capable of restricting competition, taking into account all the relevant circumstances of the case.

The Court next examines whether, as Google maintained, the Commission was wrong to consider, in the alternative, that the exclusivity clause in GSAs concluded with all sites direct partners was capable of restricting competition.

As regards the question whether that clause had deterred all direct partners from sourcing from other intermediaries in order to display competing ads on their websites or on certain of their pages,

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55 Judgment of 13 February 1979, Hoffmann-La Roche v Commission (85/76, EU:C:1979:36). According paragraph 89 of that judgment, 'an undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102 TFEU]'.

Google criticised, inter alia, the Commission for having referred, in the contested decision, only to the replies of some of those direct partners to the requests for information sent during the administrative procedure.

In that context, the Court notes that, in the contested decision, the Commission could rightly take into consideration certain examples of replies of all sites direct partners as elements capable of corroborating its assessment that the exclusivity clause in GSAs concluded with such direct partners could have deterred them from sourcing at least part of their requirements from Google's competing intermediaries.

In order to challenge the fact that the exclusivity clause had had such a deterrent effect, Google also relied on a statement of a direct partner that it had itself collected during the administrative procedure. The Commission considered that that statement had limited probative value, on the ground, inter alia, that it did not know how Google had obtained it. Although Google does not have the Commission's investigative and sanctioning powers and therefore necessarily has to rely on the voluntary cooperation of direct partners, the Court considers, however, that this does not mean that the information collected by Google was necessarily irrelevant, on the ground that its probative value is more limited.

As regards the question whether the exclusivity clause in GSAs concluded with all sites direct partners had prevented Google's competitors from accessing a significant part of the market for online search advertising intermediation in the EEA, Google claimed, inter alia, that the Commission's analysis of the market coverage by that clause was inconsistent in that it had taken account, to characterise the foreclosure effect of the exclusivity clause in GSAs concluded with all sites direct partners, the revenues generated by every GSA containing the placement and prior authorisation clauses, including GSAs in which direct partners had not typically included all of their websites.

In that regard, the Court notes inter alia that, in order to assess the effects of the exclusivity clause, the Commission had to take into account all the circumstances of the case and, in particular, determine whether the coverage rate of that exclusivity clause was sufficient for it to enable it to produce a foreclosure effect. In the contested decision, however, the Commission found, first, that the exclusivity and placement clauses were complementary, in particular in that they sought to deter direct partners from sourcing competing ads and, second, that the placement clause had progressively replaced the exclusivity clause in GSAs, such that those two clauses had simultaneously covered different parts of the market during the relevant period. Consequently, contrary to what Google submitted, the Commission could not examine the coverage of the exclusivity clause and that of the placement clause in isolation from each other without disregarding their factual and legal context and partitioning artificially the examination of the coverage of the market.

The Court thus noted, after having examined the coverage rate of those clauses, that the Commission could rightly consider that, having regard to the coverage of the placement clause, the coverage of the exclusivity clause in GSAs in which direct partners had typically included all of their websites could be sufficient to enable that clause to be capable of producing a foreclosure effect between 1 January 2006 and 31 December 2015.

The Court next examines Google's proposition according to which the Commission failed to prove, by means of the as-efficient competitor test, [56] that the exclusivity clause in GSAs concluded with all sites direct partners prevented a competitor as efficient as Google from emerging on the relevant market or excluded it. On that point, it notes that the Commission was not required to rely on such a test, which is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects. Had, on the other hand, Google produced an analysis based on the as-efficient

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56 According to the case-law, that test consists in examining whether the practices of a dominant undertaking could drive an equally efficient competitor from the market.

competitor test, which is not the case here, it would have been for the Commission to examine that analysis.

However, after having confirmed the majority of the Commission's assessments, the Court finds that the Commission's analysis of the foreclosure effect is vitiated by errors concerning the taking into account of the coverage rate of the exclusivity clause during 2016 and the duration of GSAs.

First, the Court notes that the contested decision does not identify the part of the market for online search advertising intermediation covered by the exclusivity clause in GSAs concluded by all sites direct partners for 2016. Therefore, the Commission did not prove that that clause could produce a foreclosure effect, owing to its coverage, between 1 January 2016 and 31 March 2016.

Second, in that analysis, the Commission did not take due account either of the duration of each of the GSAs concluded with direct partners or of direct partners' unilateral termination rights.

The Court recalls that, in order to determine whether conduct was in fact capable of producing a foreclosure effect vis-à-vis a competitor at least as efficient as Google, the Commission had to take into account all the relevant circumstances. Regarding, more specifically, an exclusive supply obligation, the Commission had to take into account the duration of that obligation and its economic and legal context.

A large proportion of the GSAs to which the said direct partners had been subject had, individually, a duration of only a few years, even if they had subsequently been renewed or extended, sometimes several times. In the contested decision, the Commission took into account only the cumulative duration of GSAs in which all sites direct partners had typically included all of their websites, and not the duration of each of those GSAs, taken individually, or the duration of each of their possible extensions. Nor did it take into account the actual conditions and the terms under which those extensions had been agreed or the substance of the clauses providing for the unilateral termination rights held by some of the all sites direct partners or the conditions in which those rights could be exercised.

In those circumstances, the Commission could certainly take into account the cumulative duration of GSAs in which direct partners had typically included all of their websites as a relevant circumstance. It could not, however, exclude that those direct partners had the option of sourcing from Google's competitors at the term of each of their GSAs, or, therefore, hold that the said direct partners had been obliged to source all or most of their requirements from Google for the entire cumulative duration of their GSAs.

The Court concludes that the Commission has not demonstrated to the requisite legal standard that that clause had been capable of deterring all sites direct partners from sourcing from Google's competing intermediaries or of preventing those intermediaries from accessing a significant part of the market for online search advertising intermediation in the European Economic Area and, consequently, that that same clause had been capable of having the foreclosure effect found in that decision.

According to the Court, the Commission made similar errors in its analysis of the foreclosure effect of the placement clause and of the prior authorisation clause. In that regard, the Commission was right to find that the placement clause was akin to a relaxed exclusivity clause so far as concerns websites that were included in GSAs containing that clause since it reserved the most prominent spaces of direct partners' results pages for Google ads. So far as concerns the prior authorisation clause, the Commission considered, in the contested decision, that it produced a foreclosure effect similar to that of the exclusivity clause in GSAs concluded with all sites direct partners, on the one hand, and to that of the placement clause, on the other hand.

Consequently, like the exclusivity clause, the duration of the obligation imposed on direct partners, under the placement clause, to reserve the most prominent spaces counts among the circumstances relevant for assessing the foreclosure effect of that clause. The same applies to the duration of the obligation imposed on direct partners, under the prior authorisation clause, to request authorisation from Google before being able to change the display of competing ads. The Commission, however, did not take due account of the duration of those obligations.

The Court considers that the abovementioned errors vitiate all of the restrictions identified by the Commission, such that it has not demonstrated, to the requisite legal standard, that the clauses at issue had been capable of having the foreclosure effect found in the contested decision or, therefore, that they each constituted an infringement of Article 102 TFEU.

Since, in the contested decision, the Commission considered that the single and continuous infringement was characterised only in so far as it consisted of the three separate infringements referred to above, the Court annuls that decision in its entirety.

Judgment of the General Court (First Chamber, Extended Composition), 18 September 2024, Qualcomm v Commission (Qualcomm – predation), T-671/19

Link to the full text of the judgment

Competition – Abuse of dominant position – Market for UMTS baseband chipsets – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Predatory pricing – Competence of the author of the act – Rights of the defence – Definition of the relevant market – Dominant position – Abuse – Reconstruction of prices – Determining the cost benchmark – Price-cost test – No requirement to demonstrate the existence of actual effects – Intention to eliminate a competitor – Objective justification – Calculation of the fine – 2006 Guidelines on the method of setting fines – Value of sales – Additional amount – Unlimited jurisdiction

Hearing an action for annulment brought by Qualcomm Inc. against the decision of the European Commission imposing a fine on Qualcomm Inc. for abuse of a dominant position on the market for UMTS chipsets [57], the First Chamber (Extended Composition) of the General Court upholds the Commission's finding that Qualcomm abused its dominant position on that market by applying selectively, to a number of key customers, prices below cost in order to eliminate a competitor. Nevertheless, in the exercise of its unlimited jurisdiction, the Court slightly reduces the amount of the fine imposed on Qualcomm.

Qualcomm is an US undertaking operating in the field of cellular and wireless technologies, which, with its subsidiaries, develops and supplies baseband chipsets. Its chipsets are sold to companies which use them in mobile phones, tablets, laptops, data modules, and other consumer electronics.

On 30 June 2009, Icera Inc. lodged a complaint with the Commission against Qualcomm for infringement of the competition rules, subsequently replaced by a revised and updated version dated 8 April 2010, on the basis of which the Commission initiated an investigation.

In 2012, Nvidia Corp., which had acquired Icera, supplied further information, supplementing the complaint and making allegations of predatory pricing against Qualcomm.

Between June 2010 and July 2015, the Commission sent a number of requests for information to Qualcomm, Icera, Nvidia and other players in the baseband chipset sector.

On 16 July 2015, the Commission initiated proceedings against Qualcomm concerning alleged abuse of its dominant position in the form of predatory pricing on the UMTS chipsets market. A statement of objections was sent to Qualcomm in December 2015, which was followed in particular by an oral hearing and a number of investigative steps undertaken by the Commission.

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57 UMTS chipsets are baseband chipsets which use the third generation (3G) communications standards based on Universal Mobile Telecommunications System technology.

A supplementary statement of objections was sent to Qualcomm in July 2018, alleging the duration of the predation was more limited and using a revised methodology to compare Qualcomm's prices and costs relative to Qualcomm's alleged predatory sales.

After having obtained Qualcomm's response, organised a new oral hearing and sent another request for information as well as a letter of facts to Qualcomm, the Commission found, by decision of 18 July 2019, [58] that Qualcomm had abused its dominant position on the market for UMTS chipsets by supplying, between 1 July 2009 and 30 June 2011, certain quantities of three of its UMTS chipsets to two of its key customers, namely Huawei and ZTE, below cost prices, with the intention of eliminating Icera, its main competitor at the time in the leading edge segment of the UMTS chipsets market. Accordingly, the Commission imposed a fine on Qualcomm of EUR 242 042 000.

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

Findings of the Court

- *The procedural irregularities allegedly committed by the Commission*

In support of its action, Qualcomm relied on a number of procedural irregularities allegedly committed by the Commission, including, in particular, that the duration of the investigation was excessive.

On that point, the Court recalls that, taken as a whole, it is true that the investigation lasted approximately seven years from receipt of the information which enabled the Commission to initiate its investigation into the conduct at issue. However, in the light of the specific circumstances of the case and, in particular, its complexity, that duration was not excessive.

Moreover, Qualcomm's conduct also had an impact on the duration of that procedure, since it called on the Hearing Officer on nine occasions and requested a number of time limit extensions, the postponement of a hearing, and requested that an additional hearing be held. In addition, by bringing an action for annulment against a request for information from the Commission and then an appeal against the judgment of the Court dismissing that action, Qualcomm could not have been unaware that that would necessarily slow down the investigation.

In any event, even if the duration of the investigation could be regarded as excessive, that breach of the principle that cases must be dealt with within a reasonable time would not be such as to result in the contested decision being set aside, since Qualcomm had not demonstrated how that alleged procedural irregularity could have had a negative impact on its ability to defend itself.

The Court also rejects Qualcomm's various criticisms of the file which the Commission submitted to it during the administrative procedure.

In that regard, Qualcomm complained, inter alia, that the Commission had failed to fulfil its obligation to take detailed notes of all meetings, telephone calls and interviews, in particular with third parties, conducted for the purpose of collecting information relating to the subject matter of its investigation, and properly to provide it with those notes. However, since Qualcomm has not demonstrated that it would have been better able to defend itself had there been no such procedural irregularity, the Court finds that, while it is true that the Commission did not record those meetings, telephone calls and interviews and that some of the notes relating to them are too brief to be able to compensate for that failure to make a recording, that cannot in any event result in the annulment of the contested decision.

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58 Commission Decision C(2019) 5361 final of 18 July 2019 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39711 - Qualcomm (predation) ('the contested decision').

- *Definition of the relevant market for the purposes of Article 102 TFEU*

As to the substance, the Court rejects, in particular, Qualcomm's complaint that the Commission ought to have applied the 'small but significant and non-transitory increase in price' test in order to define the relevant market for the purposes of applying Article 102 TFEU, which prohibits the abuse of a dominant position within the internal market or in a substantial part of it.

In that regard, the Court notes that, although that test is a recognised method for defining the relevant market when examining whether a dominant position has been abused, it is not the only method which the Commission may use. In provides, as to the remainder, for a certain margin of discretion in that regard.

Therefore, in order to define the relevant market for the purposes of applying Article 102 TFEU, the Commission may also take into account other tools, such as market studies or an assessment of consumers' and competitors' points of view, without having to comply with an order of hierarchy between the different criteria available to it.

- *Qualcomm's abuse of its dominant position in the form of predatory pricing*

Given that Qualcomm's alleged abuse of a dominant position resulted, according to the contested decision, from the fact that it supplied certain quantities of three of its UMTS chipsets to two of its main customers below cost prices, with the intention of eliminating Icera from the market, Qualcomm disputed both the price-cost test for the chipsets in question carried out by the Commission and the Commission's findings regarding Icera being eliminated from the market.

A. The price-cost test for the UMTS chipsets in question

As regards the price-cost test for the UMTS chipsets conducted in the contested decision, Qualcomm criticised, in particular, the Commission's decision to use the long run average incremental costs ('LRAIC') as a cost benchmark.

On that point, the Court stated that, according to settled case-law, prices below average variable costs ('AVC') of the undertaking concerned must in principle be regarded as abusive, in accordance with Article 102 TFEU, in so far as, in applying such prices, an undertaking in a dominant position is presumed to pursue no economic purpose other than that of eliminating its competitors (first hypothesis). By contrast, prices below average total costs ('ATC'), but above AVC, must be regarded as abusive only if they are determined as part of a plan for eliminating a competitor (second hypothesis).

Since the contested decision concerns the second hypothesis set out above, the Court states that the Commission cannot be criticised for having used LRAIC instead of ATC as benchmark costs for the purposes of its price-cost analysis in that LRAIC is lower and, consequently, is more favourable to Qualcomm than ATC. Moreover, it was not necessary for the Commission to determine whether Qualcomm's prices were also below AVC or LRAIC, since, in any event, it chose to ascertain whether Qualcomm intended to exclude a competitor.

Furthermore, since a price calculation based solely on variable costs is unsuitable for identifying predatory prices in the semiconductor sector, which is characterised by high fixed costs, in particular in terms of research and development, it was appropriate to use LRAIC as a benchmark for the purpose of identifying predatory pricing in that sector.

B. Whether Icera was eliminated from the market

As regards the Commission's findings concerning whether Icera was eliminated from the market, Qualcomm complained, inter alia, that the Commission failed to carry out a so-called 'as efficient' competitor analysis on the relevant market and failed to examine whether the share of the market covered by the conduct at issue was of sufficient magnitude to have anticompetitive effects.

On the latter point, the Court points out that, contrary to Qualcomm's allegations, the Commission is not required, when examining whether an undertaking in a dominant position charged predatory prices, to examine whether the share of the market covered by the contested practice is of sufficient magnitude for that practice to have anticompetitive effects.

As regards the arguments that the 'as-efficient competitor' test was not applied on the relevant market, the Court observes that, in the context of an investigation into potential predatory prices, the analysis by which the Commission compares, as in the present case, the prices charged by an

undertaking in a dominant position with some of its costs for the purposes of assessing whether that undertaking priced below ATC but above AVC already includes an 'as efficient' competitor analysis. In so far as an undertaking in a dominant position sets its prices below ATC but above AVC, a competitor 'as efficient' as that undertaking will not, in principle, be able, because of its lesser financial resources, to compete with those prices without incurring losses which are unsustainable in the long term. Such prices are therefore capable of excluding an 'as-efficient' competitor, which corresponds to what the Commission must demonstrate when applying the 'as-efficient-competitor' test in order to prove that an anticompetitive practice has foreclosure potential.

As regards the finding in the contested decision concerning Qualcomm's intention to eliminate Icera from the market in question, the Court also states that the Commission substantiated that finding by providing both direct and indirect evidence. As Qualcomm challenged, in that context, the Commission's interpretation of a number of internal email exchanges, the Court notes that Qualcomm neither disputed the other direct evidence nor the body of indirect evidence relied on by the Commission, whereas that evidence alone is in itself sufficient to demonstrate Qualcomm's intention to eliminate Icera. In any event, the disputed email exchanges also constitute, according to the Court, a body of sound and consistent evidence making it possible to establish Qualcomm's intention to eliminate Icera.

- *Whether the Commission complied with its enforcement priorities communication* [59]

Similarly, the Court rejects the various complaints alleging that the Commission failed to comply with its Enforcement Priorities Communication.

The Court finds that, while that communication limits the Commission's discretion in that it cannot, in a particular case, depart from that communication without providing reasons, Qualcomm has failed to demonstrate that, in the contested decision, the Commission departed from the general framework of analysis set out in its Enforcement Priorities Communication.

By referring to that communication and to the case-law of the Court of Justice, the General Court concurs with the Commission, which was entitled to penalise, in the contested decision, conduct limited to a segment of the relevant market, without being required to define precisely the parameters of that segment, as it is obliged to do for the relevant market for the purposes of ascertaining whether there is a dominant position.

- *The alleged lack of connection between the abuse of a dominant position observed by the Commission and the allegations of infringement of Article 102 TFEU forming the subject matter of the complaint*

Contrary to Qualcomm's assertions, the alleged lack of connection between the abuse of its dominant position, in the form of predatory pricing, observed in the contested decision and the allegations forming the subject matter of the initial complaint is also not such as to call into question the lawfulness of the contested decision.

In that context, Qualcomm criticised in particular the fact that the first allegations of predatory pricing were made by Nvidia only in 2012, three years after the complaint against Qualcomm was lodged.

In that regard, the Court nonetheless observes that it is a standard practice on the part of the Commission to allow the complainant to expand on the allegations made in the complaint in order to take account of the Commission's initial reaction, as was so in the present case.

Furthermore, it follows from the need to ensure effective enforcement of the competition rules that the Commission cannot be bound by the outline and legal assessments made by a complainant.

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59 Commission Communication regarding Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7; 'the Enforcement Priorities Communication').

In any event, Qualcomm had not explained how the fact that the complainant expanded its allegations of predation only at a relatively late stage could call into question the Commission's findings on that point, which were adopted following an in-depth investigation by the Commission.

- *The calculation of the fine imposed on Qualcomm*

In the contested decision, the Commission decided to impose a fine on Qualcomm calculated on the basis of the principles set out in the 2006 Guidelines. [60]

In order to calculate the basic amount of that fine, the Commission first of all determined the value of sales, as set out in those guidelines, by adding the value of Qualcomm's sales of UMTS chipsets between the second quarter of 2009 and the first quarter of 2011. It then applied a gravity factor and added an additional amount for deterrence. Lastly, the Commission concluded that, in the absence of any aggravating or mitigating circumstances, the basic amount was not to be adjusted.

In that regard, the Court holds, first, that the Commission was entitled to calculate the basic amount on the basis of the allegedly more reliable data provided by Qualcomm relation to the value of its sales presented by calendar year, and not by tax year.

By contrast, as regards, second, the Commission's reference to sales made by Qualcomm throughout the duration of the infringement, it is apparent from point 24 of the 2006 Guidelines that, in order to take fully into account the duration of the participation of each undertakings in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement.

It follows that, by adding the value of sales made by Qualcomm throughout the duration of the infringement instead of multiplying the value of sales made during the last calendar year of the infringement by the number of years of participation, the Commission failed to have regard to point 24 of the 2006 Guidelines.

While it is true that point 37 of the 2006 Guidelines allows the Commission, in general terms, to depart from the methodology laid down by those guidelines, the fact remains that, in such a case, it is required to state, in particular, the reasons for its decision not to apply that methodology and to provide that reasoning at the same time as the contested decision, which it failed to do in the present case.

Consequently, the Court annuls the contested decision in so far as it sets the amount of the fine imposed on Qualcomm at EUR 242 042 000.

- *The Court's determination of the amount of the fine imposed on Qualcomm*

Unlimited jurisdiction empowers the Court, in addition to carrying out a mere review of the lawfulness of the penalty, which merely permits dismissal of the action for annulment or annulment of the contested measure, to substitute its own appraisal for the Commission's and, therefore, to vary the contested measure, by taking account of all of the factual circumstances, so as, in particular, to amend the amount of the fine, to reduce that amount as well as to increase it.

In the exercise of that jurisdiction, the Court considers it appropriate to apply the methodology laid down by the 2006 Guidelines to determine the amount of the fine intended to penalise Qualcomm in the present case. Therefore, applying that methodology, the Court sets the amount of the fine imposed on Qualcomm for having implemented selective predatory pricing for two years in order to eliminate Icera from the UMTS chipsets market at EUR 238 732 659.33.

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60 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210/2, p. 2, 'the 2006 Guidelines').

3. CONCENTRATIONS

Judgment of the Court of Justice (Grand Chamber), 3 September 2024, Illumina and Grail v Commission, C-611/22 P and C-625/22 P

Link to the full text of the judgment

Appeal – Competition – Concentrations – Pharmaceutical industry market – Genetic sequencing systems – Acquisition by Illumina Inc. of sole control over Grail LLC – Regulation (EC) No 139/2004 – Article 22 – Referral request from a national competition authority not having competence under national law to examine the concentration – Decision of the European Commission to examine that concentration – Commission decisions accepting requests from other national competition authorities to join the referral request – Competence of the Commission – Legal certainty

Setting aside the judgment of the General Court in Illumina v Commission, [61] the Court of Justice, sitting as the Grand Chamber, clarifies the extent of the power to review proposed concentrations conferred on the European Commission by the Merger Regulation. [62] The Court of Justice thus states that the Commission is not authorised to encourage or accept, on the basis of Article 22 of that regulation, referrals of proposed concentrations without a European dimension from national competition authorities where those authorities are not competent to examine those proposed concentrations under their own national law, in particular where the proposed concentration does not reach the thresholds determining competence provided for by that law.

On 20 September 2020, the US company Illumina Inc, which supplies sequencing- and array-based solutions for genetic and genomic analysis, entered into an agreement and plan of merger to acquire sole control of the company Grail LLC, also established in the United States. A press release announcing that concentration was issued by Illumina and Grail on 21 September 2020.

Since turnover did not exceed the relevant thresholds, the announced concentration did not have a European dimension, within the meaning of Article 1 of the Merger Regulation, and was accordingly not notified to the Commission. Nor was it notified in the EU Member States or in other States party to the Agreement on the European Economic Area ('the EEA Agreement'), since it did not fall within the scope of their national merger control rules.

That being so, after receiving, on 7 December 2020, a complaint concerning the concentration between Illumina and Grail, the Commission reached the preliminary conclusion that that concentration appeared to satisfy the necessary conditions in order to be the subject of a referral by a national competition authority pursuant to Article 22 of the Merger Regulation. Therefore, the Commission sent, pursuant to Article 22(5) of that regulation, a letter to the Member States and to the other States party to the EEA Agreement in order, first, to inform them of that concentration and, second, to invite them to send it a referral request under Article 22(1) of that regulation for it to examine that concentration.

Under that provision, 'one or more Member States may request the Commission to examine any concentration that does not have a [European] dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request'.

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61 Judgment of 13 July 2022, IMG v Commission (T- 509/21, EU:T:2022:447).

62 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1; 'the Merger Regulation').

On 9 March 2021, the French national competition authority submitted to the Commission a referral request pursuant to that provision, which the Icelandic, Norwegian, Belgian, Dutch and Greek competition authorities subsequently requested, each in its own right, to join.

After informing Illumina and Grail of the referral request submitted by the French national competition authority ('the information letter'), the Commission accepted that request and the requests to join it ('the decisions at issue').

Illumina, supported by Grail, brought an action for the annulment of those decisions and of the information letter, which was, however, dismissed by the General Court by judgment of 13 July 2022. [63]

The Court of Justice, hearing two appeals brought, respectively, by Illumina and by Grail, sets aside that judgment of the General Court and, itself giving final judgment in the dispute, annuls the decisions at issue.

Findings of the Court

In the judgment under appeal, the General Court held, in essence, that it was apparent from the literal, historical, contextual and teleological interpretations of the first subparagraph of Article 22(1) of the Merger Regulation that the Commission could, as it had found in the decisions at issue, accept the referral of a concentration under that article in a situation where the Member State requesting that referral is not entitled, under its national merger control rules, to examine that concentration. That is typically the case where the proposed concentration does not reach the thresholds set by national law to allow the national authority to review it.

Since Illumina and Grail challenged that assessment, the Court of Justice examines whether the General Court's interpretation was well founded.

- *The relationship between the different methods of interpretation applied by the General Court*

For the purposes of the interpretation of the first subparagraph of Article 22(1) of the Merger Regulation, the General Court started from the finding that, without giving a definitive conclusion, a literal interpretation of that provision makes it clear that a Member State is entitled to refer any concentration to the Commission which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules. Next, the General Court engaged in a historical, contextual and teleological interpretation of that provision.

On that point, the Court of Justice finds that that approach on the part of the General Court, consisting in combining various methods of interpretation, is not vitiated by error.

Although it follows from settled case-law that an interpretation of a provision of EU law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness, the Courts of the European Union are not deprived of the possibility of having recourse in certain situations to methods of interpretation which they consider appropriate in order to clarify the exact scope of a provision of EU law that appears to be clear.

In the circumstances of the present case, where it appears that numerous factors were brought to the attention of the General Court with a view to clarifying the scope of the allegedly clear wording of the first subparagraph of Article 22(1) of the Merger Regulation, the General Court was fully entitled to hold that it could not confine itself to an isolated reading of the - both concise and general - wording of that provision and refrain from a contextual and teleological interpretation, as informed by the legislative history of that provision.

63 See footnote 62.

- *The historical interpretation*

With a view to challenging the General Court's historical interpretation of the first subparagraph of Article 22(1) of the Merger Regulation, Grail referred, inter alia, to documents drawn up in the context of the travaux préparatoires for the adoption of Regulations No 4064/89 [64] and No 1310/97 [65] and of the Merger Regulation that were not aired before the General Court.

Since the Commission disputed the admissibility of that evidence, the Court of Justice notes that, where, as in the present cases, the interpretation of a provision of secondary law is called into question, the EU judicature must be able to examine, whether of its own motion or on the basis of evidence that has been properly submitted for its assessment, the documents drawn up in the context of the travaux préparatoires that led to its adoption. The legislative history of a provision of EU law may provide indications as regards the intention of the EU legislature.

As regards the substance, the Court of Justice finds that, contrary to what the General Court held, the historical interpretation does not lead to the conclusion that the first subparagraph of Article 22(1) of the Merger Regulation confers on the Commission the competence to examine a concentration without a European dimension within the meaning of Article 1 of that regulation irrespective of the scope of the rules of the Member State that has made a request in the field of merger control.

In that regard, the Court of Justice considers that the arguments of the General Court concerning the legislative history of Article 22 of the Merger Regulation do not show that the EU legislature intended to empower Member States which have national merger control rules to refer to the Commission transactions that do not fall within the scope of those rules.

Similarly, the historical documents relating to the adoption of Regulation No 4064/89 and of the Merger Regulation do not demonstrate intention on the part of the EU legislature to use the referral mechanisms provided for, respectively, in Article 22(3) of Regulation No 4064/89 and in Article 22 of the Merger Regulation to remedy alleged deficiencies stemming from the rigidity of the quantitative thresholds laid down in Article 1 of each of those regulations for the purpose of identifying concentrations with a European dimension.

- *The contextual interpretation*

As regards the contextual interpretation of Article 22 of the Merger Regulation, the Court of Justice finds that the contextual elements examined by the General Court are also not conclusive for the purpose of determining whether the Commission was competent to adopt the decisions at issue.

In addition, the Court of Justice notes that the General Court disregarded other contextual factors capable of contradicting the interpretation adopted in the judgment under appeal, related

– first, to the conditions for the application of the referral mechanism that are set out in the first subparagraph of Article 22(1) of the Merger Regulation;

– second, to the differences between that referral mechanism and another referral mechanism, provided for in Article 4(5) of that regulation; and

– third, to the simplified procedure provided for by that regulation for revising the thresholds and criteria which define its scope.

In the light of those considerations, the Court of Justice concludes that the General Court erred in holding that it followed from the contextual interpretation of Article 22 of the Merger Regulation that a request under that provision could be submitted irrespective of the existence or scope of national rules on the ex ante control of concentrations.

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64 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

65 Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation No 4064/89 (OJ 1997 L 180, p. 1).

- *The teleological interpretation*

The Court of Justice finds, furthermore, that the General Court's conclusion that the teleological interpretation of Article 22 of the Merger Regulation confirms that that article is a corrective mechanism for the effective control of all concentrations with significant effects on the structure of competition in the European Union, irrespective of the existence or scope of national rules on the ex ante control of concentrations, is incorrect.

On that point, the Court of Justice emphasises, in particular, that only two primary objectives are pursued by the referral mechanism provided for in Article 22 of that regulation. The first objective is to permit the scrutiny of concentrations that could distort competition locally, where the Member State in question does not have any national merger control rules. The second objective is to extend the 'one-stop shop' principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national level and thereby to enhance legal certainty for undertakings.

By contrast, it has not been established that that mechanism was intended to remedy deficiencies in the control system inherent in a scheme based principally on turnover thresholds, which cannot, by definition, cover all potentially problematic concentrations.

The General Court's interpretation that Article 22 of the Merger Regulation is aimed at the effective control of all concentrations with significant effects on the structure of competition in the European Union is, moreover, liable to upset the balance between the various objectives pursued by that regulation. In particular, that interpretation undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration.

Moreover, it is apparent that the broad interpretation of the first subparagraph of Article 22(1) of the Merger Regulation adopted by the General Court, which potentially entails an extension of the scope of that regulation and of the Commission's competence to review concentrations, is at odds with the principle of institutional balance, characteristic of the institutional structure of the European Union, deriving from Article 13(2) TEU, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions.

In that regard, the Court of Justice points out, first, that the Merger Regulation provides for a simplified procedure with a view to revising the thresholds which define its scope. Therefore, even if the effectiveness of the thresholds determining competence on the basis of turnover provided for by that regulation were to prove insufficient to scrutinise some transactions capable of significantly affecting competition, it is for the EU legislature alone to review those thresholds or to provide for a safeguard mechanism enabling the Commission to scrutinise such a transaction.

Second, where the Member States consider it necessary to extend the sphere of transactions that merit prior examination under merger legislation, it is open to them to revise downwards their own thresholds determining competence based on turnover as laid down by national legislation.

- *Setting aside of the judgment under appeal and annulment of the decisions at issue*

In the light of the foregoing, the Court of Justice concludes that, by holding that the Member States may, under the conditions set out therein, make a request under the first subparagraph of Article 22(1) of the Merger Regulation irrespective of the scope of their national rules on the ex ante control of concentrations, the General Court erred in law in interpreting that provision. The General Court therefore erred in holding that the Commission had been right, by the decisions at issue, to accept the referral request submitted by the French national competition authority and the requests to join submitted by the other national competition authorities pursuant to Article 22 of that regulation.

Consequently, the Court of Justice sets aside the judgment of the General Court. Giving final judgment itself in the matter, it also annuls the decisions at issue.

4. STATE AID

Judgment of the Court of Justice (Grand Chamber), 10 September 2024, Commission v Ireland and Others, C-465/20 P

Link to the full text of the judgment

Appeal – State aid – Article 107(1) TFEU – Tax rulings issued by a Member State – Selective tax advantages – Allocation of profits generated by intellectual property licences to branches of non-resident companies – Arm's length principle

In setting aside the judgment of the General Court in Ireland and Others v Commission [66] by which the General Court annulled the decision of the European Commission on State aid implemented by Ireland to Apple, [67] and then itself giving final judgment on the remaining elements of the dispute, the Grand Chamber of the Court of Justice rules, in the light of the analysis set out in the decision at issue and of the findings of the General Court that remained unchallenged, that the Commission correctly established the selective nature of the advantage conferred on two Apple Group companies, incorporated in Ireland, by two tax rulings issued by the Irish tax authorities in relation to the determination of the tax base of the Irish branches of the companies concerned. In that regard, the Court of Justice places its analysis within the framework set out by the recently consolidated principles of case-law [68] concerning the definition and analysis of the reference framework in the light of which the selectivity of tax measures must be assessed for the purposes of Article 107(1) TFEU. It notes in that regard that the appropriate definition of the relevant reference framework, and, by extension, the correct interpretation of the constituent provisions of national law, is a question of law that falls within the scope of the review to be carried out by the Court of Justice on appeal, within the limits of the subject matter of that appeal.

Within the Apple Group, Apple Inc., established in Cupertino (United States), controls various companies incorporated in Ireland through its wholly owned subsidiary, Apple Operations International. The latter fully owns the subsidiary Apple Operations Europe (AOE), which in turn fully owns the subsidiary Apple Sales International (ASI). ASI and AOE are both companies incorporated in Ireland, but are not tax resident in Ireland. They each have a branch in Ireland, which does not have a separate legal personality. [69]

ASI and AOE were bound to Apple Inc. by a cost-sharing agreement under which they were in particular granted royalty-free licences enabling them to use the Apple Group's intellectual property rights. That use consisted, inter alia, in the manufacture and sale of the products concerned in all territories apart from North and South America.

Under the provisions of Irish law governing taxation of companies in force during the period under consideration ('the reference provisions'), non-resident companies were liable to tax in respect of trading income arising directly or indirectly through an active branch in Ireland. In the present case, in

66 Judgment of 15 July 2020, Ireland and Others v Commission (T-778/16 and T-892/16, EU:T:2020:338).

67 Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (OJ 2017 L 187, p. 1; 'the decision at issue').

68 See, in particular, judgment of 5 December 2023, Luxembourg and Others v Commission (C-451/21 P and C-454/21 P, EU:C:2023:948).

69 ASI's Irish branch is, inter alia, responsible for carrying out procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in the regions covering Europe, the Middle East, India, Africa and the Asia-Pacific. AOE's Irish branch is responsible for the manufacture and assembly of a specialised range of computer products in Ireland, such as iMac desktops, MacBook laptops and other computer accessories, which it supplies to related parties for Europe, the Middle East, India and Africa.

1990, the Irish tax authorities received requests from the predecessors of ASI and AOE for determination of their chargeable profits to be clarified. It is against that background that the Irish tax authorities issued a first tax ruling in 1991, subsequently revised at the request of ASI and AOE, and a second ruling in 2007 (together, 'the contested tax rulings').

At the end of a formal investigation procedure initiated in 2014, the Commission adopted the decision at issue concerning the contested tax rulings. In that decision, the Commission found, in particular, that, in so far as the contested tax rulings had led to a reduction in ASI's and AOE's tax base, for the purpose of establishing corporation tax in Ireland, they had conferred an advantage on those two companies. In order to prove the existence of a selective advantage in the present case, the Commission examined whether there was a selective advantage arising from a derogation from the reference framework. On the basis of primary, subsidiary and alternative lines of reasoning, the Commission considered, in essence, that the contested tax rulings had enabled ASI and AOE to reduce the amount of tax for which they were liable in Ireland during the period when those rulings were in force, namely from 1991 to 2014, and that that reduction in the amount of tax represented an advantage as compared to other companies in a comparable situation. More specifically, primarily, the Commission contended that the fact that the Irish tax authorities had accepted, in the contested tax rulings, the premiss that the Apple Group's intellectual property ('IP') licences held by ASI and AOE had to be allocated outside Ireland had led to ASI's and AOE's annual chargeable profits in Ireland departing from a reliable approximation of a market-based outcome in line with the arm's length principle.

Ruling on the actions brought by Ireland and by ASI and AOE, respectively, for annulment of the decision at issue, the General Court found that the Commission had not succeeded in showing to the requisite legal standard that there was an advantage for the purposes of Article 107(1) TFEU and annulled the decision at issue in its entirety.

In its judgment, the General Court recalled as a preliminary point that, in the context of State aid control, in order to assess whether the contested tax rulings constituted such aid, the Commission was required to demonstrate in particular that those tax rulings had conferred a selective advantage.

In that regard, the General Court rejected the Commission's primary line of reasoning in relation to the existence of an advantage on two grounds, relating, first, to the Commission's assessments of normal taxation under the Irish tax law applicable in the present case, and, secondly, to the Commission's assessments of the activities within the Apple Group.

Having also rejected the subsidiary and alternative lines of reasoning in that respect, the General Court annulled the decision at issue in its entirety without examining the other pleas in law and complaints raised by Ireland and by ASI and AOE.

The Commission relies, in support of its appeal, on two grounds of appeal, relating, respectively, to the grounds of the judgment under appeal concerning the assessment of the primary line of reasoning and those concerning the assessment of the subsidiary line of reasoning.

Findings of the Court

As a preliminary point, the Court of Justice recalls that, in order to classify a national tax measure as 'selective' for the purposes 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.

The Court states that the determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation.

On that point, the Court also observes that, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime. This includes, in particular, the determination of the basis of assessment, the taxable event and any exemptions to which the tax is subject. It follows that

only the national law applicable in the Member State concerned must be taken into account in order to identify that reference system. That conclusion is, however, without prejudice to the possibility of finding that the reference framework itself, as it results from national law, is incompatible with EU law on State aid, since the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law.

The Court examined the appeal in the light of those principles.

In that regard, the Court states at the outset that the Commission's primary line of reasoning is based on the premiss that, in order to allocate the profits correctly in accordance with the separate entity approach and the arm's length principle laid down by the applicable provisions of national law, [70] the competent Irish authorities were required to verify whether the profits derived from the use of the Apple Group's IP licences held by ASI and AOE did not, wholly or in part, have to be attributed to their Irish branches. The failure to verify as required by those provisions resulted, according to the Commission, in a lowering of the tax burden for those companies, conferring a selective advantage on them.

Having made that point, the Court of Justice rules that the Commission is permitted to challenge the General Court's findings in respect of the reference framework derived from Irish law. The question whether the General Court adequately defined the reference system under Irish law and, by extension, correctly interpreted the national provisions which that system comprises is a question of law which can be reviewed by the Court of Justice on appeal. Thus, the Commission's arguments aimed at calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law. In the present case, the same applies both to the complaint that the General Court misinterpreted the decision by finding that the Commission had confined itself to an 'exclusion' approach in its primary line of reasoning, and to the complaint by which the Commission argues that the General Court relied on the functions performed by Apple Inc.

The Court of Justice thus examines, in the first place, the complaint alleging that the decision at issue was misinterpreted, in so far as the General Court found that the Commission's primary line of reasoning relied solely on the lack of employees and physical presence in the head offices of ASI and AOE and, accordingly, on an 'exclusion' approach.

In that regard, the Court of Justice finds, first of all, that the Commission's reasoning is based on the premiss that the application of the reference provisions required the prior determination of a profit allocation method, which is not defined in those provisions, and, moreover, that that method had to lead to an outcome consistent with the arm's length principle. As it is, that premiss was not called into question by the General Court, which added that 'normal' taxation is to be determined according to the national tax rules and that those rules must be used as a reference point when establishing the very existence of an advantage, but nevertheless went on to make clear that if those national rules provide that the branches of non-resident companies, as concerns the profits derived from those branches' trading activity in Ireland, and resident companies are subject to the same conditions of taxation, Article 107(1) TFEU gives the Commission the right to check whether the level of profit allocated to such branches, which has been accepted by the national authorities for the purpose of determining the chargeable profits of those non-resident companies, corresponds to the level of profit that would have been obtained if that activity had been carried on under market conditions.

According to the Court of Justice, it may be inferred from this that the application of the arm's length principle in the present case is based on Irish tax rules on the taxation of companies and, accordingly, on the reference system identified by the Commission and confirmed by the General Court. In the present case, the General Court explicitly acknowledged that, contrary to Ireland's contention, the

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70 That is, in particular, those to which section 25 of the Taxes Consolidation Act 1997 ('TCA 97') relates.

application of the reference provisions, as described by Ireland, corresponded in essence to the functional and factual analysis conducted as part of the first step of the approach authorised by the Organisation for Economic Co-operation and Development (OECD) for profit allocation to a permanent establishment. Those findings of the General Court caused it in particular to rule that the Commission had not erred when it relied on the arm's length principle in order to check whether, in the application of the reference provisions by the Irish tax authorities, the level of profit allocated to the branches of ASI and AOE for their trading activity in Ireland, as accepted in the contested tax rulings, corresponded to the level of profit that would have been obtained by carrying on that trading activity under market conditions, and when it relied, in essence, on the Authorised OECD Approach for the purposes of applying those provisions, while taking into account the allocation of assets, functions and risks between those branches and the other parts of those companies. Those findings must be taken as read, in so far as they have not been validly called into question by the other parties in the context of the present appeal.

It follows from the steps in the reasoning set out in the decision at issue that the Commission first of all found that, in order to determine, in accordance with the relevant provisions of national law, ASI's and AOE's taxable profit in Ireland under the arm's length principle, it was appropriate to compare the functions performed, respectively, by the head offices and by the Irish branches of those companies in relation to the IP licences. Next, in applying that test, it carried out a separate examination of the role assumed by each of those head offices and each of those branches in relation to those licences. Following that examination, it found, on the one hand, an absence of functions in relation to the IP licences in the case of the head offices and, on the other, an active role by the Irish branches resulting from the assumption of a series of functions and risks associated with the management and use of those licences. Furthermore, the finding of the absence of 'active or critical' functions performed by the head offices is based on the lack of evidence to the contrary from Apple, in conjunction with the finding that those head offices lacked the actual capacity to perform those functions. Thus, the Commission's primary line of reasoning is based not only on the lack of functions performed by the head offices in relation to the IP licences, but also on the analysis of functions actually performed by the branches in relation to those licences.

Therefore, it was not the finding that the head offices had neither employees nor physical presence outside the Irish branches that led the Commission to conclude that the IP licences and related profits had to be allocated to those branches. The Commission drew that conclusion after linking two separate findings, that is to say, first, the absence of active or critical functions performed and risks assumed by the head offices and, secondly, the multiplicity and centrality of the functions performed and risks assumed by those branches, applying the legal test set out in the decision at issue.

In those circumstances, the Court of Justice holds that the General Court erred in law when it found that the Commission had confined itself to an 'exclusion' approach in its primary line of reasoning, which was a misinterpretation of the decision at issue.

In the second place, as regards the grounds covered by the appeal on which the General Court relied when it found that ASI's and AOE's branches in Ireland did not control the Apple Group's IP licences and did not generate the profits which the Commission claimed they achieved, the Court of Justice holds, first of all, that the Commission is justified in arguing that the General Court committed a breach of procedure by taking into account, for the purposes of its analysis, evidence which had not been produced during the administrative procedure and which, therefore, had to be considered inadmissible. Furthermore, as regards the method for allocating chargeable profits required under Irish law, the Court of Justice observes that the test for determining the profits of a non-resident company held by the General Court to be applicable under section 25 of the TCA 97 requires the allocation of assets, functions and risks between the Irish branches and the other parts of the companies concerned, excluding any role played by separate entities, such as, in this instance, Apple Inc. In that regard, the Court of Justice finds that, in the grounds that are being challenged, the General Court relied explicitly or implicitly on the functions performed by Apple Inc. in relation to the Apple Group's IP to support its finding of an error vitiating the analysis set out by the Commission. Consequently, the Court of Justice rules that the Commission is justified in arguing that, in order to rule that the evidence to support the allocation of profits from the exploitation of the IP licences to the branches of ASI and AOE was insufficient, the General Court wrongly compared the functions performed by those branches in relation

to those licences to the functions performed by Apple Inc. in relation to the Apple Group's IP, rather than to those actually performed by the head offices in connection with those licences.

In the third place, the Court of Justice examines the finding that the agreements and activities of ASI and AOE outside Ireland show that those companies were in a position to develop and manage the Apple Group's IP and to generate profits outside Ireland and that those profits were, consequently, not subject to tax in Ireland. It considers in that regard that, while the assessment of the probative value of a document in the file is in principle for the General Court alone to make, it is nevertheless incumbent on the Court of Justice to examine a complaint that the burden of proof has been determined incorrectly. In the present case, by finding that the Commission was required to demonstrate the existence of important business decisions not mentioned in the board minutes of the companies concerned, the General Court imposed an excessive burden of proof on the Commission.

In the light of the foregoing considerations, the Court of Justice sets aside the judgment under appeal in so far as the complaints against the primary line of reasoning relating to the existence of a selective advantage are upheld and, in consequence, the decision at issue is annulled.

Next, the Court of Justice considers the state of the proceedings to be such that it may give final judgment and examines the actions for annulment of the decision at issue brought by Ireland and by ASI and AOE.

On that basis, the Court rules, first of all, that all of the pleas directed against the Commission's findings that relate to its primary line of reasoning and deal, on the one hand, with the identification of the reference framework and, on the other, with normal taxation under the Irish law applicable in the present case must be rejected, in so far as the General Court rejected the complaints raised in that respect on grounds that remained unchallenged at the appeal stage. In the absence of a cross-appeal, such grounds have the force of res judicata.

The Court of Justice goes on to find that, contrary to what was held by the General Court, the Commission succeeded in showing that, in the light of the activities and functions actually performed by the Irish branches of ASI and AOE and, moreover, of the absence of consistent evidence establishing that strategic decisions were taken and implemented by the head offices of those companies outside Ireland, the profits generated by the exploitation of the Apple Group's IP licences should have been allocated to those Irish branches when determining the annual chargeable profits of ASI and AOE in Ireland. The Commission also demonstrated to the requisite standard that the contested tax rulings have the effect that ASI and AOE enjoy favourable tax treatment as compared to resident companies taxed in Ireland which are not capable of benefiting from such advance rulings by the tax administration, that is, in particular, non-integrated standalone companies, integrated group companies that carry out transactions with third parties or integrated group companies that carry out transactions with group companies with which they are linked by fixing the price of those transactions at arm's length, even though those companies are in a comparable factual and legal situation as regards the objective of that reference system, which is to tax profits generated in Ireland. Lastly, the Commission was right to find, in the decision at issue, that the different tax treatment of ASI's and AOE's profits as a result of the contested tax rulings was not justified by the nature or by the general scheme of the Irish tax system. In those circumstances, the complaints put forward by the applicants in respect of the examination of the selectivity of those tax rulings in the decision at issue must be rejected.

Furthermore, the Commission did not err when it found that Ireland had renounced tax revenue from ASI and AOE since the contested tax rulings endorse methods for allocating profits which produce an outcome that separate and standalone undertakings operating under normal market conditions would not have accepted. Those tax rulings reduce the chargeable profits of ASI and AOE for the purposes of applying the reference provisions and, therefore, the amount of corporation tax which they are required to pay in Ireland, as compared to other companies taxed in Ireland whose chargeable profits reflect prices determined on the market in line with the arm's length principle. Such measures therefore mitigate the charges which are generally included in the budget of an undertaking, and thus do involve an advantage granted 'through State resources'.

Lastly, the Court of Justice rejects as unfounded the pleas in law alleging, in particular, infringement of the right to be heard in the context of the procedure leading to the adoption of the decision at issue, breach of the principles of legal certainty and the protection of legitimate expectations, and that the

Commission exceeded its competences and encroached on the competences of the Member States in breach of the principle of their fiscal autonomy.

In the light of the foregoing, the Court of Justice dismisses in their entirety the actions for annulment brought before the General Court.

Judgment of the Court of Justice (Second Chamber), 19 September 2024, United Kingdom and Others v Commission (Taxation of profits of CFCs), C-555/22 P, C-556/22 P and C-564/22 P

Link to the full text of the judgment

Appeal – State aid – Aid scheme implemented by the United Kingdom of Great Britain and Northern Ireland in favour of certain multinational groups – Taxation of the non-trading finance profits of controlled foreign companies (CFCs) – Exemptions – Significant people functions – Artificial diversion of profits – Erosion of the tax base – Decision declaring the aid scheme incompatible with the internal market and ordering the recovery of the aid paid – Reference framework – Applicable national law – 'Normal' taxation

Upholding the appeals against the judgment of the General Court in the case United Kingdom and ITV v Commission, [71] the Court of Justice clarifies its case-law regarding the determination of the reference framework with regard to which the selectivity of measures must be assessed for the purpose of determining whether they constitute State aid within the meaning of Article 107(1) TFEU. In particular, it clarifies the criteria in the light of which the national law must be interpreted for the purpose of that determination.

Under the corporation tax rules in the United Kingdom, only profits generated by activities and assets in the United Kingdom are taxed. However, the rules applicable to controlled foreign companies (CFC) provide that the profits of those companies are taxed in the United Kingdom by means of a charge ('the CFC charge') when they are considered to have been artificially diverted from the United Kingdom.

The CFC charge is laid down, inter alia, in respect of the non-trading finance profits of CFCs, when they arise from activities involving significant human functions carried out in the United Kingdom or are generated from United Kingdom funds or assets.

The rules applicable to CFCs provide however for partial or total exemptions from the CFC charge for non-trading finance profits from intragroup loans which are granted by a CFC and for which those groups could submit a claim for partial or total exemption from the CFC charge ('the exemptions at issue').

By decision of 2 April 2019 ('the decision at issue'), [72] the European Commission categorised those exemptions as a State aid scheme which was illegal and incompatible with the internal market. It stated that the incompatibility ceased on 1 January 2019 when amendments to the rules applicable to CFCs pursuant to which it was no longer possible to claim the exemptions at issue as regards those profits.

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71 Judgment of 8 June 2022, United Kingdom and ITV v Commission (T-363/19 and T-456/19, EU:T:2022:349; 'the judgment under appeal').

72 Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p. 1) ('the decision at issue').

The United Kingdom and the company ITV plc, supported in particular by the companies LSEGH (Luxembourg) Ltd and London Stock Exchange Group Holdings (Italy) Ltd, which had all benefited from the exemptions at issue, asked the General Court to annul the decision at issue.

By judgment of 8 June 2022, the General Court dismissed their action. To that end, it confirmed inter alia the analysis in the decision at issue as to the existence of a selective advantage, including the first step of that analysis consisting of identifying the reference framework. On that point, the General Court held that the Commission had not erred in law in finding that the reference framework was comprised not of the United Kingdom's general corporation tax system ('the GCTS') but only of the rules applicable to CFCs.

Against that background, the United Kingdom, ITV, LSEGH (Luxembourg) and London Stock Exchange Group Holdings (Italy) ('the appellants') each brought an appeal against the judgment of the General Court.

Findings of the Court

As regards admissibility, the Court of Justice finds that the appellants may, on appeal, challenge the determination of the reference framework made by the General Court. The question whether the General Court adequately defined the relevant reference framework and, by extension, correctly interpreted the constituent provisions, is a question of law which can be reviewed on appeal.

As to the substance, the Court of Justice examines the appellants' argument that the General Court erred in law in finding, as the Commission had done in the decision at issue, that the reference framework allowing the determination of whether the exemptions at issue gave rise to a selective advantage consisted not of the GCTS but of the rules applicable to CFCs.

The Court of Justice begins by recalling that, in order to classify a national tax measure as 'selective' for the purpose of applying Article 107(1) TFEU, the Commission must, as a first step, identify the reference framework that is the 'normal' tax system applicable in the Member State concerned and, as a second step, demonstrate 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, without the Member State in question being able to justify that differentiation.

The determination of the reference framework must be carried out following an exchange of arguments with the Member State concerned and must follow from an objective examination of the content, the structure and the specific effects of the applicable national rules. Where the tax measure in question is inseparable from the general tax system of the Member State concerned, reference must be made to that system. On the other hand, where it appears that such a measure is clearly severable from that general system, the reference framework may be more limited than the latter.

The Court finds, furthermore, that it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference framework. Consequently, when determining the reference framework, the Commission may reject the interpretation of the relevant provisions of national law given by the Member State concerned only if it establishes that another interpretation prevails in the case-law or administrative practice of that Member State, by relying in that regard on reliable and consistent evidence that has been subject to the abovementioned exchange of arguments. In that context, the Member State concerned is bound by a duty of sincere cooperation and must in good faith provide the Commission with all relevant information requested by it concerning the interpretation of the relevant provisions of national law. Where the Commission, in the light of the information provided by the Member State concerned, does not have national case-law or an administrative practice which substantiates its own interpretation of the national law, that interpretation can prevail over that advocated by that Member State only if the Commission is able to demonstrate that the Member State's interpretation is incompatible with the wording of the relevant provisions.

In the light of those principles, the Court examines whether the interpretation of the national law which must prevail is the one on which the decision at issue is based, confirmed in the judgment under appeal, or the one advocated by the United Kingdom.

It observes that, in the judgment under appeal, first of all, the General Court found that the GCTS is based on the principle of territoriality under which only profits made in the United Kingdom are taxed. Next, it held that the rules applicable to CFCs, which allowed for the taxation of profits artificially diverted from the United Kingdom for the benefit of a CFC, were based on a logic that was admittedly supplementary to or a corollary of the GCTS, but was distinct and severable from it. Finally, it found that those rules did not constitute an exception to the GCTS, but could rather be regarded as an extension thereof.

In that regard, the Court of Justice observes that national provisions which are a corollary to, supplementary to, or an extension of a wider legislative framework can hardly be regarded as clearly severable from it, with the result that to sever them is in principle artificial.

In the present case, the Court holds that there is nothing to preclude the interpretation of the rules applicable to CFCs advocated by the United Kingdom, according to which, in essence, those rules follow the same logic, largely based on the principle of territoriality, as the GCTS. They allow the profits of those CFCs to be taxed in the same way as they would have been if they had been made by the United Kingdom companies which control them, where there is a sufficiently high risk that those profits result from arrangements which give rise to artificial diversions of profits or the erosion of the tax base of United Kingdom corporation tax. The exemptions at issue make it possible not to apply, in whole or in part, the CFC charge where that risk is insufficiently high. Thus, the chapters of those rules providing respectively for the CFC charge and for the exemptions at issue must be read together, since they complement each other and define, together, the scope of the CFC charge, taking into account an assessment of that risk.

To arrive at that conclusion, the Court observes that, where profits fulfil the conditions of applicability of the chapter on the rules applicable to CFCs relating to the exemptions at issue, there is no need to examine them in the light of the other chapters, including those laying down the criteria in accordance with which non-trading finance profits of a CFC are taxable in the United Kingdom. Similarly, the provisions defining those criteria make their application subject to the non-trading finance profits in question not being covered by the chapter relating to the exemptions at issue. The fact that the exemptions may apply to non-trading finance profits which fulfil some of the criteria of the CFC charge does not contradict the interpretation advocated by the United Kingdom, since, according to the assessment by the United Kingdom legislature, if the conditions required for the purpose of those exemptions are satisfied, it is possible to rule out that the abovementioned risk is sufficiently high.

The Court adds that the interpretation of the rules applicable to CFCs relied on by the appellants is consistent with the guidance provided in the judgment in Cadbury Schweppes and Cadbury Schweppes Overseas. [73] According to that judgment, Articles 49 and 54 TFEU preclude a Member State from taxing a resident company on the profits made by a CFC in another Member State, unless those profits result from wholly artificial arrangements intended to escape the national tax normally due. Such taxation is therefore excluded where objective factors which are ascertainable by third parties show that the CFC in question is actually established in the host Member State and carries on genuine economic activities there. The appellants' interpretation, according to which the rules applicable to CFCs seek to tax profits arising from abusive practices, such as wholly artificial arrangements, while allowing taxpayers to claim a total or partial exemption in the absence of any risk of such arrangements, reflects those principles.

In the light of those considerations, the Court holds that the rules applicable to CFCs form an integral part of the GCTS, which they supplement, by following the same logic largely based on the principle of territoriality. The CFC charge is totally or partially excluded in respect of non-trading finance profits of CFCs which do not have a sufficient territorial link with the United Kingdom and which therefore do

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73 Judgment of 12 September 2006, Cadbury Schweppes and Cadbury Schweppes Overseas (C-196/04, EU:C:2006:544).

not therefore constitute artificially diverted profits or an erosion of the United Kingdom corporation tax base. Therefore, the General Court erred in law in finding, as the Commission had done, that the reference framework for the purpose of examining the selectivity of the exemptions at issue consisted solely of the rules applicable to CFCs.

Since the determination of the reference framework constitutes the starting point for the assessment of selectivity, the General Court's error vitiates the whole of that assessment. Consequently, the Court of Justice sets aside the judgment under appeal in its entirety and, itself giving final judgment in the matter, annuls the Commission decision at issue for the same reasons.

VII. FISCAL PROVISIONS: ADJUSTMENT OF VAT DEDUCTIONS

Judgment of the Court of Justice (Second Chamber), 12 September 2024, Drebers, C-243/23

Link to the full text of the judgment

Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Article 187 – Adjustment of deductions – Extended adjustment period for immovable property acquired as capital goods – Concept of 'capital goods' – Article 190 – Option for Member States to treat as capital goods services with characteristics similar to those normally associated with those goods – Building extension and renovation works – Possibility under national law of treating such works as the construction or acquisition of immovable property – Restrictions – Direct effect of Article 190 – Margin of discretion

Ruling on a reference for a preliminary ruling from the hof van beroep te Gent (Court of Appeal, Ghent, Belgium), the Court of Justice clarifies the scope of the discretion available to the Member States to treat similar services as 'immovable property acquired as capital goods', where the Member States have exercised the option to apply to such goods an extended adjustment period, as provided for in Article 187(1) of the VAT Directive. [74]

L BV is a Belgian law firm which, for the purposes of that economic activity, has an immovable property.

Between 2007 and 2015, significant works were carried out on that building, as a result of which it now consists of renovated buildings and newly built parts.

From 1 January 2014, Belgium abolished the VAT exemption previously applicable to the exercise of the profession of lawyer. Accordingly, taking the view that the works concerned constituted immovable property acquired as capital goods subject to an extended adjustment period of 15 years and that, consequently, that period was still ongoing, L BV deducted part of the VAT which it had paid in respect of the costs of those works.

Following a tax inspection, the tax authority took the view that those works were not subject to the extended adjustment period but to the standard adjustment period of five years. For that reason, it considered that L BV remained liable for an amount of VAT relating to the deductions made. L BV objected by bringing an action before a court of first instance, which ruled in part in L BV's favour.

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74 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

On appeal, the referring court expresses doubts as to, inter alia, the compatibility with the VAT Directive of the Belgian legislation under which it is not possible to apply the extended adjustment period to works to substantially extend and renovate a building.

Findings of the Court

First, the Court rules that such legislation is not compatible with Article 190 of the VAT Directive, read in conjunction with Article 187 of that directive and in the light of the principle of fiscal neutrality. In that regard, it observes that the possibility for the Member States to extend the adjustment period up to 20 years for immovable property acquired as capital goods, as provided for in the third subparagraph of Article 187(1) of the VAT Directive, is intended to enhance the precision of deductions, while adapting those detailed rules to the particular characteristics of those goods, which concern inter alia the duration of their economic life, which is much longer than that of other capital goods.

Given that the construction works concerned were taxed as a supply of services and not as a supply of goods within the meaning of the VAT Directive, they cannot, as such, fall within the concept of 'immovable property acquired as capital goods' referred to in Article 187(1) of the VAT Directive. Therefore, the detailed adjustment rules laid down in that article are not, in themselves, applicable to those works.

Nevertheless, the Court finds that the option to treat as capital goods services with characteristics similar to those normally associated with those goods, laid down in Article 190 of the VAT Directive, which served as a basis for the actions of the tax authorities in the present case, also applies to immovable property acquired as capital goods. In that regard, it states that that article refers in a general manner to the concept of 'capital goods', without excluding immovable property acquired as capital goods which, despite its specific treatment, continues to fall within the general category of capital goods. It follows that, in the light of the aim of Article 190 of the VAT Directive and in order to enhance the precision of VAT deductions paid on services according to the duration of their economic life, the Member States may treat, for the purposes of the adjustment mechanism, certain services, as the case may be, as capital goods or immovable property acquired as capital goods.

However, when exercising that discretion, they must comply with the principle of fiscal neutrality as a specific expression of the principle of equal treatment, as well as the aim of Article 190 of the VAT Directive. In that context, the Member States cannot disregard the duration of the economic life of the effects of the services that are to be treated as capital goods, given that the similarity of the characteristics of the services and goods concerned for the purposes of the adjustment mechanism depends on the duration of their economic life.

Furthermore, the Court adds that, in the light of the aim of Article 190 of the VAT Directive, the fact that the construction works concerned do not constitute a conversion of a building, within the meaning of that directive, is irrelevant in that regard.

Secondly, the Court rules that Article 190 of the VAT Directive, read in conjunction with Article 187 of that directive and in the light of the principle of fiscal neutrality, is capable of having direct effect. In finding, first of all, that that article is unconditional, the Court observes that it confers on Member States the option of treating services as immovable property acquired as capital goods, subject to the prior implementation of the third subparagraph of Article 187(1) of that directive. However, the freedom as regards the decision to implement or not implement that option does not prevent the national court from reviewing whether a Member State has, in so doing, complied with the conditions governing that implementation and remained within the limits of its margin of discretion, bearing in mind that, in the present case, the Member State had already fully exhausted the discretion available to it with regard to Article 187. Next, in order to find that Article 190 of the VAT Directive is sufficiently precise, the Court states that the existence of the discretion left by that provision to the Member States also does not preclude judicial review in order to verify whether the Member State concerned has exceeded that margin of discretion.

Accordingly, where the national court finds that the Member State has exceeded its discretion, the taxable person may rely directly on the abovementioned provisions before that court in order to have applied to those construction works the extended adjustment period laid down in national law pursuant to the third subparagraph of Article 187(1) of the VAT Directive.

VIII. APPROXIMATION OF LAWS

1. MOTOR VEHICLE INSURANCE

Judgment of the Court of Justice (First Chamber), 19 September 2024, Inkreal, C-236/23

Link to the full text of the judgment

Reference for a preliminary ruling – Compulsory insurance against civil liability in respect of the use of motor vehicles – Directive 2009/103/EC – Articles 3 and 13 – Insurance contract concluded on the basis of an intentional false statement concerning the usual driver – National legislation providing that the nullity of an insurance contract may be invoked against a 'passenger victim', who is also the insurance policyholder, where that nullity results from an intentional false statement made by that person when the contract was concluded – Abuse of rights – Action brought against the policyholder seeking to establish his liability as a result of his intentional false statement

Following a reference for a preliminary ruling from the Cour de cassation (Court of Cassation, France), the Court clarifies the extent of the cover provided to third-party victims under compulsory insurance against civil liability in respect of the use of motor vehicles. Thus, it notes that Directive 2009/103 [75] precludes, except in the case of an abuse of rights, national legislation under which it is possible to invoke against a passenger of a vehicle who is a victim of a road accident, where he or she is also the policyholder, the nullity of a contract of insurance against civil liability in respect of the use of motor vehicles resulting from a false statement made by that policyholder in concluding that contract. Where such nullity cannot be invoked against such a passenger victim and where there is no abuse of rights, that directive precludes national legislation which allows the insurer to bring proceedings against that passenger in order to obtain reimbursement of the sums paid in performance of the insurance contract.

In October 2012, PQ took out a motor vehicle insurance contract with Matmut, stating that he was the only driver of the insured vehicle. In September 2013, that vehicle, while being driven by TN, who was under the influence of alcohol, was involved in a road traffic accident with another vehicle insured by another insurance company. PQ, who was a passenger in the first vehicle, was injured in that accident.

Criminal proceedings were brought against TN before a criminal court (France) and he was found guilty, inter alia, of causing unintentional physical injuries to PQ. That court declared the insurance contract in question null and void on account of an intentional false statement made by the policy holder concerning the identity of the usual driver of the vehicle concerned. That judgment was upheld by the Cour d'appel de Lyon (Court of Appeal, Lyon, France), which held, however, that the nullity of the insurance contract at issue could not be relied on against PQ because, under EU law, the nullity of an insurance contract on the ground of an intentional false statement by the insured person cannot be relied on against the victims of a road traffic accident or their successors in title.

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75 Article 3, first paragraph, and Article 13(1) of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11).

Hearing the appeal brought against that judgment, the referring court questions whether the nullity of an insurance contract may be invoked against the passenger victim where he is also the policyholder and the person who made the intentional false statement which rendered that contract void. It also questions whether, in the event that that nullity is declared unenforceable against such a victim, the insurer can bring an action against that victim in order to obtain reimbursement of all the sums paid to him under the contract.

Findings of the Court

In the first place, the Court recalls that the objective of protecting victims of accidents caused by those vehicles has consistently been pursued and reinforced by the EU legislature. It points out that, under Directive 2009/103, [76] a civil liability motor insurance company may not refuse to compensate third party victims of an accident caused by an insured vehicle by relying on statutory provisions or contractual clauses contained in an insurance policy excluding from insurance against civil liability in respect of motor vehicles damage or injury caused to third party victims as a result inter alia of the use or driving of the insured vehicle by persons who do not have authorisation to drive that vehicle.

As regards the status of a victim of a road traffic accident, the Court notes that the objective of protecting victims requires the legal position of the person who was insured to drive a vehicle but who was, at the time of an accident, a passenger in that vehicle, to be the same as that of any other passenger who is a victim of that accident. Thus, the fact that a passenger in a road traffic accident was the insurance policyholder does not allow that person to be excluded from the concept of 'third parties who have been victims'. [77] The same is true if the policyholder is not the usual driver of the vehicle involved in a road traffic accident. Accordingly, the fact that, at the time when the road traffic accident occurred, PQ was the insurance policyholder and the passenger in the vehicle concerned has no bearing on his status as a 'third party who has been a victim'.

In the second place, as to whether the nullity of the insurance contract in question resulting from PQ's false statement made when concluding that contract as to the identity of the usual driver of the vehicle concerned may be relied on against PQ, the Court holds that the fact that an insurance company has concluded an insurance contract on the basis of omissions or false statements on the part of the policyholder does not enable that company to invoke that nullity against a third party victim so as to be released from its obligation to compensate that victim for damage or injury suffered as a result of an accident caused by the insured vehicle. Such a situation is not covered by the single derogation from the obligation of insurance companies to compensate third party victims of a road traffic accident laid down in Directive 2009/103. [78]

In view of the fact that PQ is not only the passenger victim of the road traffic accident in question seeking compensation but also the policyholder who made the intentional false statement which led to the nullity of the insurance contract, the Court emphasises that Directive 2009/103 does not contain any provisions governing any abuse of rights by the insured person. However, the general legal principle that EU law cannot be relied on for abusive or fraudulent ends must be complied with by individuals. It follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon by a person not with a view to achieving the objectives of those provisions, but with the aim of benefiting from an advantage granted to that person by EU law when the objective conditions required for obtaining the

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76 Inter alia under the first subparagraph of Article 13(1) of Directive 2009/103.

77 As provided in the first subparagraph of Article 13(1) of Directive 2009/103.

78 Under the first and second subparagraphs of Article 13(1), an insurance company may refuse to compensate third-party victims of a road traffic accident only in cases where the vehicle which caused the damage or injury was used or driven by persons who did not have express or implied authorisation to do so and where the third party victims of the accident voluntarily entered that vehicle knowing that it had been stolen.

advantage sought are met only formally. In the present case, first, as regards the question whether the objective pursued by Directive 2009/103 has been achieved, the Court notes that, subject to verification by the referring court, the objective of protecting victims of road traffic accidents appears to be achieved, as PQ is a victim of the accident at issue who is seeking compensation. As regards, secondly, the subjective element consisting of the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it, it does not appear, subject to verification by the referring court, that PQ made false statements with the essential aim of relying himself on the provisions of Directive 2009/103 [79] and of circumventing a national provision relating to the legal conditions for nullity of an insurance contract. PQ's false statement was made in order to have TN's vehicle insured under more advantageous conditions than those which would have applied if the identity of the usual driver of that vehicle had been known to the insurer. In the light of the foregoing, it does not appear, subject to verification by the referring court, that PQ infringed the principle prohibiting abuse of rights. Accordingly, the nullity of the contract of insurance against civil liability in respect of the use of motor vehicles at issue in the main proceedings, resulting from PQ's false statement made when that contract was concluded, cannot be relied on against him.

In the third place, as regards the possibility for the insurer to obtain from PQ reimbursement in full of the sums which it paid to him in performance of the insurance contract by means of an action based on PQ's intentional wrongdoing when concluding that contract, the Court notes that the legal conditions of validity of an insurance contract and those relating to the policyholder's liability for false statements made at the time of concluding the insurance contract are governed by the laws of the Member States. However, the national provisions governing those conditions cannot deprive Directive 2009/103 of its effectiveness. In circumstances such as those at issue in the main proceedings, national legislation which allows the insurer, by means of an action brought against the passenger victim, who is also the policyholder and the person who made the false statement in concluding the insurance contract, to obtain reimbursement of all of the sums paid to that passenger victim in performance of that contract is liable to deprive that person, definitively and disproportionately, of the protection which Directive 2009/103 grants to the victims of such accidents. Such legislation is liable to limit disproportionately the right of that individual to obtain compensation by the compulsory insurance against civil liability in respect of the use of motor vehicles.

79 More specifically, Articles 3 and 13 of Directive 2009/103.

2. INTELLECTUAL PROPERTY

Judgment of the General Court (Second Chamber, Extended Composition), 25 September 2024, Kirimova v EUIPO, T-727/20 RENV

Link to the full text of the judgment

Internal market – Representation before EUIPO – Entry on the list of professional representatives – Refusal of the request – Requester who is not a national of a Member State of the EEA – Exemption from the nationality requirement – Article 120(4)(b) of Regulation (EU) 2017/1001 – Concept of highly qualified professional – Principle of legal certainty – Right to be heard – Alteration – Lack of jurisdiction of the General Court

In this judgment, the General Court interprets, for the first time, the concept of 'highly qualified professional' set out in Article 120(4)(b) of Regulation 2017/1001 [80] for the purpose of entering a person on the list of professional representatives in trade mark law.

On 10 October 2019, Ms Kirimova, a national of the Republic of Azerbaijan, submitted to the European Union Intellectual Property Office (EUIPO) an application to be entered on the list of professional representatives at that office, while also requesting an exemption from the requirement to be a national of one of the Member States of the European Economic Area (EEA), on the basis of Article 120(4)(b) of Regulation 2017/1001.

EUIPO informed the applicant by letter that her request was inadmissible. In response to that letter, the applicant submitted observations. By decision of 30 September 2020 ('the contested decision'), the Executive Director of EUIPO denied the applicant's request.

Findings of the Court

In the first place, the Court observes that the concept of 'highly qualified professional' is not defined in any regulation and interprets that concept by taking account of the wording of the provision in which it appears, the context in which it is used and the aims of the legislation of which it is part.

As regards the wording and context of the provision at issue, the Court notes, first, that the concept of 'highly qualified professional' within the meaning of Article 120(4)(b) of Regulation 2017/1001 refers to a specialist with particularly advanced qualities, skills, abilities or knowledge in trade mark matters and does not appear to imply any restriction with respect to the manner in which those are acquired. Second, it is apparent from that provision that the three requirements for entering a person on the list of professional representatives as laid down in Article 120(2) of Regulation 2017/1001, namely the nationality requirement, the place requirement and the entitlement requirement, are not only cumulative but also autonomous in nature. The entitlement requirement must be fulfilled both by natural persons who fulfil the nationality requirement and by natural persons who request an exemption from the nationality requirement on account of their status as a 'highly qualified professional'. It therefore appears that that status is independent of, and additional to, the entitlement requirement and that it has no connection with the conditions necessary for fulfilling that requirement. Accordingly, the qualities, skills, abilities or knowledge capable of demonstrating the status of 'highly qualified professional' may have been acquired by the non-EEA national, both in a Member State of the EEA and in a third country, before or after obtaining the entitlement in the EEA.

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80 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).

As regards the aims pursued by the rules on representation before EUIPO, namely of ensuring a smooth, effective and efficient operation of the EU trade mark system, [81] the Court observes that the pursuit of such objectives does not presuppose that the status of 'highly qualified professional' is conditional on a certain amount of professional experience in a given Member State. On the contrary, it appears to be irrelevant whether the particularly advanced qualities, skills, abilities or knowledge possessed by the specialist requesting the exemption were acquired in one Member State rather than another, or even in a third country, since a requester who is not a national of a Member State of the EEA must also fulfil the place requirement and the entitlement requirement which require a connection with a Member State of the EEA.

Thus, the requirement relating to the need for professional experience in the Member State of entitlement applied by the Executive Director in the contested decision is based on an overly restrictive and incorrect interpretation of the concept of 'highly qualified professional'. None of those criteria for interpretation permits the inference that that status requires, as a necessary condition, professional experience in the Member State of entitlement.

In the second place, the Court examines whether the Executive Director complied with the principle of legal certainty in its assessment of the applicant's request. First of all, it points out that the Executive Director must comply with the rules of conduct set out in the EUIPO guidelines relating to the application of Article 120(4)(b) of Regulation 2017/1001 and comply with the principles governing the temporal application of those rules, in accordance with the principle of legal certainty. That said, it cannot be ruled out that the Executive Director may depart from those rules and give reasons which take account of the principle of equal treatment, or that a requester may demonstrate the status of 'highly qualified professional' on the basis of factors other than those set out in the EUIPO guidelines.

Next, the Court notes that the 2020 EUIPO guidelines lay down criteria for assessing requests for exemption from the nationality requirement which were not included in the 2017 EUIPO guidelines and therefore set out a new, and more restrictive, practice of the Executive Director in that regard. Those differences are liable to have a significant impact both on the Executive Director's assessment of a request for an exemption and on the content of such a request, given that the guidance set out in the EUIPO guidelines enables requesters to anticipate on the basis of which factors a request for an exemption may be assessed. Thus, demonstrating that a person holds the status of 'highly qualified professional' in the light of 'exceptional circumstances' involving the fulfilment of the requirements set out in the 2020 EUIPO guidelines is manifestly different in scope from demonstrating that status in the light of relevant 'special circumstances' within the meaning of the 2017 EUIPO guidelines.

Lastly, the Court observes that, in the contested decision, although he did not formally specify which EUIPO guidelines were applied, the Executive Director examined the applicant's request in the light of the requirements and circumstances set out in the 2020 EUIPO guidelines. In accordance with the case-law relating to the principle of legal certainty, it is the rules of conduct in force at the time of the facts at issue, that is to say, at the time when the request for an exemption was submitted, which must be applied when assessing that request, and not those in force at the time when the contested decision was adopted. In the present case, at the time of the request, the 2020 EUIPO guidelines had not yet been adopted; the guidelines in force at that time were those of 2017.

In the light of those considerations, the Court concludes that the Executive Director failed to observe the principle of legal certainty by assessing the applicant's request for an exemption in the light of the rules of conduct set out in the 2020 EUIPO guidelines, which were not in force at the time when the request was submitted.

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81 As is apparent from recital 43 of Regulation 2017/1001 and from recital 18 of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

IX. ECONOMIC AND MONETARY POLICY: RECOVERY AND RESOLUTION OF CREDIT INSTITUTIONS

Judgment of the Court of Justice (First Chamber), 5 September 2024, Banco Santander (Resolution of Banco Popular II), C-775/22, C-779/22 and C-794/22

Link to the full text of the judgment

Reference for a preliminary ruling – Directive 2014/59/EU – Resolution of credit institutions and investment firms – General principles – Article 34(1)(a) and (b) – Bail-in – Write down of capital instruments – Conversion of subordinated obligations into shares and mandatory transfer for no consideration – Effects – Article 38(13) – Article 53(1) and (3) – Article 60(2), first subparagraph, points (b) and (c) – Articles 73 to 75 – Protection of the rights of shareholders and creditors – Purchase of capital instruments – Flawed and incorrect information provided in the prospectus – Action for damages – Action for a declaration of nullity in respect of the agreement for the purchase of capital instruments – Actions brought against the universal successor of the credit institution subject to a resolution decision

Hearing a reference for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain,), on the interpretation of provisions of Directive 2014/59, [82] the Court of Justice rules, again, on whether persons who have purchased capital instruments of a credit institution under resolution can, after the total write down of the shares in the capital stock of that institution, bring an action for a declaration of nullity in respect of the subscription agreement relating to those instruments and/or an action for damages, on the basis of flawed and incorrect information provided in the issue prospectus. [83] The question has been raised in proceedings brought by persons whose capital instruments were converted into shares in that credit institution, either before the procedure to adopt resolution measures or in the context of that procedure.

The present judgment of the Court comes in response to the judgment of 5 May 2022, Banco Santander, [84] in which the Court held that, after a total write down of the shares in the capital stock of a credit institution or of an investment firm subject to a resolution procedure, persons having acquired shares before the opening of that procedure cannot bring such actions for damages or for a declaration of nullity.

Les requérants au litige principal avaient acquis, en 2010 et 2011, différents instruments de fonds propres émis par Banco Popular, établissement de crédit espagnol, ou par une filiale de celle-ci. Au cours des années 2012 et 2014, une partie desdits instruments ont été convertis en actions de Banco Popular. On 7 June 2017, the Single Resolution Board (SRB) adopted a resolution scheme in respect of

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82 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).

83 Under Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ 2003 L 345, p. 64), which was repealed, with effect from 21 July 2019, by Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC (OJ 2017 L 168, p. 12).

84 Judgment of 5 May 2022, Banco Santander (Resolution of Banco Popular), C-410/20, EU:C:2022:351.

Banco Popular, which was endorsed by the European Commission and implemented by the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring, Spain; 'the FROB') by a decision adopted the same day. [85] By that decision, the FROB, inter alia, reduced Banco Popular's share capital to zero by means of the write down of all the outstanding shares. That write down had the effect that certain applicants ceased to be the holders of shares in Banco Popular resulting from the conversion of their capital instruments in 2012 and 2014. In addition, the FROB decided to convert the subordinated obligations (Tier 2 capital instruments) into new shares and to transfer those new shares to Banco Santander without the consent of the former holders of those instruments. That operation led to other applicants ceasing to be the holders of the subordinated obligations purchased in 2010 and 2011 that were converted into shares and, subsequently, transferred to Banco Santander, without receiving any consideration.

Findings of the Court

In the first place, the Court rules on the action for damages for flawed or incorrect information in the issue prospectus and on the actions for a declaration of nullity [86] in respect of the subscription agreement relating to capital instruments in a credit institution, brought by persons having purchased such instruments that were converted into shares in that institution before the adoption of resolution measures against it.

At a first stage, it points out that, under Directive 2014/59, [87] where a resolution authority reduces to zero the principal amount of, or outstanding amount payable in respect of, a liability, that liability and any obligations or claims arising in relation to it that are not accrued at the time of the resolution are to be treated as discharged for all purposes, and are not to be provable vis-à-vis the credit institution or the investment firm under a resolution measure or any successor entity. Furthermore, the directive states that no liability to the holder of the capital instruments written down, under the resolution decision, is to remain under or in connection with that amount of the instrument, which has been written down, except for any liability already accrued, and any liability for damages that may arise as a result of an appeal challenging the legality of the exercise of the write-down power. [88]

As regards the concepts of 'accrued obligations' or 'accrued claims', the Court notes that, as it held previously in the judgment of 5 May 2022, Banco Santander, the rights arising from an action for damages due to the information given in the prospectus for the sale of securities [89] and an action for a declaration of nullity in respect of a share subscription agreement cannot be regarded as falling within the category of 'accrued' obligations or claims [90] where those actions are brought against the credit institution or investment firm issuing the prospectus or the successor entity after the adoption of the resolution decision.

At a second stage, the Court holds that it is also necessary to understand those concepts in that way where the rights arise from an action for damages or for a declaration of nullity in respect of the purchase of capital instruments which have subsequently been converted into shares in the light of the context of those concepts and the objectives pursued by Directive 2014/59.

First, Directive 2014/59 establishes the principle whereby it is the shareholders, followed by the creditors, of a credit institution or investment firm under resolution that are required to bear the first losses incurred as a result of the application of that procedure. In the context of a bail-in, the write-

85 FROB Decision of 7 June 2017 (BOE No 155 of 30 June 2017, p. 55470).

86 As provided for in Article 6 of Directive 2003/71.

87 Article 53(3) of Directive 2014/59.

88 Article 60 of Directive 2014/59.

89 Under Article 6 of Directive 2003/71.

90 Within the meaning of Article 53(3) and Article 60(2)(b) of Directive 2014/59.

down and conversion of capital instruments contributes directly to the achievement of the objectives of the resolution procedure. Accordingly, to allow persons who have purchased capital instruments prior to the resolution to bring actions, after that resolution, for damages or for a declaration of nullity for the purposes of seeking damages or reimbursement in the amount of the funds paid for that purchase would entail precisely the risk that the amount of the capital instruments subject to a bail-in would be retroactively reduced, which could call into question whether the objectives pursued by the resolution action were being achieved.

From that perspective, Directive 2014/59 provides [91] that no compensation is to be paid to the holders of the relevant capital instruments, other than the cases where such instruments [92] are converted, and that, in those cases, compensation is to take the form of an issuance of capital instruments to those holders. By doing so, the directive has the effect of preventing that compensation from being able retroactively to reduce the amount of capital used for the purposes of resolution.

Second, in relation to the objectives pursued by Directive 2014/59, the Court notes that Directive 2014/59 provides for the use, in an exceptional economic context, of a procedure that may affect in particular the rights of shareholders and creditors of a credit institution or investment firm, in order to preserve the financial stability of the Member States, by creating an insolvency regime derogating from the ordinary law governing insolvency proceedings, which may only be applied in exceptional circumstances and must be justified by an overriding public interest.

The Court points out that, as is apparent from the judgment of 5 May 2022, Banco Santander, Directive 2003/71 is one of the 'Union company law directives' from which Directive 2014/59 makes it possible to derogate, in so far as the application of those provisions could hinder the implementation of a resolution procedure or deprive it of practical effect. Both actions for damages and actions for a declaration of nullity, which essentially require that the credit institution or investment firm under resolution, or the successor of those entities, compensate shareholders for the losses incurred as a consequence of the exercise by a resolution authority of the write-down and conversion powers, would call into question the entire valuation upon which the resolution decision is based because the breakdown of the capital forms part of the objective data for that valuation, and, consequently, would be capable of causing the resolution procedure itself as well as the objectives pursued by Directive 2014/59 to be frustrated. Accordingly, in the same judgment, the Court held that the application of Article 34(1)(a), Article 53(1) and (3) and points (b) and (c) of the first subparagraph of Article 60(2) of Directive 2014/59 excludes the possibility of an action for damages under Article 6 of Directive 2003/71 or an action for a declaration of nullity in respect of the share subscription agreement, under Spanish law, being brought against the credit institution or investment firm issuing the prospectus or the successor entity, after a resolution decision has been adopted on the basis of those provisions.

In the present case, it notes that, although the applicants in the main proceedings initially purchased capital instruments other than shares in Banco Popular, those instruments had already been converted into shares in Banco Popular prior to the resolution of that bank and that, in the context of the resolution of that bank, the shares resulting from that conversion were subject to a write-down and conversion measure for the purposes of the bail-in of that bank.

The Court holds that the provisions of Directive 2014/59 referred to above preclude, after the total write down of the shares in a credit institution under resolution, persons who have purchased capital instruments that have been converted into shares in that credit institution before the adoption of resolution measures against it, from bringing, against that institution or against its successor entity, an action for damages on the basis of flawed and incorrect information provided in the issue prospectus or an action for a declaration of nullity in respect of the agreement by which they subscribed for those capital instruments under national law, which, in the light of its retroactive effect,

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91 Article 60(2), first subparagraph, point (c), and (3) of Directive 2014/59.

92 Referred to in Article 60(3) of Directive 2014/59.

would lead to the reimbursement of the price paid for those capital instruments that were initially purchased and were then converted into shares, plus interest from the date on which that agreement was concluded.

In the second place, the Court addresses the question of whether the provisions of Directive 2014/59 [93] preclude, after the total write down of the shares in a credit institution under resolution, persons who have purchased capital instruments which, in the context of that procedure, have been converted into shares in that credit institution, which were then immediately transferred to another credit institution, from bringing an action against the latter for a declaration of nullity in respect of the subscription agreement relating to those capital instruments under national law, which, taking account of its retroactive effect, would lead to the reimbursement of the price paid for those capital instruments, together with interest from the date on which that agreement was concluded.

It states that, under Article 37(3)(a) and (d) and (4) of Directive 2014/59, resolution authorities may combine the bail-in tool with the sale of business tool. As is apparent from Article 2(57) and (58) of that directive, although the first of those tools includes write-down and conversion powers, the second consists of the transfer, inter alia, of shares or other instruments of ownership issued by an institution under resolution to a purchaser that is not a bridge institution. According to that directive, [94] in the context of that second tool, since ownership of shares or other instruments of ownership is transferred, with immediate legal effect, to the purchaser, the original owners lose not only the ownership, but also the status of 'shareholder' or 'creditor' of the credit institution under resolution. In that way, the former shareholders of the credit institution under resolution whose shares have been transferred in the context of the resolution are no longer shareholders, either of that credit institution or of its successor and lose any rights over or in relation to the assets, rights or liabilities transferred. The directive thereby precludes creditors and shareholders from being able, with retroactive effect, to frustrate the resolution procedure and the objectives pursued by that procedure, with all the more reason since such an action might enable creditors and shareholders retroactively to avoid the losses which they must bear first.

In respect of the argument raised by the applicants in the main proceedings invoking a limitation of their right to effective judicial protection as regards their right to bring an action for a declaration of nullity in respect of the agreement by which they subscribed for shares or capital instruments converted into shares, the Court points out that the right in question, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, is not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Furthermore, although there is a clear public interest in ensuring, throughout the European Union, strong and consistent protection of investors, that interest cannot be held to prevail in all circumstances over the public interest in ensuring the stability of the financial system. By making shareholders the first to bear the losses suffered by a credit institution or investment firm, the directive is intended to ensure the stability of the financial system of the European Union, on the basis that, according to that directive, a resolution procedure should apply only in those exceptional and extremely urgent economic circumstances, where the credit institution or investment firm in question cannot be wound up under normal insolvency proceedings without destabilising the EU financial system. Although the provisions of the directive in that way prevent the bringing of such an action for a declaration of nullity, after the adoption of the resolution decision, the Court notes, inter alia, that the resolution action, as resulting from the Commission decision approving a resolution scheme, may be the subject of an action for annulment under the fourth paragraph of Article 263 TFEU. Such an action contributes to the effective judicial protection of shareholders and creditors, also in so far as the potential annulment of the resolution action would make it possible to bring an action for a declaration of nullity in respect of the agreement by which they subscribed for shares or capital instruments converted into shares.

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93 In particular, Article 34(1)(a) and (b) and Article 38 of Directive 2014/59.

94 Article 38(1), (4), (6), 9(a) and (13) of Directive 2014/59.

The Court holds that the provisions of Directive 2014/59, in particular Article 34(1)(a) and (b) and Article 38 thereof, preclude, after the total write down of the shares in a credit institution under resolution, persons who have purchased capital instruments which, in the context of that procedure, have been converted into shares in that credit institution, which were then immediately transferred to another credit institution, from bringing an action against the latter for a declaration of nullity in respect of the agreement by which they subscribed for those capital instruments under national law.

X. SOCIAL POLICY: PROTECTION OF THE SAFETY AND HEALTH OF WORKERS

Judgment of the Court of Justice (First Chamber), 26 September 2024, Energotehnica, C-792/22

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – Protection of the safety and health of workers – Directive 89/391/EEC – General obligations relating to the protection of safety and health – Parallel national proceedings – Judgment of an administrative court having force of res judicata before the criminal court – Classification of an event as an 'accident at work' – Effectiveness of the protection of the rights guaranteed by Directive 89/391 – Article 47 of the Charter of Fundamental Rights of the European Union – Right to be heard – Disciplinary proceedings against a judge of an ordinary court in the event of failure to comply with a decision of a constitutional court that is contrary to EU law – Primacy of EU law

Hearing a request for a preliminary ruling from the Curtea de Apel Braşov (Court of Appeal, Braşov, Romania), the Court of Justice holds that Directive 89/391, [95] read in conjunction with the principle of effectiveness and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), precludes legislation of a Member State under which the final judgment of an administrative court concerning the classification of an event as an 'accident at work' has the force of res judicata before the criminal court called on to rule on the civil liability arising from the acts of which the defendant is accused, where that legislation does not allow the successors of the victim of that event to be heard in any of the proceedings ruling on the existence of such an accident at work.

In 2017, an electrician employed by SC Energotehnica SRL Sibiu ('Energotehnica') died by electrocution during an operation on an outdoor light fixture on a low-voltage pylon. MG, who was also employed by Energotehnica, was responsible for organising work, training staff and adopting measures to ensure safety at work and the provision of protective equipment.

Following that death, two procedures were conducted, namely, first, an administrative inquiry carried out by the Inspecția Muncii (Labour Inspectorate, Romania) against Energotehnica and, secondly, criminal proceedings against MG for failure to comply with the legal measures concerning safety at work and for manslaughter. The victim's successors became civil parties in the latter proceedings.

At the end of the administrative court proceedings, it was found, by final judgment, that the event in question did not constitute an accident at work within the meaning of the national legislation.

95 Article 1(1) and (2) and Article 5(1) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

The referring court, before which an appeal has been brought in the context of the criminal proceedings, notes that, under the national legislation and the case-law of the Curtea Constituțională (Constitutional Court, Romania), it is bound by the findings of the administrative court, which did not classify the event at issue in the main proceedings as an accident at work within the meaning of Romanian law.

Finding that the impossibility of deciding whether criminal or civil liability is incurred, even though the parties heard in the two sets of proceedings are not the same, would undermine the principle of responsibility of the employer and that of the protection of workers, enshrined in Article 1(1) and (2) and Article 5(1) of Directive 89/391, read in the light of the Charter, the referring court asks the Court about the interpretation of those provisions.

Findings of the Court

The Court notes, first of all, that the purpose of Directive 89/391 is to introduce preventive measures to encourage improvements in the safety and health of workers at work so as to ensure a better level of protection.

In that regard, as stated in Article 1(2), that directive contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors and general guidelines for the implementation of those principles.

Moreover, under Article 5(1) of Directive 89/391, the employer is to have a duty to ensure the safety and health of workers in every aspect related to the work. That provision makes the employer subject to the duty to ensure that workers have a safe working environment. The meaning of that duty is specified in Articles 6 to 12 of that directive and by various individual directives that lay down the preventive measures to be adopted in certain specific industrial sectors. Nevertheless, that provision simply embodies the general duty of safety to which the employer is subject, without specifying any form of liability.

The Court states that EU law does not harmonise the procedures applicable to the liability of the employer in the event of non-compliance with the requirements of Article 4(1) and Article 5(1) of Directive 89/391. Therefore, those procedures fall within the domestic legal system of the Member States, in accordance with the principle of procedural autonomy of Member States; nevertheless, they must be no less favourable than those governing similar domestic actions (principle of equivalence) and not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness).

When the Member States set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 89/391, they must ensure compliance with the right to an effective remedy and to a fair trial, enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, and which comprises various elements, including, in particular, the right to be heard.

Where a criminal court is called upon to rule on the civil liability arising from acts of which the defendant is accused, the right to be heard of the parties seeking to establish that liability would be infringed if it were not possible for them to adopt a position on a condition necessary for that liability to be incurred, before that condition is definitively settled.

The same would be true if the solution to be adopted as regards such a condition were decided, by a decision binding on the court called upon to rule on that liability, by another court before which the parties could not appear and did not, at the very least, have a genuine opportunity to present their arguments. By contrast, where the parties did have such a right and, in particular, had the genuine opportunity to present their arguments, the fact that they did not exercise that right is irrelevant.

Accordingly, it falls to the national court to ascertain whether the victim's successors, who were civil parties in the criminal proceedings, had the right to be heard before the administrative court regarding the definitive classification of the event at issue in the main proceedings as an 'accident at work'.

XI. ENVIRONMENT: CONSERVATION OF WILD BIRDS

Judgment of the Court of Justice (First Chamber), 12 September 2024, Elliniki Ornithologiki Etaireia and Others, C-66/23

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Directive 92/43/EEC – Directive 2009/147/EC – Conservation of wild birds – Conservation of natural habitats and of wild fauna and flora – Classification of a territory as a Special Protection Area – 'Classification' species – Temporary horizontal measures applied uniformly to all Special Protection Areas – Failure to adopt individualised management plans

The Court of Justice, hearing a request for a preliminary ruling from the Symvoulio tis Epikrateias (Council of State, Greece), specifies the scope of the obligations of the Member States relating to the adoption of special conservation measures in special protection areas (SPAs) under the Birds Directive, [96] read in conjunction with the Habitats Directive. [97]

Several associations and a large number of individuals brought two actions before the referring court for annulment of a ministerial decision adopted in 2012 to amend the measure transposing the Birds Directive into Greek law. By their actions, the applicants challenge the protection regime laid down in that decision in so far as, first, it does not cover all the bird species protected under Article 4 of the Birds Directive but only those which justified the designation of the zone concerned as an SPA and, second, it does not contain, for each SPA, individual conservation measures.

The referring court, uncertain as to the correct transposition of the Birds Directive into the Greek legal order, decided to make a reference to the Court.

Findings of the Court

The Court begins by recalling that the Birds Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the FEU Treaty applies. Under Article 4 of the directive, Member States must adopt special conservation measures relating to habitats that are capable, in particular, of ensuring the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of migratory species not listed in that annex which are, nevertheless, regular visitors (together, 'the protected species').

Article 4 of the Birds Directive thus establishes a regime which is specifically targeted and reinforced to protect those protected species, an approach justified by the fact that they are the most endangered species and the species constituting a common heritage of the European Union. In that context, the Member States must, in particular, classify as SPAs the most suitable territories in number and size for conservation of those protected species. Regarding protection requirements, Article 4 of the Birds Directive does not differentiate according to whether the SPA concerned was designated for the protected species pursuant to that provision, or whether such species are 'present' without that area having been deisgnated as an SPA for those other species.

Article 6(2) of the Habitats Directive, which applies to the SPAs designated pursuant to Article 4 of the Birds Directive, does, admittedly, require the Member States to take appropriate steps to avoid, in the

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96 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive').

97 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

special areas of conservation, 98 the deterioration of habitats and significant disturbance of the species 'for which [those] areas have been designated'. However, read in its context, that article confirms that, first, the relevant criterion for establishing conservation measures is that of the presence of species on the site concerned and, second, the level of protection against the deterioration of habitats and the disturbance of species must, inter alia, be determined by reference to the conservation objectives of the site concerned.

The Court therefore considers that the Member States are required to establish, for each SPA, individual conservation objectives and conservation measures for all the protected species and their habitat. In establishing the conservation objectives of a site, account must be taken not only of the species listed in Annex I to the Birds Directive and for regularly occurring migratory species not listed in that annex, for both of which an SPA was designated, but also other species of birds which must be protected under Article 4 of the Birds Directive and which are present in a significant manner in the SPA concerned, without that site having been designated as an SPA for those other species. A contrary interpretation cannot confer on protected species the specifically targeted and reinforced protection regime required for all those species by Article 4 of the Birds Directive.

In that context, Member States are responsible for defining priorities according to the significance of measures that could be envisaged in order to achieve conservation objectives in respect of all those species. To that effect, although the species and habitats for which a site has been designated as an SPA enjoy, naturally, priority status regarding special conservation measures that must be adopted and implemented on that site, the adoption of such conservation measures in respect of other vulnerable species present, such as rare bird species and bird species living naturally in an isolated manner on the site concerned, may prove useful or necessary to attain the relevant conservation objectives.

XII. ENERGY

Judgment of the General Court (Third Chamber, Extended Composition), 25 September 2024, TenneT TSO and TenneT TSO v ACER, T-482/21

Link to the full text of the judgment

Energy – Internal market for electricity – Capacity calculation region – Core region – Adoption by ACER of the methodology for cost sharing of redispatching and countertrading – Obligation to state reasons – Determination of the threshold for legitimate loop flows – Article 16(13) of Regulation (EU) 2019/943

Upholding the action for annulment brought by electricity transmission system operators ('TSOs'), the General Court annuls a decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) ('the Board of Appeal') on the ground that it is vitiated by illegality regarding the determination of the threshold for loop flows and by an inadequate statement of reasons. However, the Court confirms the lawfulness of the scope of a methodology for sharing the costs of redispatching and countertrading, adopted by ACER, which includes internal network elements that are not 'critical'.

98 The special conservation areas designated in accordance with the Habitats Directive are part of the network of protected sites Natura 2000, as are the SPAs provided for by the Birds Directive.

On 24 July 2015, the European Commission adopted Regulation 2015/1222. [99] That regulation sets out a series of requirements, in the electricity sector, relating to cross-zonal capacity allocation and congestion management in the day-ahead and intraday markets, including, in particular, a requirement to set a common methodology for sharing the costs of redispatching and countertrading of cross-border relevance. [100]

Pursuant to that regulation, the TSOs of the 'Core' region [101] submitted a proposal relating to that methodology to all the national regulatory authorities ('NRAs') of that region.

Since the NRAs did not reach an agreement on that proposal, on 30 November 2020, ACER adopted, pursuant to that regulation, a decision approving a cost sharing methodology ('the contested cost sharing methodology').

The applicants, TenneT TSO GmbH and TenneT TSO BV, in their capacity as TSOs that operate an electricity transmission system in part of Germany and in the Netherlands, respectively, then brought an appeal before the Board of Appeal against that decision. After that appeal was dismissed, they brought an action before the Court for annulment of the decision of the Board of Appeal ('the contested decision').

Findings of the Court

Before ruling on the substance, the Court declared the statement in intervention of the Federal Republic of Germany to be inadmissible in part, since some of the pleas in law put forward were not set out in sufficient detail to enable the Court to rule on them. Thus, the general reference to the statement in intervention submitted in a related case also seeking the annulment of the contested decision, annexed to the statement in intervention in the present case, cannot make up for the absence of the essential arguments in law which must appear in the statement in intervention.

Going on to its analysis of the substance, the Court examines in turn the three pleas in law raised by the applicants, namely, a plea alleging an error of law in the determination of the scope of the contested cost sharing methodology, a plea alleging that the flow decomposition method used in that methodology is unlawful and a plea alleging that the threshold for legitimate loop flows was determined incorrectly.

- *The plea concerning the scope of the contested cost sharing methodology*

As a preliminary point, the Court recalls that redispatching [102] and countertrading [103] constitute costly remedial actions [104]implemented to relieve physical congestion on the electricity transmission system.

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99 Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24).

100 Article 74 of Regulation 2015/2022.

101 The Core region is the geographic area comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia, established for the calculation of capacity in accordance with Article 15 of Regulation 2015/1222.

102 Under point 26 of Article 2 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54), redispatching is defined as a measure that is activated by one or more TSOs or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security.

103 Under point 27 of Article 2 of Regulation 2019/943, countertrading refers to a cross-zonal exchange initiated by system operators between two bidding zones to relieve physical congestion. Under point 4 of Article 2 of Regulation 2019/943, congestion, which is a risk to operational security that requires remedial action, is defined, for its part, as a situation in which all requests from market participants to trade between network areas cannot be accommodated because they would significantly affect the physical flows on network elements which cannot accommodate those flows. Congestion is caused by physical flows.

104 Under point 13 of Article 2 of Regulation 2015/1222, remedial action means any measure applied by a TSO or several TSOs in order to maintain operational security.

In that regard, Article 74(2) and (4) of Regulation 2015/1222 provides for the adoption of cost-sharing solutions for remedial actions of cross-border relevance and establishes that the cost sharing methodology must define which costs incurred from using redispatching or countertrading to guarantee the firmness of cross-zonal capacity are eligible for sharing between all the TSOs of a capacity calculation region, in the present case the Core region.

Furthermore, Article 16(13) of Regulation 2019/943 provides for the sharing of the costs of remedial actions intended to relieve congestion between two bidding zones [105] on the basis of the contribution of flows resulting from transactions internal to a zone to the congestion between two bidding zones observed.

The scope of the contested cost sharing methodology extends not only to cross-zonal network elements (interconnectors), but also to all internal network elements with a voltage level higher than or equal to 220 kilovolts (kV). According to that methodology, cross-border relevant redispatching and countertrading actions are, in principle, all actions intended to relieve congestion on cross-border relevant network elements, as identified inter alia by the methodology for regional operational security coordination for the Core region ('the ROSC methodology'). According to the ROSC methodology, cross-border relevant network elements are all critical network elements taken into account in the cross-zonal capacity calculation process, as well as internal network elements with a voltage level higher than or equal to 220 kV.

According to the applicants, the costs of remedial actions attributed to internal network elements that are not critical network elements should be excluded from cost sharing, since congestion on those elements is 'internal' congestion, which does not fall within the definition of congestion 'between zones'.

In that regard, the Court states that Article 74(4)(b) of Regulation 2015/1222 aims to share the costs of remedial actions that are intended to guarantee the firmness of cross-zonal capacity. Since Regulation 2015/1222 is an implementing act, it must be interpreted in accordance with its basic regulation, namely Regulation 2019/943, Article 16(13) of which refers, for its part, to the costs of remedial actions activated in order to ensure cross-zonal trade.

Thus, in order to ascertain whether the contested cost sharing methodology, as confirmed by the contested decision, is compatible with the abovementioned provisions, it is necessary to determine which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade in accordance with Article 16(13) of Regulation 2019/943, which will then make it possible to establish whether the remedial actions covered by the contested methodology are intended to guarantee the firmness of cross-zonal capacity, within the meaning of Article 74(4)(b) of Regulation 2015/1222.

First, the Court notes that the mere fact of including within the scope of the contested cost sharing methodology the costs incurred as a result of congestion on network elements with a voltage level higher than or equal to 220 kV cannot be contrary to Article 16(13) of Regulation 2019/943, since that provision merely entails determining which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade.

Second, the fact that congestion may be relieved by using up to 30% of the capacity of each critical network element, whereas 70% of that capacity must remain available for cross-zonal trade, does not mean that only the costs of remedial actions carried out on those critical elements must be shared. Remedial actions on non-critical network elements may contribute to relieving congestion on critical network elements, thereby guaranteeing the firmness of cross-zonal capacity.

Third, the Court adds that the costly remedial actions of redispatching and countertrading arise only in the regional operational security assessment process ('the CROSA process'), established by the

[105] Point 65 of Article 2 of Regulation 2019/943 defines a bidding zone as 'the largest geographical area within which market participants are able to exchange energy without capacity allocation'.

ROSC methodology, the objective of which is, inter alia, to coordinate cross-border relevant remedial actions within the meaning of that methodology. The remedial action optimisation provided for by that process involves determining the most effective remedial action to resolve congestion on all network elements (critical or non-critical) with a voltage level higher than or equal to 220 kV.

It follows that all congestion that is managed in a coordinated way as part of the CROSA process corresponds to congestion 'between zones' for the purposes of Article 16(13) of Regulation 2019/943, and that all the remedial actions activated as part of that process to relieve the congestion at issue contribute to guaranteeing the firmness of cross-zonal capacity, in accordance with Article 74(4)(b) of Regulation 2015/122. Consequently, in accordance with the 'polluter pays' principle, the costs of those remedial actions must be shared between the TSOs.

- *The plea concerning flow decomposition*

The applicants complain, in particular, that the Board of Appeal did not examine the arguments that they had raised against the flow decomposition method used in the contested cost sharing methodology, as confirmed by the contested decision.

As a preliminary point, the Court observes that flow decomposition, which is intended to identify the types of flow that cause congestion on network elements, is a necessary and important step in sharing the costs of remedial actions, since it provides input data necessary for the sharing of those costs. Thus, in so far as the applicants' arguments concerned the very design of the flow decomposition method used and, consequently, essential aspects of the contested decision, the Board of Appeal was required to respond to those arguments in order to discharge its obligation to state reasons. However, the contested decision is vitiated by an inadequate statement of reasons on that point, which does not enable the applicants to ascertain the reasons for that decision or the Court to exercise its power of review of that decision.

Since an inadequate statement of reasons constitutes an infringement of essential procedural requirements within the meaning of Article 263 TFEU, the Court annuls the contested decision on that basis.

- *The plea concerning the loop flow threshold*

The applicants dispute the threshold set by ACER in the contested cost sharing methodology, as confirmed by the Board of Appeal in the contested decision, with regard to loop flows, [106] which are among the types of physical flow that may cause congestion.

In that regard, the Court recalls that, according to Article 16(13) of Regulation 2019/943, the costs induced by flows resulting from internal transactions that contribute to the congestion between two bidding zones observed, but which are below the level that could be expected without structural congestion [107] in a bidding zone ('the threshold'), are to be excluded from the sharing of the costs of remedial actions referred to in that provision. Under that provision, the threshold must be analysed and defined by the TSOs for each individual bidding zone border.

In the present case, since the TSOs did not carry out the required analysis, ACER considered itself authorised, or even obliged, to set a temporary threshold itself without having that analysis at its disposal, in order to avoid a deadlock situation when adopting the contested cost sharing methodology. Thus, ACER set a common threshold for all bidding zones of the Core region, which it divided equally by the number of bidding zones from which loop flows originate.

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[106] According to the contested cost sharing methodology, a loop flow is 'a physical flow on a network element where the source and sink are located in the same bidding zone and the network element or even part of the network element is located in a different bidding zone'.

[107] Structural congestion is defined in point 6 of Article 2 of Regulation 2019/943 as 'congestion in the transmission system that is capable of being unambiguously defined, is predictable, is geographically stable over time, and frequently reoccurs under normal electricity system conditions'.

The Court finds that the threshold set by ACER does not comply with the requirements laid down in Article 16(13) of Regulation 2019/943, according to which the threshold must correspond to the 'level that could be expected without structural congestion' and must be defined 'for each individual bidding zone border'.

As regards the determination of the first requirement, the analysis required by the first subparagraph of Article 16(13) of Regulation 2019/943 presupposes, inter alia, an analysis of network investments and any alternative configurations of bidding zones that would remove structural congestions. ACER, which admits that it did not carry out such an analysis, set the threshold at 10% of the maximum capacity of the network element concerned as an 'average' of the divergent opinions provided by the TSOs concerned.

As regards the second requirement, although the allocation made by ACER results in an individual threshold for each bidding zone, in that that threshold is determined on the basis of the individual maximum capacity of each network element concerned and according to the number of bidding zones from which loop flows that pass through those network elements originate, it does not correspond to the individualisation required by that article, which requires the threshold to be determined on the basis of the characteristics of the bidding zones in question and the different borders between them.

Next, the Court examines whether ACER had, in the specific circumstances of the present case, an implicit competence authorising it to determine a threshold in a different way than that prescribed by Article 16(13) of Regulation 2019/943.

First of all, the Court observes that it cannot in principle be accepted, in the light of the principle of legality, that an agency of the European Union, such as ACER, may derogate from the applicable legal framework. Next, although Regulation 2019/943 allows ACER to adopt an interim decision in clearly defined circumstances, the determination of the threshold in the methodology for sharing the costs of remedial actions is not among those circumstances. Last, mere reliance on an interest linked to effectiveness is insufficient to create an implicit competence on the part of ACER, unless it corresponds to a real need to ensure the practical effect of the provisions at issue.

In that regard, ACER justified, inter alia, the need to adopt the contested cost sharing methodology, without being able to wait for the analysis prescribed by Article 16(13) of Regulation 2019/943, by the time limit set for it to adopt that methodology and the TSOs' delay in developing the proposal for a cost sharing methodology. However, first, the time limit set for ACER to adopt the methodology at issue was indicative and, therefore, capable of being extended. Second, the obligation to determine the threshold by carrying out the analysis provided for in Article 16(13) of Regulation 2019/943 entered into force after the TSOs of the Core region submitted their proposal for a cost sharing methodology to all the NRAs of the region. Moreover, ACER has not demonstrated that it facilitated the development of that analysis, when it was supposed to do so under the principle of sincere cooperation.

Having failed to demonstrate the existence of a real need to ensure the practical effect of the provisions at issue, ACER could not base its determination of the threshold in the contested cost sharing methodology on an implicit competence.

In the light of all the foregoing, the Court annuls the contested decision, adopted by the Board of Appeal, in so far as it upholds ACER's decision of 30 November 2020 and dismisses the applicants' appeal against that decision.

Judgment of the General Court (Third Chamber, Extended Composition), 25 September 2024, Polskie sieci elektroenergetyczne v ACER, T-483/21

Link to the full text of the judgment

Energy – Internal market for electricity – Common methodology for regional coordination of operational security – Rejection of the proposal of the system operators – Capacity calculation region – Core region – Compatibility with Regulation (EU) 2019/942, Regulation (EU) 2019/943 and Regulation (EU) 2017/1485

Dismissing the action for annulment brought by an electricity transmission system operator ('TSO'), the General Court specifies the scope of the competence of the European Union Agency for the Cooperation of Energy Regulators (ACER) to adopt a methodology for regional coordination of operational security of the electricity transmission system, before confirming the lawfulness of the scope of the methodology adopted by that agency.

On 2 August 2017, the European Commission adopted Regulation 2017/1485, [108] which sets out a series of requirements as regards the secure operation of the electricity transmission system.

Pursuant to that regulation, the TSOs of the 'Core' region [109] submitted a proposal for a common methodology for regional operational security coordination to all the national regulatory authorities ('NRAs') of that region for approval.

Upon the joint request of the NRAs, ACER ruled on the TSOs' proposal and adopted a decision on a methodology for regional operational security coordination for the Core region ('the contested ROSC methodology') that departed from the TSOs' proposal concerning the scope of that methodology.

The applicant, Polskie sieci elektroenergetyczne S.A., in its capacity as TSO responsible for the operation, maintenance and development of the Polish power grid, then brought an appeal before the Board of Appeal of ACER ('the Board of Appeal') against that decision by ACER. After that appeal was dismissed, it brought an action before the Court for annulment of the decision of the Board of Appeal.

Findings of the Court

As a preliminary point, the Court recalls that, according to the contested ROSC methodology, the regional operational security coordination governed by that methodology includes, on the one hand, regional operational security analysis and, on the other, the regional operational security assessment process ('the CROSA process'). The objective of the CROSA process is, inter alia, to coordinate and implement cross-border relevant remedial actions, [110] such as, amongst others, redispatching [111] and countertrading, [112] which are activated to relieve physical congestion on the electricity transmission

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108 Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (OJ 2017 L 220, p. 1).

109 The Core region is the geographic area comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia, established for the calculation of capacity in accordance with Article 15 of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24).

110 Under point 13 of Article 2 of Regulation 2015/1222, remedial action means any measure applied by a TSO or several TSOs in order to maintain operational security.

111 Under point 26 of Article 2 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54), redispatching is defined as a measure that is activated by one or more TSOs or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security.

112 Under point 27 of Article 2 of Regulation 2019/943, countertrading refers to a cross-zonal exchange initiated by system operators between two bidding zones to relieve physical congestion.

system and thus to limit the risks to operational security flowing from that congestion. For the purposes of the contested ROSC methodology, cross-border relevant remedial actions are all those that are at least sometimes able to relieve congestion on all the critical network elements taken into account for the calculation of cross-zonal capacity, and all other network elements with a voltage level higher than or equal to 220 kilovolts (kV).

It is in the light of that information that the Court examines the pleas raised by the applicant.

- *The plea concerning ACER's competence*

The Court rejects as inadmissible the applicant's plea alleging that ACER was not competent to depart from the TSOs' proposal concerning the scope of the contested ROSC methodology, on the ground that that plea does not appear to have been expressly challenged by the applicant before the Board of Appeal. Pleas not submitted before that board may not be put forward for the first time before the Court in an action for annulment, which must be examined in the light of the factual and legal context of the disputes as they were brought before that board.

In any event, the Court considers that plea to be unfounded, in so far as Article 6(10) of Regulation 2019/942 [113] and Article 6(8) of Regulation 2017/1485 empower ACER to rule on or adopt individual decisions on regulatory issues or problems affecting cross-border trade or cross-border network security falling within the competence of NRAs, such as the adoption of the contested ROSC methodology, inter alia if the competent NRAs have made, as in the present case, a joint request to ACER to that effect, without being bound by the position taken by those NRAs. It follows that ACER was competent, on the basis of those provisions, to depart from the TSOs' proposal concerning the scope of the contested ROSC methodology.

- *The plea concerning the scope of the contested ROSC methodology*

The applicant complains that the Board of Appeal erred in law in considering that the contested ROSC methodology, under which all congestion on network elements with a voltage level higher than or equal to 220 kV must be managed in a coordinated way through the CROSA process, was consistent with the applicable legal framework. Accordingly, while the parties agree that the network elements with a voltage level higher than or equal to 220 kV could have cross-border relevance, they disagree as to which specific congestions, on such elements, should be managed in a coordinated way through the CROSA process.

In that context, in the first place, the Court rejects the applicant's complaint that only the congestions caused by scheduled cross-border exchanges, namely allocated flows, should be managed in a coordinated way. In that regard, Article 76(2) of Regulation 2017/1485 provides that, 'in determining whether congestion [has] cross-border relevance, the TSOs shall take into account the congestion that would appear in the absence of energy exchanges between control areas.' Interpreting that provision with regard to its regulatory context, the Court determines that the ROSC methodology does not have to provide for the coordination of remedial actions on the basis of the origin of the congestion that those actions are intended to relieve, but on the basis of the cross-border relevance that those actions may have.

As is apparent from the contested ROSC methodology, in the light of the highly meshed interconnected network of the Core region, it was not generally possible to identify a network element that would have been affected only by remedial actions that would not have any impact on other cross-border relevant network elements, such that all remedial actions that were at least sometimes able to relieve congestion on network elements with a voltage level higher than or equal to 220 kV were to be regarded as having cross-border relevance and, consequently, had to be coordinated through the CROSA process.

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[113] Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22).

Accordingly, the Board of Appeal did not err in law in finding, in reliance on that technical assessment, that all congestion on network elements with a voltage level higher than or equal to 220 kV had to be managed in a coordinated way through the CROSA process, in accordance with the ROSC methodology.

In the second place, the Court considers that the definition of the scope of the contested ROSC methodology does not affect the TSOs' powers as regards the secure operation of their networks, as laid down in Article 35(5) of Regulation 2019/943 [114] and Article 40(1)(d) of Directive 2019/944, [115] in so far as it does not include remedial actions that do not need to be managed in a coordinated way through the CROSA process.

In addition, all the network elements and all the remedial actions available to the TSOs are not included, by default, in the contested ROSC methodology. It is, moreover, possible for the TSOs to exclude certain network elements or certain remedial actions that have no cross-border relevance from the scope of that methodology.

Last, the TSOs remain solely responsible for activating cross-border relevant remedial actions to ensure the operational security of their networks, since they are able to reject a remedial action recommended through the CROSA process that could lead to a violation of that security, or they may activate a remedial action where an unanticipated violation occurs.

In the third place, the Court finds that the scope of the contested ROSC methodology is compatible with Article 16 of the methodology for coordinating operational security analysis (CSAM), which requires TSOs in the Core region jointly to develop a proposal for an ROSC methodology, including rules for determining the cross-border relevance of remedial actions and the TSOs affected by those remedial actions in general. The procedure established by the contested ROSC methodology lays down the criteria for the creation by TSOs of a list of cross-border relevant network elements and for the identification of the cross-border relevance of a potential remedial action and lays down specific rules concerning the exclusion of network elements and remedial actions that have no cross-border relevance.

- *The plea concerning the absence of fair rules for cross-border exchanges in electricity and appropriate incentives for remedial actions related to hardware*

The applicant claims also that the Board of Appeal erred in law by not finding that the contested ROSC methodology failed to set fair rules for cross-border exchanges in electricity and to provide appropriate incentives for remedial actions related to hardware such as phase-shifting transformers. [116]

In that regard, the Court recognises that the contested ROSC methodology may generate additional costs for certain TSOs that have already invested in hardware such as phase-shifting transformers, where congestion management in the CROSA process requires both a change in the configuration of the phase-shifting transformers and costly remedial actions, such as redispatching. First, the mere fact that a TSO may bear higher costs as a result of regional coordination cannot mean that the rules laid down by the contested ROSC methodology are unfair or that they are incapable of promoting regional coordination of system operation. The costs arising as a result of the application of the

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114 Under Article 35(5) of Regulation 2019/943, TSOs are responsible for managing electricity flows and ensuring a secure, reliable and efficient electricity system, in accordance with Article 40(1)(d) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125).

115 Under Article 40(1)(d) of Directive 2019/944, each TSO is to be responsible for managing electricity flows on the system, taking into account exchanges with other interconnected systems. To that end, the TSO is to be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services, including those provided by demand response and energy storage facilities, in so far as such availability is independent from any other transmission systems with which its system is interconnected.

116 Phase-shifting transformers allow congestion to be relieved by 'shunting' electricity from an overloaded power line to a less used power line.

regional solution selected through the CROSA process are inherent in regional coordination and constitute a tangible expression of the principle of energy solidarity. Second, it has not been demonstrated that the effect of the contested ROSC methodology is to discourage the TSOs from investing in hardware such as phase-shifting transformers, which may in fact reduce the costs incurred by the TSOs in relieving local congestion before the CROSA process starts.

- *The other pleas relied on by the applicant*

The Court furthermore considers that, contrary to the applicant's claims, the Board of Appeal did not err in law by not finding an infringement of the provisions guaranteeing the TSOs' ability to use the central dispatching model [117] to manage national congestion or to carry out electricity system balancing tasks. The applicant has not demonstrated that the contested ROSC methodology prevents it from using that central dispatching model to ensure the operational security of its network.

The Court also rejects the plea alleging infringement of the provisions ensuring compliance with operational security limits, in particular voltage limits, [118] at local and regional level, after finding that the applicant had not succeeded in demonstrating that the Board of Appeal erred in law in finding that the contested ROSC methodology did not impede, at local and regional level, compliance with those limits.

Last, the Court finds that the Board of Appeal stated sufficient reasons for its decision and rejects the applicant's plea alleging a failure to state reasons.

In the light of all of the foregoing, the Court dismisses the action in its entirety.

Judgment of the General Court (Third Chamber, Extended Composition), 25 September 2024, BNetzA v ACER, T-485/21

Link to the full text of the judgment

Energy – Internal market for electricity – Capacity calculation region – Core region – Adoption by ACER of the methodology for cost sharing of redispatching and countertrading – Determination of the threshold for legitimate loop flows – Article 16(13) of Regulation (EU) 2019/943

Upholding the action for annulment brought by a national regulatory authority ('NRA'), the General Court annuls a decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) ('the Board of Appeal') on the ground that it is vitiated by illegality regarding the determination of the threshold for loop flows. However, the Court confirms, first, the lawfulness of the scope of a methodology for sharing the costs of redispatching and countertrading, adopted by ACER, which includes internal network elements that are not 'critical' and, second, the prioritisation of loop flows in the sharing of costs.

On 24 July 2015, the European Commission adopted Regulation 2015/1222. [119] That regulation sets out a series of requirements, in the electricity sector, relating to cross-zonal capacity allocation and

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117 Under point 18 of Article 2 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6), the central dispatching model means a 'scheduling and dispatching model where the generation schedules and consumption schedules as well as dispatching of power generating facilities and demand facilities, in reference to dispatchable facilities, are determined by a TSO within the integrated scheduling process'.

118 Articles 76 and 77 of Regulation 2017/1485, read in conjunction with Article 25 and Article 4(1)(d) and (h) and (2)(e) of that regulation.

119 Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24).

congestion management in the day-ahead and intraday markets, including, in particular, a requirement to set a common methodology for sharing the costs of redispatching and countertrading of cross-border relevance. [120]

Pursuant to that regulation, the transmission system operators ('TSOs') of the 'Core' [121] region submitted a proposal relating to that methodology to all the NRAs of that region.

Since the NRAs did not reach an agreement on that proposal, on 30 November 2020, ACER adopted, pursuant to that regulation, a decision approving a cost sharing methodology ('the contested cost sharing methodology').

The applicant, Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), in its capacity as the German NRA, then brought an appeal before the Board of Appeal against that decision. After that appeal was dismissed, it brought an action before the Court for annulment of the decision of the Board of Appeal ('the contested decision').

Findings of the Court

The Court examines three of the pleas in law raised by the applicant, namely, a plea alleging that the scope of the contested cost sharing methodology was unlawfully extended, a plea alleging that priority was incorrectly given to loop flows over internal flows in the sharing of costs and a plea alleging that the threshold for legitimate loop flows was determined incorrectly.

- *The plea concerning the scope of the contested cost sharing methodology*

As a preliminary point, the Court recalls that redispatching [122] and countertrading constitute costly remedial actions [123] implemented to relieve physical congestion on the electricity transmission system.

In that regard, Article 74(2) and (4) of Regulation 2015/1222 provides for the adoption of cost-sharing solutions for remedial actions of cross-border relevance and establishes that the cost sharing methodology must define which costs incurred from using redispatching or countertrading to guarantee the firmness of cross-zonal capacity are eligible for sharing between all the TSOs of a capacity calculation region, in the present case the Core region.

Furthermore, Article 16(13) of Regulation 2019/943 provides for the sharing of the costs of remedial actions intended to relieve congestion between two bidding zones [124] on the basis of the contribution of flows resulting from transactions internal to a zone to the congestion between two bidding zones observed.

The scope of the contested cost sharing methodology extends not only to cross-zonal network elements (interconnectors), but also to all internal network elements with a voltage level higher than or equal to 220 kilovolts (kV). According to that methodology, cross-border relevant redispatching and countertrading actions are, in principle, all actions intended to relieve congestion on cross-border relevant network elements, as identified inter alia by the methodology for regional operational

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120 Article 74 of Regulation 2015/2022.

121 The Core region is the geographic area comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia, established for the calculation of capacity in accordance with Article 15 of Regulation 2015/1222.

122 Under point 26 of Article 2 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54), redispatching is defined as a measure that is activated by one or more TSOs or distribution system operators by altering the generation, load pattern, or both, in order to change physical flows in the electricity system and relieve a physical congestion or otherwise ensure system security.

123 Under point 13 of Article 2 of Regulation 2015/1222, remedial action means any measure applied by a TSO or several TSOs in order to maintain operational security.

124 Point 65 of Article 2 of Regulation 2019/943 defines a bidding zone as 'the largest geographical area within which market participants are able to exchange energy without capacity allocation'.

security coordination for the Core region ('the ROSC methodology'). According to the ROSC methodology, cross-border relevant network elements are all critical network elements taken into account in the cross-zonal capacity calculation process, as well as internal network elements with a voltage level higher than or equal to 220 kV.

According to the applicant, the costs of remedial actions attributed to internal network elements that are not interconnectors or, at most, critical network elements should be excluded from cost sharing, since congestion on those elements is 'internal' congestion, which does not fall within the definition of congestion 'between zones'.

In that regard, the Court states that Article 74(4)(b) of Regulation 2015/1222 aims to share the costs of remedial actions that are intended to guarantee the firmness of cross-zonal capacity. Since Regulation 2015/1222 is an implementing act, it must be interpreted in accordance with its basic regulation, namely Regulation 2019/943, Article 16(13) of which refers, for its part, to the costs of remedial actions activated in order to ensure cross-zonal trade.

Thus, in order to ascertain whether the contested cost sharing methodology, as confirmed by the contested decision, is compatible with the abovementioned provisions, it is necessary to determine which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade in accordance with Article 16(13) of Regulation 2019/943, which will then make it possible to establish whether the remedial actions covered by the contested methodology are intended to guarantee the firmness of cross-zonal capacity, within the meaning of Article 74(4)(b) of Regulation 2015/1222.

First, the Court notes that the mere fact of including within the scope of the contested cost sharing methodology the costs incurred as a result of congestion on network elements with a voltage level higher than or equal to 220 kV cannot be contrary to Article 16(13) of Regulation 2019/943, since that provision merely entails determining which congestion is to be relieved in a coordinated way in order to ensure cross-zonal trade.

Second, the fact that congestion may be relieved by using up to 30% of the capacity of each critical network element, whereas 70% of that capacity must remain available for cross-zonal trade, does not mean that only the costs of remedial actions carried out on those critical elements must be shared. Remedial actions on non-critical network elements may contribute to relieving congestion on critical network elements, thereby guaranteeing the firmness of cross-zonal capacity.

Third, the Court adds that the costly remedial actions of redispatching and countertrading arise only in the regional operational security assessment process ('the CROSA process'), established by the ROSC methodology, the objective of which is, inter alia, to coordinate cross-border relevant remedial actions within the meaning of that methodology. The remedial action optimisation provided for by that process involves determining the most effective remedial action to resolve congestion on all network elements (critical or non-critical) with a voltage level higher than or equal to 220 kV.

It follows that all congestion that is managed in a coordinated way as part of the CROSA process corresponds to congestion 'between zones' for the purposes of Article 16(13) of Regulation 2019/943, and that all the remedial actions activated as part of that process to relieve the congestion at issue contribute to guaranteeing the firmness of cross-zonal capacity, in accordance with Article 74(4)(b) of Regulation 2015/122. Consequently, in accordance with the 'polluter pays' principle, the costs of those remedial actions must be shared between the TSOs.

- *The plea concerning the prioritisation of loop flows*

The applicant claims that the contested cost sharing methodology incorrectly prioritises loop flows over internal flows as a source of congestion, which is not consistent with Article 16(13) of Regulation 2019/943, according to which costs must be shared 'based on the contribution to the congestion' of those flows.

Under the contested cost sharing methodology, once the overload [125] has been identified on the network element in question, an order of priority is established between the various types of flow, under which burdening loop flows above a certain threshold are identified as the first contributor to any overload, while burdening internal flows are identified as the second contributor to that overload.

While specifying that flows contribute to the overload only to the extent that they exceed the maximum capacity of the network element in question, the Court notes that the share of the costs relating to internal flows and loop flows is determined according to the volume of those flows which exceed the maximum capacity of the network element in question, in accordance with the order of priority established in the contested cost sharing methodology.

In addition, the Court finds that the words 'based on the contribution to the congestion' used in Article 16(13) of Regulation 2019/943 may be understood as meaning that all of the flows on the network element in question 'contribute' in the same way to any congestion. However, the Court states that Article 16(13) of Regulation 2019/943 itself introduces a differentiation between internal flows and loop flows, by providing for the determination of a threshold for flows resulting from internal transactions that are below the level that could be expected without structural congestion in a bidding zone ('the threshold'). According to the Court, it appears that that threshold is required to be determined only for loop flows, given that it must be defined for each individual bidding zone border. In addition, even without structural congestion, the determination of a threshold for loop flows is justified by the fact that such flows are, to a certain extent, inevitable in a highly meshed interconnected electricity network and must therefore be excluded from the sharing of the costs incurred as a result of remedial actions where they do not exceed that threshold.

In those circumstances, Article 16(13) of Regulation 2019/943 must be interpreted as allowing internal flows and loop flows that exceed the threshold to be treated differently for the purpose of sharing the costs of remedial actions, and such differentiation appears to be justified by their different nature, in the context of the legislation at issue.

- *The plea concerning the loop flow threshold*

The applicant also disputes the threshold set by ACER in the contested cost sharing methodology, as confirmed by the Board of Appeal in the contested decision, with regard to loop flows. [126]

In that regard, the Court recalls that, according to Article 16(13) of Regulation 2019/943, costs induced by flows resulting from internal transactions that contribute to the congestion between two bidding zones observed, but which are below the level that could be expected without structural congestion [127] in a bidding zone, are to be excluded from the sharing of the costs of remedial actions referred to in that provision. Under that provision, the threshold must be analysed and defined by the TSOs for each individual bidding zone border.

In the present case, since the TSOs did not carry out the required analysis, ACER considered itself authorised, or even obliged, to set a temporary threshold itself without having that analysis at its disposal, in order to avoid a deadlock situation when adopting the contested cost sharing methodology. Thus, ACER set a common threshold for all bidding zones of the Core region, which it divided equally by the number of bidding zones from which loop flows originate.

The Court finds that the threshold set by ACER does not comply with the requirements laid down in Article 16(13) of Regulation 2019/943, according to which the threshold must correspond to the 'level

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125 The overload corresponds, in principle, to the volume of flows that exceeds the maximum capacity of the network element in question.

126 According to the contested cost sharing methodology, a loop flow is 'a physical flow on a network element where the source and sink are located in the same bidding zone and the network element or even part of the network element is located in a different bidding zone'.

127 Structural congestion is defined in point 6 of Article 2 of Regulation 2019/943 as 'congestion in the transmission system that is capable of being unambiguously defined, is predictable, is geographically stable over time, and frequently reoccurs under normal electricity system conditions'.

that could be expected without structural congestion' and must be defined 'for each individual bidding zone border'.

As regards the determination of the first requirement, the analysis required by the first subparagraph of Article 16(13) of Regulation 2019/943 presupposes, inter alia, an analysis of network investments and any alternative configurations of bidding zones that would remove structural congestions. ACER, which admits that it did not carry out such an analysis, set the threshold at 10% of the maximum capacity of the network element concerned as an 'average' of the divergent opinions provided by the TSOs concerned.

As regards the second requirement, although the allocation made by ACER results in an individual threshold for each bidding zone, in that that threshold is determined on the basis of the individual maximum capacity of each network element concerned and according to the number of bidding zones from which loop flows that pass through those network elements originate, it does not correspond to the individualisation required by that article, which requires the threshold to be determined on the basis of the characteristics of the bidding zones in question and the different borders between them.

Next, the Court examines whether ACER had, in the specific circumstances of the present case, an implicit competence authorising it to determine a threshold in a different way than that prescribed by Article 16(13) of Regulation 2019/943.

First of all, the Court observes that it cannot in principle be accepted, in the light of the principle of legality, that an agency of the European Union, such as ACER, may derogate from the applicable legal framework. Next, although Regulation 2019/943 allows ACER to adopt an interim decision in clearly defined circumstances, the determination of the threshold in the methodology for sharing the costs of remedial actions is not among those circumstances. Last, mere reliance on an interest linked to effectiveness is insufficient to create an implicit competence on the part of ACER, unless it corresponds to a real need to ensure the practical effect of the provisions at issue.

In that regard, ACER justified, inter alia, the need to adopt the contested cost sharing methodology, without being able to wait for the analysis prescribed by Article 16(13) of Regulation 2019/943, by the time limit set for it to adopt that methodology and the TSOs' delay in developing the proposal for a cost sharing methodology. However, first, the time limit set for ACER to adopt the methodology at issue was indicative and, therefore, capable of being extended. Second, the obligation to determine the threshold by carrying out the analysis provided for in Article 16(13) of Regulation 2019/943 entered into force after the TSOs of the Core region submitted their proposal for a cost sharing methodology to all the NRAs of the region. Moreover, ACER has not demonstrated that it facilitated the development of that analysis, when it was supposed to do so under the principle of sincere cooperation.

Having failed to demonstrate the existence of a real need to ensure the practical effect of the provisions at issue, ACER could not base its determination of the threshold in the contested cost sharing methodology on an implicit competence.

In the light of all the foregoing, the Court annuls the contested decision, adopted by the Board of Appeal, in so far as it upholds ACER's decision of 30 November 2020 and dismisses the applicant's appeal against that decision.

XIII. COMMON FOREIGN AND SECURITY POLICY

1. RESTRICTIVE MEASURES

Judgment of the General Court (Ninth Chamber), 4 September 2024, Al-Assad v Council, T-370/23

Link to the judgment as published in extract form

Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds and economic resources – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion of the applicant's name on the list – Family membership criterion – Plea of illegality – Requirement that any limitation must be provided for by law – Error of assessment – Right to property

By its judgment, the General Court dismisses the action for annulment brought by Mr Samer Kamal Al-Assad against the acts by which, in 2023, [128] the Council of the European Union included his name on the lists of persons subject to restrictive measures in view of the situation in Syria.

This case affords the Court the opportunity to rule, for the first time, on the lawfulness of the criterion enabling the Council to adopt restrictive measures against 'members of the Assad or Makhlouf families' set out in Article 27(2)(b) and Article 28(2)(b) of Decision 2013/255, [129] as amended by Decision 2015/1836 ('the family membership criterion'). In addition, in 2015, Article 15 of Regulation No 36/2012 [130] was supplemented by paragraph 1a(b), which provides for the assets of the members of those families to be frozen.

The name of the applicant - who is a businessman of Syrian nationality - was included on the lists at issue as a member of the Assad family, involved in activities relating to the production of, and trade in, narcotics.

Findings of the Court

As regards, in the first place, the complaint alleging that the family membership criterion breaches the principle of legality and, consequently, infringes the rights to property and to respect for private and family life, the Court notes, first of all, that the right to property and the right to respect for private life are not absolute rights. Under Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), their exercise may be subject to restrictions provided that the limitations concerned are provided for by law, respect the essence of the fundamental right in question and, subject to the principle of proportionality, are necessary and meet objectives of general interest recognised by the European Union.

Next, the Court recalls that the principle of legality, established by the words 'provided for by law' in Article 52(1) of the Charter, means that any limitation on the rights and freedoms enshrined in the Charter must have a legal basis which itself defines, clearly and precisely, the scope of the limitation on their exercise. However, that requirement does not preclude, on the one hand, the limitation in question from being formulated in terms which are sufficiently open to be able to adapt to different

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128 Council Implementing Decision (CFSP) 2023/847 of 24 April 2023 implementing Decision 2013/255/CFSP concerning restrictive measures in view of the situation in Syria (OJ 2023 L 109 I, p. 26) and Council Implementing Regulation (EU) 2023/844 of 24 April 2023 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2023 L 109 I, p. 1).

129 Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures in view of the situation in Syria (OJ 2013 L 147, p. 14), as amended by Council Decision (CFSP) 2015/1836 of 12 October 2015 (OJ 2015 L 266, p. 75).

130 Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1), as amended by Council Regulation (EU) 2015/1828 of 12 October 2015 (OJ 2015 L 266, p. 1).

scenarios and keep pace with changing circumstances and, on the other hand, the Court of Justice of the European Union from, where appropriate, specifying, by means of interpretation, the actual scope of the limitation in the light of the very wording of the EU legislation in question as well as its general scheme and the objectives it pursues.

In the present case, the Court takes the view that the family membership criterion does not allow the Council to impose restrictive measures on all persons with the surname Assad, whether or not they are associated with that family, which is currently in power in Syria.

First, all decisions to include a person on the lists at issue are to be made on an individual and case-by-case basis taking into account the proportionality of the measure. [131] Secondly, the family membership criterion forms part of a legal framework that is clearly delineated by the objectives pursued, [132] in particular, by the basic legislation [133].

In addition, the scope of the family membership criterion, although worded in open terms, is circumscribed by recital 7 of Decision 2015/1836 and is therefore capable of targeting only a clearly identifiable circle of persons, namely those associated with the Assad family currently in power in Syria. It follows that persons with the surname Assad fall within the scope of the family membership criterion only if they have family ties to the Assad family currently governing Syria. Furthermore, persons with family ties to the Assad family in power in Syria may have their names included on the lists at issue on the basis of the family membership criterion, even if they do not have the surname Assad.

Finally, as regards the applicant's argument concerning non-observance of the principle of personal responsibility, the Court states that it does indeed follow from the case-law that, in accordance with the principle that penalties must be specific to the offender, a natural or legal person may be penalised only for acts imputed to that person individually. However, by their precautionary nature and their preventive purpose, restrictive measures can be distinguished from criminal or administrative penalties. Specifically, the objective pursued by the restrictive measures adopted in view of the situation in Syria is not to penalise the persons or entities which they target, but to exert pressure, through those measures, on the Syrian regime in order to have it bring an end to the policy of violent repression against the civilian population in Syria. Furthermore, all listing decisions are to be made on an individual basis, with the result that there can be no automatic listing on the basis of the family membership criterion. Therefore, the applicant cannot invoke the principle of personal responsibility in order to challenge the lawfulness of that criterion.

Taking the view, therefore, that the family membership criterion, read in conjunction with the objective of applying pressure on the Syrian regime in order to force it to put an end to its policy of repression, defines, in an objective and sufficiently precise manner, a limited category of persons liable to be subject to restrictive measures, the Court concludes that that criterion establishes a clear and precise provision which meets the requirements flowing from the principle of legality.

In the second place, the Court rejects the complaint alleging breach of the principle of non-discrimination. As a preliminary point, the Court recalls that the principle of equal treatment, of which the principle of non-discrimination is a particular expression, prohibits comparable situations from being treated differently or different situations from being treated in the same way, unless such difference in treatment is objectively justified.

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131 See Article 27(4) and Article 28(4) of Decision 2013/255, as amended by Decision 2015/1836.

132 It is apparent from recital 7 of Decision 2015/1836 that the power of the current Syrian regime 'is concentrated in influential members of the Assad and Makhlouf families' and that the Council therefore imposed restrictive measures on certain members of those families 'both to directly influence the regime through members of those families to change its policies of repression, as well as to avoid the risk of circumvention of restrictive measures through family members'.

133 Regulation No 36/2012 and Decision 2013/255.

A difference in treatment is justified if it is based on an objective and reasonable criterion and is proportionate to the aim pursued by the treatment.

The Court notes, however, that in the field of restrictive measures, the Council has a broad discretion as regards the definition and adoption of the listing criteria. Therefore, the legality of restrictive measures is not dependent on their being found to have immediate effects; all that is required is that they are not manifestly inappropriate in regard to the objective that the competent institution seeks to pursue.

In the present case, the Court finds, first of all, that, contrary to the applicant's claims, the restrictive measures adopted on the basis of the family membership criterion do not constitute a criminal penalty. In addition, they pursue an objective of general interest recognised by the European Union. Consequently, the freezing of the funds and other economic resources, and the prohibition of entry into the territory of the European Union, of persons identified as being involved in supporting the Syrian regime cannot, in themselves, be regarded as inappropriate.

Next, the Court states that the applicant does not specify how or in relation to whom the application of the family membership criterion is discriminatory. Nor does he provide specific examples of other persons who are in a situation comparable to his own and who are treated differently. Accordingly, the Court is not in a position to ascertain whether his claims are well founded in fact.

Finally, the Court rejects the applicant's argument that the family membership criterion leads to a result which is disproportionate to the objective pursued by the restrictive measures, since, as the Syrian President's second cousin, it is impossible for him to rebut the presumption that he has ties to the Syrian regime. It is apparent from the contested acts that any person, notwithstanding the capacity or status by virtue of which his or her name was included on the lists at issue, may adduce evidence to challenge the inclusion or retention of his or her name on those lists.

In the light of all the foregoing, the Court rejects the plea of illegality in its entirety.

Judgment of the General Court (Ninth Chamber), 4 September 2024, Sharif v Council, T-503/23

Link to the judgment as published in extract form

Common foreign and security policy – Restrictive measures adopted in view of the situation in Syria – Freezing of funds – Restrictions on entry into the territories of the Member States – Maintaining the applicant's name on the lists of persons, entities and bodies concerned – Criterion of association with members of the Assad or Makhlouf families – Plea of illegality – Errors of assessment – Non-contractual liability

By its judgment, the General Court dismisses the action for annulment brought by Mr Ammar Sharif against the acts by which, in 2023, his name was maintained on the lists of persons and entities subject to the restrictive measures taken against the Syrian Arab Republic by the Council of the European Union ('the lists at issue'). [134] In particular, it specifies the scope of the criterion of association with members of the Assad or Makhlouf families established by Decision 2013/255 [135] and

[134] Council Decision (CFSP) 2023/1035 of 25 May 2023 amending Decision 2013/255/CFSP concerning restrictive measures in view of the situation in Syria (OJ 2023 L 139, p. 49) and Council Implementing Regulation (EU) 2023/1027 of 25 May 2023 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2023 L 139, p. 1) (together, 'the 2023 acts').

[135] Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures in view of the situation in Syria (OJ 2013 L 147, p. 14), as amended by Council Decision (CFSP) 2015/1836 of 12 October 2015 (OJ 2015 L 266, p. 75).

the rules concerning the burden of proof and the rebuttal of the presumption of association with the Syrian regime established by that decision.

Mr Ammar Sharif is associated with Mr Rami Makhlouf, his brother-in-law. His name was initially included on the lists at issue in 2016 as a leading Syrian businessman active in the banking, insurance and hospitality sectors. [136] His name was maintained on those lists from 2020 due to his association with his brother-in-law, Mr Rami Makhlouf. [137] The latter reason was based on the criterion, set out in the final part of Article 27(2) and the final part of Article 28(2) of Decision 2013/255, as amended by Decision 2015/1836, read in conjunction with the criterion defined in paragraph 2(b) of each of those provisions, reproduced, as regards the freezing of funds, in the final part of Article 15(1a) of Regulation No 36/2012, [138] as amended by Regulation 2015/1828, read in conjunction with the criterion set out in paragraph 1a(b) of that provision.

Findings of the Court

According to the applicant, the provisions of Decision 2013/255, laying down the criterion of association with members of the Assad or Makhlouf families, breach the principle of equal treatment in so far as it is theoretically and practically impossible for the persons included on the lists at issue, due to their association with members of the Assad or Makhlouf families, to rebut the presumption of association with the Syrian regime.

The Court observes, first of all, that it is clear from the wording of Article 27(3) and Article 28(3) of Decision 2013/255, as amended by Decision 2015/1836, that those provisions [139] apply to all categories of persons referred to in paragraph 2 of those two articles, thus including the persons on the lists at issue due to their association with members of the Assad or Makhlouf families. Consequently, the applicant's argument relating to the theoretical impossibility of rebutting the presumption at issue must be rejected.

Next, as regards the alleged practical impossibility, the Court finds that it is true that a family tie cannot, in principle, be dissolved. Nevertheless, it does not follow from the wording of Article 27(3) and Article 28(3) of Decision 2013/255, as amended by Decision 2015/1836, that persons included on the lists at issue, due to their family ties to members of the Assad or Makhlouf families, are required necessarily to provide evidence of the dissolution of that family tie to demonstrate that they are not, or are no longer, associated with the Syrian regime, do not exercise influence over it or do not pose a real risk of circumvention. Various measures are available to the applicant to rebut the presumption of association with the Syrian regime; accordingly, he is not restricted to demonstrating the dissolution of the family ties with Mr Rami Makhlouf or to waiting for the latter's name to be removed from the lists at issue. Persons who are associated with members of the Assad or Makhlouf families can, inter alia, distance themselves from the Syrian regime due to their individual conduct and thus provide evidence that they are no longer associated with it. Therefore, being the brother-in-law of Mr Rami Makhlouf does not in any way prevent the applicant from demonstrating that he has severed all ties with the Syrian regime or that he does not pose a real risk of circumvention.

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136 Council Implementing Decision (CFSP) 2016/1897 of 27 October 2016 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2016 L 293, p. 36) and Council Implementing Regulation (EU) 2016/1893 of 27 October 2016 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2016 L 293, p. 25).

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

138 Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1), as amended by Council Regulation (EU) 2015/1828 of 12 October 2015 (OJ 2015 L 266, p. 1).

139 Under Article 27(3) and Article 28(3) of Decision 2013/255, as amended by Decision 2015/1836, persons in one of the categories referred to in paragraph 2 of Article 27 and Article 28 of Decision 2013/255 are not to be included or maintained on the lists of persons and entities appearing in Annex I to that decision if there is sufficient information indicating that they are not, or are no longer, associated with the regime or do not exercise influence over it or do not pose a real risk of circumvention.

Lastly, as regards the applicant's arguments seeking to obtain a declaration that the Council failed to duly review Mr Rami Makhlouf's situation even though it has allegedly evolved considerably, the Court points out that it is not for it, in the present action brought by Mr Ammar Sharif, to rule on the merits of the inclusion of Mr Rami Makhlouf's name on the lists at issue. Moreover, the Court observes that the applicant can, in accordance with Article 32(2) and (3) of Regulation No 36/2012, at any time, submit a request to the Council in order to ask it to review his situation in the light of that of Mr Rami Makhlouf, which he however did not do in the present case.

Judgment of the Court of Justice (Second Chamber), 5 September 2024, Jemerak, C-109/23

Link to the full text of the judgment

Reference for a preliminary ruling – Common foreign and security policy – Restrictive measures taken in view of Russia's actions destabilising the situation in Ukraine – Regulation (EU) No 833/2014 – Article 5n(2) and (6) – Prohibition on the direct or indirect provision of legal advisory services to the Russian Government or to legal persons, entities or bodies established in Russia – Exemption concerning the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitration proceedings in a Member State – Authentication and execution, by a notary, of a contract for the sale of immovable property – Assistance provided by an interpreter during such authentication

In a reference for a preliminary ruling from the Landgericht Berlin (Regional Court, Berlin, Germany), the Court rules on the scope of the prohibition on the provision of legal advisory services to legal persons established in Russia laid down in Article 5n(2) of Regulation No 833/2014, [140] as amended by Regulation 2022/1904, [141] which concerns restrictive measures adopted by the Council of the European Union in view of Russia's actions destabilising the situation in Ukraine.

GM and ON, German nationals, were preparing to purchase an apartment located in Berlin (Germany) and owned by Visit Moscow Ltd, a legal person established in Russia. For the purposes of that transaction, GM, ON and Visit-Moscow approached PR, a notary practising in Germany, asking him to draw up a contract of sale in the form of a notarial act and to arrange subsequently for that contract to be executed. In 2022, PR however refused to authenticate the contract of sale on the ground that it could not rule out the possibility that authentication would infringe the prohibition laid down in Article 5n(2) of Regulation No 833/2014. Since he did not accede to the request to reconsider that refusal made by GM, ON and Visit-Moscow, PR forwarded the appeal brought by them against that refusal to the Berlin Regional Court, which referred various questions to the Court for a preliminary ruling in that regard.

Findings of the Court

In the first place, the Court notes that, according to its ordinary meaning in everyday language, the term 'legal advice' generally refers to an opinion on a question of law. The term 'legal advice' used in combination with the term 'services', expressed as 'legal advisory services' in Article 5n(2) of Regulation No 833/2014, refers to the pursuit of an activity of an economic nature, based on a relationship between a service provider and his or her client, the purpose of which is the provision of

140 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1).

141 Council Regulation (EU) No 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 259 I, p. 3).

legal advice, and by which a provider delivers advice on questions of law to persons seeking that advice.

That meaning of the term 'legal advisory services' is confirmed by recital 19 of Regulation 2022/1904. First, that recital refers to a relationship between a service provider and his or her 'customers' or 'clients' and describes the role of that service provider as the provision of assistance and advice to them, in their interest, as regards the legal aspects of their transactions with third parties. Second, it refers to ancillary activities consisting of 'the preparation, execution and verification of legal documents'.

Thus, the activities covered by the concept of 'legal advisory services', within the meaning of Article 5n(2) of Regulation No 833/2014, are clearly different from those which public authorities may be required to perform. Those public authorities do not have the task of providing services consisting in giving opinions on questions of law to persons in order to promote or defend the individual interests of those persons.

In the present case, the Court notes that, in the context of the authentication of a contract for the sale of immovable property, it appears that a notary does not act with the aim of promoting the specific interests of one or the other of the parties concerned, or both, but acts impartially, maintaining an equal distance from those parties and their respective interests, solely in the interests of the law and legal certainty. Therefore, in the light of the specific rules governing the procedure for the notarial authentication of acts and the legal effects deriving from authentic acts in the German legal system, the authentication by a notary - such as that governed by German law - of a contract for the sale of immovable property owned by a legal person established in Russia is not covered by the concept of 'legal advisory services' referred to in Article 5n(2) of Regulation No 833/2014 and, consequently, does not fall within the scope of the prohibition on the provision of such services to such a legal person, laid down in subparagraph (b) of that provision.

The Court observes in that regard that, if Article 5n(2) of that regulation were to be interpreted to the contrary, that would lead to inconsistencies, on the one hand, in the application of that regulation and, on the other, between that regulation and Regulation No 269/2014 [142].

Transactions concerning immovable property situated within the territory of the European Union and owned by legal persons established in Russia remain authorised under Regulation No 833/2014. In practice, however, those transactions could be hindered in certain Member States in which the notarial authentication of a contract for the sale of immovable property constitutes an essential condition for the disposal of such property, irrespective of whether or not those legal persons are subject to a prohibition on disposing of their assets in accordance with Regulation No 269/2014.

Such variability in the effects of the prohibition laid down in Article 5n(2) of Regulation No 833/2014 from one Member State to another, depending on the existing notarial system, could not have been the aim of the EU legislature.

Moreover, the interpretation adopted is not contrary to the aim of Regulation No 833/2014 or that of Regulation No 269/2014.

First of all, it is not apparent from either Decision 2022/1909, [143] Regulation No 833/2014 or Regulation 2022/1904 that, by imposing a prohibition on the provision of legal advisory services, the Council intended to ensure that legal persons established in Russia would be unable, in certain Member States, to dispose of their immovable property.

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142 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6).

143 Council Decision (CFSP) 2022/1909 of 6 October 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 259 I, p. 122).

Next, the objective underlying the prohibition laid down in Article 5n(2) of Regulation No 833/2014 was to make it more difficult for Russian legal persons operating in the territory of the European Union to continue their commercial activities in that territory, and, thereby, to have an impact on the Russian economy. The notarial authentication of a contract for the sale of immovable property owned by a legal person established in Russia is not contrary to such an objective.

Lastly, it is not apparent how notarial authentication of a contract for the sale of immovable property owned by a legal person established in Russia could, a priori and generally, contribute to circumventing the restrictive measures adopted.

In the second place, the Court points out that it will be for the referring court to assess, for each of the tasks which a notary carries out to execute an authenticated contract for the sale of immovable property, whether they involve the provision of legal advice to the parties by the notary, in accordance with the interpretation of the concept of 'legal advisory services' set out above.

In the last place, as regards the question whether translation services provided by an interpreter during notarial authentication constitute legal advisory services, within the meaning of Article 5n(2) of Regulation No 833/2014, given that the profession of interpreter is not legal in nature, the Court states those services cannot include an element of 'legal advice', even where the provision of services concerned consists of providing assistance to a legal professional acting in a legal field. Moreover, it does not appear that the authentication, by a German notary, of a contract for the sale of immovable property situated in Germany and owned by a legal person established in Russia falls within the scope of the prohibition on the provision of legal advisory services laid down in Article 5n(2) of Regulation No 833/2014. It follows that, by providing translation services in the context of the notarial authentication of such an instrument, in order to assist the representative of that legal person who does not have a command of the language of the authentication procedure, the interpreter does not provide 'legal advisory services', within the meaning of that provision, to such a legal person.

Judgment of the Court of Justice (Grand Chamber), 10 September 2024, Neves 77 Solutions, C-351/22

Link to the full text of the judgment

Reference for a preliminary ruling – Common Foreign and Security Policy (CFSP) – Restrictive measures adopted in view of the actions of the Russian Federation destabilising the situation in Ukraine – Decision 2014/512/CFSP – Article 2(2)(a) – Jurisdiction of the Court – Final sentence of the second subparagraph of Article 24(1) TEU – Article 275 TFEU – Article 215 TFEU – Article 17 of the Charter of Fundamental Rights of the European Union – Right to property – Principle of legal certainty and principle that penalties must be defined by law – Brokering services in relation to military equipment – Prohibition on providing such services – Failure to notify the competent national authorities – Administrative offence – Fine – Automatic confiscation of the amounts received in consideration for the prohibited transaction

The Tribunalul București (Regional Court, Bucharest, Romania) made a reference for a preliminary ruling to the Court, which specifies the scope of the limitations of its jurisdiction in Common Foreign and Security Policy (CFSP) matters. [144] Moreover, it rules on the scope of the prohibition on providing brokering services in relation to military equipment laid down in Article 2(2)(a) of Decision

[144] Those limitations are imposed by Article 24(1) TEU and Article 275(1) TFEU.

2014/512/CFSP [145] concerning restrictive measures adopted by the Council of the European Union in view of Russia's actions destabilising the situation in Ukraine.

The main activity of the Romanian company Neves 77 Solutions SRL ('Neves') is brokering in the sale of products in the field of aviation.

In 2019, Neves entered into a contract with the Ukrainian company SFTE Spetstechnoexport ('SFTE') to transfer the property rights of 32 radio sets to be delivered to the United Arab Emirates. After having purchased those radio sets, 20 of which were manufactured in Russia and exported to the United Arab Emirates, from a Portuguese company, Neves transferred them, at SFTE's request, to an Indian company.

Considering, inter alia, that that brokering transaction infringed Article 2(2)(a) of Decision 2014/512, the Romanian tax authority drew up, in 2020, an infringement notice imposing on Neves a penalty and the confiscation of the amounts received in consideration for that transaction.

Neves brought an action for annulment of that notice before the Judecătoria Sectorului 1 București (Court of First Instance, Sector 1, Bucharest, Romania), which dismissed the action. Neves then appealed against that judgment before the Regional Court, Bucharest, the referring court.

Findings of the Court

Regarding the Court's jurisdiction to interpret Article 2(2)(a) of Decision 2014/512, the Court finds, first of all, that that provision establishes a restrictive measure of general scope forming the basis for a national sanction. Although the Court's jurisdiction is not in any way limited regarding a regulation adopted on the basis of Article 215 TFEU, which gives effect to EU positions taken in CFSP matters, the prohibition on providing brokering services laid down in Article 2(2)(a) had not been implemented in a regulation at the time of the facts in the main proceedings.

However, in the first place, in monitoring compliance with the first paragraph of Article 40 TEU, [146] the Court must ensure, in particular, that, regarding the implementation of Article 215 TFEU, the Council cannot circumvent the Court's jurisdiction regarding a regulation under that article. In that regard, it is apparent from the clear wording of Article 215(1) TFEU that it falls to the Council to adopt the necessary measures to give effect to a CFSP decision setting out the European Union's position regarding the interruption or reduction of economic and financial relations with a third country. That institution therefore has, in the situation covered by that paragraph 1, circumscribed powers.

In the second place, the possibility provided for by the Treaties of making a reference to the Court for a preliminary ruling regarding a regulation adopted on the basis of Article 215(1) TFEU must be available in respect of all the provisions that the Council should have included in such a regulation and which form the basis for a national sanction adopted against third parties. That interpretation makes it possible to ensure the uniform application of EU law by the national courts and tribunals and the necessary consistency of the system of judicial protection provided for by EU law. The preliminary ruling procedure, [147] which is the keystone of the judicial system within the European Union, is essential to preserving the values of the rule of law on which the European Union is founded. [148]

The Court thus has jurisdiction to interpret a restrictive measure of general scope where it fell to the Council to implement that measure, which serves as a basis for national sanctions, by a regulation

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145 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13), as amended by Council Decision 2014/659/CFSP of 8 September 2014 (OJ 2014 L 271, p. 54).

146 Under the first paragraph of Article 40 TEU, the implementation of the CFSP does not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the competences of the European Union referred to in Articles 3 to 6 of the FEU Treaty.

147 The preliminary ruling procedure is laid down in Article 19(3)(b) TEU and Article 267 TFEU.

148 See Article 2 TEU and Article 21 TEU, to which Article 23 TEU relating to the CFSP refers.

adopted under Article 215 TFEU. In the present case, the prohibition on providing brokering services in question is intended to restrict the ability of economic operators to carry out transactions falling within the scope of the FEU Treaty. [149] It can be implemented at EU level only if it is followed by the adoption of such a regulation and is one of the measures necessary to give effect to Decision 2014/512 at EU level, which the Council was required to implement in Regulation No 833/2014.

The Court therefore has jurisdiction to answer the questions referred for a preliminary ruling.

On the substance, the Court considers, in the first place, that the prohibition on providing brokering services laid down in Article 2(2)(a) of Decision 2014/512 is applicable even where the military equipment that was the subject of the brokering transaction concerned was never imported into the territory of a Member State.

In the second place, the Court emphasises that that provision, read in the light of the right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the principle of legal certainty and the principle that penalties must be defined by law, does not preclude a national measure confiscating the entire proceeds of a brokering transaction referred to in Article 2(2)(a), which is implemented automatically following a finding by the competent national authorities of an infringement of the prohibition on carrying out that transaction and of the obligation to notify that transaction.

Regarding the right to property, the Court begins by recalling the case-law of the European Court of Human Rights ('ECtHR'), according to which confiscation measures relating to the proceeds of an infringement or unlawful activity or an instrument having been used to commit an infringement which does not belong to a third party in good faith constitute, as a general rule, regulation of the use of property, even if they deprive, by their very nature, a person of his or her property. [150]

In the present case, that limitation on the exercise of the right to property appears to comply with the principle of proportionality and, as a result, to be justified in the light of the conditions laid down in Article 52(1) of the Charter, which it is, however, for the referring court to verify. That limitation is provided for by law [151] and respects the essence of the right to property, since it relates to how the use of property is governed for the purposes of the third sentence of Article 17(1) of the Charter and does not constitute deprivation of property for the purposes of the second sentence of Article 17(1). In addition, that measure corresponds to an objective of general interest recognised by the European Union.

As for the principle of proportionality, the confiscation of all the proceeds of the prohibited brokering transaction thus appears necessary in order to dissuade effectively and efficiently economic operators from infringing the prohibition on providing brokering services in relation to military equipment. Similarly, the automatic imposition of a confiscation measure is necessary to ensure the full effectiveness of the sanction. Nevertheless, where a confiscation sanction is imposed separately from a criminal penalty, the procedure as a whole must, according to the case-law of the ECtHR, give the party concerned the opportunity to put his or her case to the national authorities which have imposed that sanction and to the courts hearing the action against the decisions of those authorities, so that they may carry out an overall examination of the interests at stake. [152]

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149 Trade in weapons, military equipment and services covered by Article 2(2)(a) of Decision 2014/512 does indeed come within that scope, under Articles 114 and 207 TFEU.

150 See, inter alia, ECtHR, 24 October 1986, Agosi v. the United Kingdom, CE ECHR:1986:1024JUD000911880, § 51; ECtHR, 12 May 2015, Gogitidze and Others v. Georgia, CE ECHR:2015:0512JUD003686205, § 94; and ECtHR, 15 October 2020, Karapetyan v. Georgia, CE ECHR:2020:1015JUD006123312, § 32.

151 The measure is based on the Ordonanța de urgență a Guvernului nr. 202/2008 privind punerea în aplicare a sancțiunilor internaționale (Government Emergency Order No 202/2008 on the implementation of international sanctions) of 4 December 2008 (Monitorul Oficial al României, Part I, No 825 of 8 December 2008) and on the national military technology and equipment list referred to in Article 12 of Common Position 2008/944 and established, as regards Romania, by Decrees No 156/2018 and No 901/2019.

152 See, to that effect, ECtHR, 15 October 2020, Karapetyan v. Georgia, CE ECHR:2020:1015JUD006123312, § 35.

Judgment of the General Court (First Chamber, Extended Composition), 11 September 2024, NSD v Council, T-494/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures adopted in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion and maintenance of the applicant's name on the list – Obligation to state reasons – Error of assessment – Definition of 'supporting, materially or financially, the Government of the Russian Federation' – Freedom to conduct a business – Right to property – Proportionality

In its judgment, the General Court dismisses the action for annulment brought by the applicant, the company NKO AO National Settlement Depository (NSD), against the acts by way of which the name of that company was included, in June 2022, [153] then maintained, in March [154] and September 2023, [155] by the Council of the European Union, on the lists of persons and entities subject to restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ('the lists at issue'). This case inter alia allows the Court to provide clarification as to the role of national authorities in the implementation of derogations to measures for the freezing of funds.

This judgment arises in the context of the restrictive measures adopted by the European Union following the military aggression launched by the Russian Federation against Ukraine on 24 February 2022. The applicant, a Russian non-bank financial institution and central securities depositary ('CSD') in Russia, had its funds and economic resources frozen on the basis of the criterion relating to natural or legal persons, entities or bodies supporting, materially or financially, the Russian Government, which is responsible for the annexation of Crimea and the destabilisation of Ukraine. [156]

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153 Council Decision (CFSP) 2022/883 of 3 June 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 153, p. 92), and of Council Implementing Regulation (EU) 2022/878 of 3 June 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 153, p. 15) (together, 'the initial acts').

154 Council Decision (CFSP) 2023/572 of 13 March 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 75, p. 134), and Council Implementing Regulation (EU) 2023/571 of 13 March 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 75, p. 1) (together, 'the maintaining acts of September 2023').

155 Council Decision (CFSP) 2023/1767 of 13 September 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 226, p. 104), and Council Implementing Regulation (EU) 2023/1765 of 13 September 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 226, p. 3) (together, 'the maintaining acts of September 2023').

156 Article 2(1)(f) of Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16), as amended by Council Decision (CFSP) 2022/329 of 25 February 2022 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 50, p. 1), and Article 3(1)(f) of Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6), as amended by Council Regulation (EU) 2022/330 of 25 February 2022 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 51, p. 1).

Findings of the Court

In the first place, in the context of the plea alleging error of assessment on the part of the Council, the Court examines, first of all, the admissibility of the evidence produced by the Council in annex to its defence and its rejoinder. In that connection, the Court recalls that the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted, and that review of substantive legality thus incumbent on the Court must be carried out in the light not only of the material set out in the statements of reasons for the acts at issue, but also in the light of the material provided by the Council, in the event of challenge, to the Court in order to establish that the facts alleged in those statements are made out. The Court states, moreover, that in its earlier case-law, [157] it was not its intention to preclude any possibility of taking into account, when conducting its review of the legality of the contested acts, additional evidence that was not contained in the evidence file and which is produced to confirm that the facts alleged in the statement of reasons are made out as long as that evidence (i) substantiates material that the Council had at its disposal and (ii) relates to events prior to the adoption of the contested acts.

In the present case, the Court holds that some of the evidence produced by the Council in annex to its defence cannot be taken into consideration in ascertaining whether the initial acts are well founded, but finds, by contrast, that the evidence produced at the rejoinder stage is admissible.

Next, the Court rules that the Council could validly consider that, from both a quantitative and a qualitative perspective, the applicant was significantly supporting, materially or financially, the Russian Government, by enabling it in its financial resources with the aim of pursuing its actions to destabilise Ukraine. The Council in fact had, from the time when the initial acts were adopted, a sufficient factual basis for considering that the applicant was an important financial institution for Russia's financial system and had connections to the international financial system. It could also find that, through the services that it offered to the Russian Government as a CSD in the issuing, custody and management of government bonds, the applicant enabled that government in its activities, policies and resources.

Finally, according to the Court, the finding that the applicant is under the control of the Russian Government cannot be decisive in justifying the inclusion of the applicant on the lists at issue. The criterion of material or financial support to the government does not require that it be established that that government controls the person, entity or body supporting it.

As regards, in the second place, the plea alleging breach of the applicant's fundamental rights, the Court notes, first of all, that an applicant cannot rely, in support of his or her action for annulment, on a right to property that he or she does not hold. Furthermore, in the context of an action for annulment, the Court does not have jurisdiction to carry out a review of the lawfulness of decisions adopted by national authorities or of judgments delivered by national courts. The Court points out, however, that when deciding on a request for release of frozen funds pursuant to the derogations laid down by Decision 2014/145, as amended, and Regulation No 269/2014, as amended, the competent national authority is required to observe the Charter of Fundamental Rights of the European Union ('the Charter'). [158] It follows that, for customers of the applicant who are not subject to any restrictive measures and whose funds or economic resources are frozen on account of the restrictive measures taken against the applicant, in the context of the examination of a request for release of frozen funds or economic resources, it is for the national authorities to ensure that the interference with the right to property of those customers is in compliance with the conditions laid down in Article 52 of the Charter.

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157 Judgment of 1 June 2022, Prigozhin v Council (T-723/20, not published, EU:T:2022:317).

158 See Article 51(1) of the Charter.

Next, the Court considers that the applicant has no basis for claiming any additional infringement of its freedom to conduct a business inasmuch as the derogations provided for by Decision 2014/145, as amended, and Regulation No 269/2014, as amended, were not capable of enabling it to return its customers' securities, which it held in its frozen accounts with depositories established in the European Union.

The Court recalls that the contested acts provide for derogations enabling the national authorities to authorise the release of certain of the applicant's funds or economic resources. Thus, Decision 2014/145, as amended, and Regulation No 269/2014, as amended, provide, in particular, for the possibility of releasing certain frozen own funds or economic resources in order to satisfy the basic needs of legal persons, entities or bodies included on the lists at issue, in respect of the reimbursement of incurred expenses, [159] to make a payment due under a contract or agreement concluded before the date of inclusion on the lists at issue, [160] or to terminate operations, contracts or other agreements concluded with, or otherwise involving, the applicant [161]. Since the applicant does not dispute the lawfulness of the latter derogation, but rather the lawfulness of the measures taken by the national authorities in implementing it, the Court recalls that it does not have jurisdiction, under Article 263 TFEU, to examine the lawfulness of acts adopted by the national authorities in implementing EU law.

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

Judgment of the General Court (Grand Chamber), 11 September 2024, Fridman and Others v Council, T-635/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion of the applicants' names on the list – Obligation to report funds or economic resources belonging to or owned, held or controlled by the applicants – Obligation to cooperate with the competent national authority – Participation in activities the object or effect of which is to circumvent restrictive measures – Article 9(2) and (3) of Regulation (EU) No 269/2014 – Action for annulment – Locus standi – Direct concern – Regulatory act not entailing implementing measures – Interest in bringing proceedings – Admissibility – Power of the Council – Proportionality

In its judgment, the General Court, sitting as the Grand Chamber, confirms that the Council of the European Union has the power (i) to impose obligations to report funds and cooperate with the competent national authorities on persons subject to restrictive measures, and (ii) to treat non-compliance with those obligations as a circumvention of fund-freezing measures.

That judgment arises in the context of a package of restrictive measures adopted by the European Union in response to the war operations that the Russian Federation has been conducting against

159 Article 4(1) of Regulation (EU) No 269/2014.

160 See Article 2(5) of Decision 2014/145 and Article 6(1) of Regulation No 269/2014.

161 By the adoption of Council Decision (CFSP) 2022/1907 of 6 October 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 259 I, p. 98), and of Council Regulation (EU) 2022/1905 of 6 October 2022 amending Regulation No 269/2014 (OJ 2022 L 259 I, p. 76). See Article 2(19) of Decision 2014/145, as amended, and Article 6b(5) of Regulation No 269/2014, as amended.

Ukraine since March 2014. In 2022, the names of Mr Fridman and Mr Khan, who have Russian and Israeli nationality, and of Mr Aven, who has Russian and Latvian nationality, were added to the lists of persons, entities and bodies subject to restrictive measures set out in the annex to Decision 2014/145 [162] and Annex I to Regulation No 269/2014. [163]

In the present case, Mr Fridman, Mr Khan and Mr Aven ask the Court to annul Article 9(2) and (3) of Regulation No 269/2014, as amended by Article 1, point 4, of Regulation 2022/1273, [164] provisions which, respectively, lay down obligations to report funds and to cooperate with the competent authorities in that regard, and treat failure to comply with those obligations as a circumvention of fund-freezing measures.

According to the applicants, the Council cannot impose positive obligations on persons subject to sanctions on the basis of Article 215 TFEU. Furthermore, the obligation to disclose their financial position is a form of sanction and not a 'restrictive measure' within the meaning of that provision. In addition, those obligations are invasive of privacy, excessive and uncertain, as the terms on which they are based are vague and undefined. They are also extraterritorial in scope. Moreover, by adopting the contested provisions when it was aware that the circumvention of sanctions was a criminal offence in 25 of the 27 Member States, the Council acted as a legislative authority in criminal matters, although that competence lies with the Member States.

The Court dismisses the action.

Findings of the Court

As a preliminary point, the Court examines the admissibility of the action and, more particularly, the applicants' standing to bring proceedings and their interest in having the contested act annulled.

In that context, first, the Court holds that the contested provisions are of direct concern to the applicants since they directly affect the applicants' legal situation. The reporting and cooperation obligations and the effects of failing to comply with them apply to the applicants as persons included on the list set out in Annex I to Regulation No 269/2014 when those provisions came into force. Moreover, the application of the provisions in question vis-à-vis the applicants does not require any implementing measure to be adopted and leaves no discretion to the addressees who are entrusted with the task of implementing those provisions, with the result that they affect the applicants' legal situation in a purely automatic fashion

Secondly, the Court states that, irrespective of whether or not the applicants or other persons have reported or frozen the funds or economic resources in question and, as the case may be, cooperated with the competent authorities, or of whether or not those funds or economic resources have been frozen, the applicants retain an interest in securing the annulment of the contested provisions, which impose on them reporting and cooperation obligations non-compliance with which may have serious consequences. An applicant's interest in bringing proceedings does not disappear because he or she has performed the obligations which he or she is challenging. Consequently, the applicants' interest in bringing proceedings persists without them having to demonstrate that they infringed their obligations.

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[162] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16). The names of Mr Aven and Mr Fridman were added to the annex of that decision on the basis of Council Decision (CFSP) 2022/337 of 28 February 2022 amending Decision 2014/145 (OJ 2022 L 59, p. 1), and Mr Khan's name was added on the basis of Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145 (OJ 2022 L 87I, p. 44).

[163] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6). The names of Mr Aven and Mr Fridman were added to the annex of that regulation on the basis of Council Implementing Regulation (EU) 2022/336 of 28 February 2022 implementing Regulation No 269/2014 (OJ 2022 L 58, p. 1), and Mr Khan's name was added on the basis of Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation No 269/2014 (OJ 2022 L 87I, p. 1).

[164] Council Regulation (EU) 2022/1273 of 21 July 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 194, p. 1).

Furthermore, compliance with the reporting obligation does not entail the discharge of all the obligations laid down in the contested provisions. Once funds or economic resources have been reported to the competent national authority, Article 9(2) of Regulation No 269/2014 requires the persons who have reported them to cooperate with that national authority in any verification. It follows that the applicants retain a vested and current interest in bringing proceedings against that provision.

As to the substance, in the first place, as regards the Council's power to adopt the contested provisions on the basis of Article 215(2) TFEU, the Court notes, first of all, that the contested provisions were established in order to ensure the uniform application of Regulation No 269/2014 throughout the European Union and to thwart strategies to circumvent restrictive measures, strategies made possible, in particular, by recourse to complex legal and financial arrangements. They are, therefore, not restrictive measures as such, but measures that ensure the effective and uniform implementation of the restrictive measures provided for in Decision 2014/145. Therefore, the contested provisions were correctly adopted on the basis of Article 215(2) TFEU.

Next, as regards the alleged breach of the right to privacy, the Court states, first, that the obligations at issue are 'provided for by law', since they are set out in Regulation 2022/1273, have a clear legal basis in EU law, namely Article 215 TFEU, and are sufficiently foreseeable. Secondly, those obligations do not interfere with the essence of the right to privacy in so far as they are limited to funds or economic resources within the jurisdiction of a Member State and are imposed on the applicants because their names appear in Annex I to Regulation No 269/2014. Thirdly, the objective of those obligations is to enable the funds and economic resources owned, held or controlled by the persons and entities subject to restrictive measures to be identified, and thereby to implement those measures effectively and uniformly, that being part of the broader objective of the restrictive measures. As it is, the importance of the objectives thus pursued is such as to justify the adverse consequences relating to the interference with the right to privacy alleged by the applicants. Fourthly, as to the appropriateness and necessity of the obligations at issue, new arrangements for implementing restrictive measures were warranted by the need to ensure the effectiveness and uniform application of the restrictive measures regime concerning the situation in Ukraine, notably in the light of the circumvention of restrictive measures as a result of the establishment of increasingly complex schemes.

Lastly, as regards the claim that the contested obligations breach the principle of legal certainty because the terms on which they are based are vague and undefined, the Court considers that the reference in Article 9(2) of Regulation No 269/2014 to the concepts of 'belonging to, owned, held or controlled' in relation to funds or economic resources is sufficiently clear and comprehensible as regards what is covered by those concepts, thus enabling the persons targeted to comply with the reporting obligation. Moreover, it follows from that provision that assets which are not within the jurisdiction of a Member State are not covered by those obligations. Furthermore, in the case of persons outside the European Union, only their assets in the territory of the European Union are covered, which constitutes a sufficient link to the European Union. Consequently, the argument relating to the extraterritorial scope of the obligations at issue must be rejected.

In the second place, the Court rules on the applicants' arguments to the effect that, by adopting the contested provisions, the Council acted as a legislative authority in criminal matters. In that regard, it states that, even if the Council was aware that the circumvention of sanctions was a criminal offence in all but two of the Member States, it cannot be inferred from this that, by adopting the contested provisions, the Council obliged the Member States to make the circumvention of the freezing of funds a criminal offence. The fact that, in the Member States in which the circumvention of restrictive measures is already a criminal offence, the penalties for breach of the two obligations at issue are, in consequence, also criminal stems not from the contested provisions but from the Member States' choice of penalties.

That finding is not altered by a combined reading of Articles 9 and 15 of Regulation No 269/2014. It is clear from Article 15(1) of that regulation that it is the Member States that are to lay down the rules on penalties applicable to infringements of the provisions of that regulation. Therefore, in the event of a failure to comply with the obligations at issue, treated as a circumvention of restrictive measures, the power to decide on the rules on penalties, including whether they are to be criminal penalties or not, still rests with the Member States.

Lastly, that finding is not altered by the adoption, on 28 November 2022, of Decision 2022/2332 or by the Commission's adoption, on 2 December 2022, of a proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures. The Court notes in that respect that those legislative steps towards harmonisation of the criminal law of the Member States are precisely distinguishable from the approach taken in Regulation 2022/1273, based on Article 215(2) TFEU, which is merely intended to ensure the effective and uniform implementation of Regulation No 269/2014. Unlike a directive, defining criminal offences and criminal penalties in respect of the circumvention of restrictive measures and adopted on the basis of Article 83(1) TFEU, which would bind the Member States to which it is addressed as to the outcome to be achieved in criminal matters, the rules on penalties laid down in Article 15(1) of Regulation No 269/2014 leave the Member States free to choose the nature - whether criminal, administrative or civil - of the penalties to be adopted in the event of any breach of the prohibition on circumvention of restrictive measures.

Judgment of the General Court (Grand Chamber), 11 September 2024, Timchenko and Timchenko v Council, T-644/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion of the applicants' names on the list – Obligation to report funds or economic resources belonging to or owned, held or controlled by the applicants – Obligation to cooperate with the competent national authority – Participation in activities the object or effect of which is to circumvent restrictive measures – Article 9(2) and (3) of Regulation (EU) No 269/2014 – Action for annulment – Locus standi – Direct concern – Regulatory act not entailing implementing measures – Interest in bringing proceedings – Admissibility – Misuse of powers – Power of the Council – Proportionality – Legal certainty

In its judgment, the General Court, sitting as the Grand Chamber, confirms that the Council of the European Union has the power (i) to impose obligations to report funds and cooperate with the competent national authorities on persons subject to restrictive measures, and (ii) to treat non-compliance with those obligations as a circumvention of fund-freezing measures.

That judgment arises in the context of a package of restrictive measures adopted by the European Union in response to the war operations that the Russian Federation has been conducting against Ukraine since March 2014. In 2022, Mr Timchenko, a businessman with Russian and Finnish nationality, and his wife were included on the lists of persons, entities and bodies subject to restrictive measures set out in the annex to Decision 2014/145 [165] and Annex I to Regulation No 269/2014 [166].

[165] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16), as amended by Council Decision (CFSP) 2022/337 of 28 February 2022 (OJ 2022 L 59, p. 1) and by Council Decision (CFSP) 2022/582 of 8 April 2022 (OJ 2022 L 110, p. 55).

[166] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6), as amended by Council Implementing Regulation (EU) 2022/336 of 28 February 2022 (OJ 2022 L 58, p. 1) and by Council Implementing Regulation (EU) 2022/581 of 8 April 2022 (OJ 2022 L 110, p. 3).

In the present case, they ask the Court to annul Article 9(2) and (3) of Regulation No 269/2014, as amended by Article 1, point 4, of Regulation 2022/1273. [167] Those paragraphs, respectively, lay down obligations to report funds and to cooperate with the competent national authorities and provide that failure to comply with those obligations is to be treated as participation in the circumvention of fund-freezing measures.

According to the applicants, by adopting those provisions, the Council exceeded the powers conferred on it by Article 215(2) TFEU and acted in the stead of the Member States in deciding how the restrictive measures should be implemented and what penalties should apply in the territory of the Member States. They also claim that the reporting obligation infringes the principle of legal certainty in so far as it is based on concepts that are imprecise.

The Court dismisses the action.

Findings of the Court

In the first place, concerning the Council's power to adopt the contested provisions on the basis of Article 215(2) TFEU, the Court recalls, first, that under Articles 24 and 29 TEU, the Council has a broad discretion in determining, in decisions taken unanimously in the field of the CFSP, the persons and entities that are to be subject to the restrictive measures that the European Union adopts in that field. Article 215 TFEU allows the Council to adopt regulations in order to implement or give effect to restrictive measures and to ensure their uniform application in all Member States. Such measures are not limited to obligations not to act.

Thus, decisions adopted under Article 29 TEU declare the position of the European Union with respect to the restrictive measures to be adopted, while regulations adopted on the basis of Article 215 TFEU relate to those decisions and constitute the instrument giving effect to them at EU level.

In the present case, the reporting and cooperation obligations laid down in Article 9(2) of Regulation No 269/2014, as amended, were established in order to ensure the uniform application of that regulation in the territory of the European Union and to thwart strategies to circumvent restrictive measures, strategies made possible, in particular, by recourse to complex legal and financial arrangements. Consequently, those obligations are such as to ensure the effective and uniform implementation of the restrictive measures for the freezing of funds provided for in Decision 2014/145, to which they relate.

For those reasons, the Council was entitled, on the basis of Article 215(2) TFEU and without infringing Article 29 TEU, to adopt such obligations by means of an EU regulation, irrespective of the fact that those obligations were not expressly provided for in the related decision.

Secondly, the Court takes the view that both Article 9(3) of Regulation No 269/2014, as amended, and Article 15(1) thereof, as amended by Regulation 2022/880, [168] could be adopted by the Council under Article 215(2) TFEU and that the Council cannot thus be accused of having improperly acted in the stead of the Member States in the exercise of their legislative powers. Those provisions cannot be regarded as constituting an offence of a criminal nature and, therefore, as having been adopted in breach of Article 83 TFEU.

The characterisation of participation in circumvention activities cannot, as such, be considered to constitute an offence of a criminal nature. Furthermore, it follows from the wording of Article 15(1) of Regulation No 269/2014, as amended, and from the last sentence of recital 5 of Regulation 2022/880

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167 Council Regulation (EU) 2022/1273 of 21 July 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 194, p. 1).

168 Council Regulation (EU) 2022/880 of 3 June 2022 amending Regulation No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 153, p. 75). Article 15(1) of Regulation No 269/2014 now provides that 'Member States shall lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented'. It adds that 'Member States shall also provide for appropriate measures of confiscation of the proceeds of such infringements'.

that the decision as to whether the applicable penalties for infringing Regulation No 269/2014 are to be of a civil, administrative or criminal nature falls within the power conferred on the Member States, including where the penalty of confiscation of the proceeds of an infringement is imposed.

Since the legal rules governing the reporting and cooperation obligations and the penalties provided for in the event of infringement of those obligations do not fall within the scope of criminal law, with the result that Article 83 TFEU has not been infringed, the Council has also not infringed Article 40 TEU.

In the second place, the Court clarifies the concept of restrictive measures by distinguishing it from the penalty of confiscation of the proceeds of infringements in the event of failure to comply with the reporting and cooperation obligations laid down in Article 15(1) of Regulation No 269/2014. Such a penalty applies only to 'the proceeds of infringements', whereas the subject matter of the restrictive measures, which retain their precautionary and temporary nature, is concerned with funds and economic resources as determined by Article 2(1) of Regulation No 269/2014. Accordingly, the penalties attached to the circumvention referred to in Article 9(3) of Regulation No 269/2014, as amended, do not alter the nature of the restrictive measures.

In the third place, concerning the precision of the concepts used as the basis for the reporting obligation at issue, the Court recalls that the principle of legal certainty requires that EU legislation be clear and precise and that its application be foreseeable for all interested parties.

In the present case, the wording used in Article 9(2) of Regulation No 269/2014, as amended, refers to the concepts of 'belonging to, owned, held or controlled', which are autonomous concepts of EU law and, as such, must be interpreted in a uniform manner throughout the territory of the European Union, taking into account the wording of that provision and the context in which it occurs and also the objectives pursued by the rules of which it is part.

In that regard, at the time of the adoption of Article 9(2) of Regulation No 269/2014, as amended, the Council's objective was to exert pressure on the persons and entities subject to restrictive measures, pressure that has a knock-on effect on the Russian authorities and is intended, in particular, to increase the costs of the Russian Federation's actions to undermine Ukraine's territorial integrity, sovereignty and independence. Against that background, it must be held that, by employing the concepts of 'belonging to, owned, held or controlled', the Council was referring to the right to dispose of or to use funds or economic resources, as defined in Article 1(d) and (g) of Regulation No 269/2014.

Those concepts do not therefore display any ambiguity capable of establishing the existence of legal uncertainty as to their scope or meaning for the persons subject to fund-freezing measures. In that regard, the fact that the Council organised a conference or had recourse to a best practice guide aimed at national authorities, with a view to clarifying the concepts used in the field of restrictive measures, is not in itself capable of establishing the existence of such legal uncertainty.

Judgment of the General Court (First Chamber, Extended Composition), 11 September 2024, Tokareva v Council, T-744/22

Common foreign and security policy – Restrictive measures taken in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Maintenance of the applicant's name on the list – Definition of 'association' – Article 2(1), in fine, of Decision 2014/145/CFSP – Definition of 'benefiting from a leading businessperson operating in Russia' – Article 2(1)(g) of Decision 2014/145 – Error of assessment – Non-contractual liability

In its judgment, the General Court upholds the action for annulment brought by Ms Maya Tokareva against the acts by which her name was maintained by the Council of the European Union on the lists of persons and entities subject to restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. The present case

enables the Court to clarify the scope of the association criterion and to interpret, for the first time, the concept of benefit within the meaning of the criterion laid down in the second part of Article 2(1)(g) of Decision 2014/145, [169] as amended by Decision 2023/1094. [170]

The applicant, the daughter of Nikolay Tokarev, the CEO of Transneft, was initially included on the lists at issue in July 2022 [171] on account of her association with her father and with Stanislav Chemezov, the son of the CEO of Rostec. Her name was then maintained on the lists, in September 2022 [172] and March 2023, [173] for the same reasons, and subsequently, from September 2023, [174] on the ground that she is an immediate family member of Nikolay Tokarev, a leading businessperson operating in Russia, and benefits from him.

Findings of the Court

As regards, in the first place, the maintenance of the applicant's name on the lists at issue on the basis of the associated person criterion, laid down in Article 2(1), in fine, of Decision 2014/145, as amended, the Court points out first of all that, although the concept of 'association' is not as such defined, it may nevertheless be accepted that associated persons are persons who are, generally speaking, linked by common interests.

According to the Court, on the basis of Article 2(1), in fine, of Decision 2014/145, as amended, a natural or legal person, entity or body may be included on the lists at issue only on the ground of association with another natural or legal person, entity or body included on those lists on the basis of one or more of the criteria for designation laid down in Article 2(1)(a) to (h) of that decision.

The Court considers that the risk that the restrictive measures may be circumvented and the need to apprehend a number of persons in a global 'network' cannot justify extending the scope of the criterion of association to the point that it may be applied to association with a person who is not himself or herself listed on the basis of one of the criteria laid down in points (a) to (h) of the aforementioned provision. Such an interpretation would give an excessively broad scope to association and would not take account of the wording of Article 2(1), in fine, of Decision 2014/145, as amended, or of the requirement of a sufficient link between the persons concerned and the third country targeted by the restrictive measures adopted by the European Union.

Consequently, in the present case, since Mr Stanislav Chemezov had been included on the lists at issue as a person associated with his father, Mr Serguey Chemezov, the Court holds that the Council

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

170 Council Decision (CFSP) 2023/1094 of 5 June 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 146, p. 20).

171 Council Decision (CFSP) 2022/1272 of 21 July 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 193, p. 219), and Council Implementing Regulation (EU) 2022/1270 of 21 July 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 193, p. 133).

172 Council Decision (CFSP) 2022/1530 of 14 September 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 239, p. 149), and Council Implementing Regulation (EU) 2022/1529 of 14 September 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 239, p. 1) (together, 'the maintaining acts of September 2022').

173 Council Decision (CFSP) 2023/572 of 13 March 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 75 I, p. 134), and Council Implementing Regulation (EU) 2023/571 of 13 March 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 75 I, p. 1).

174 Council Decision (CFSP) 2023/1767 of 13 September 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 226, p. 104), and Council Implementing Regulation (EU) 2023/1765 of 13 September 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 226, p. 3) (together, 'the maintaining acts of September 2023').

was not justified in including, by the maintaining acts of September 2022 and March 2023, the applicant's name on the lists at issue as a person associated with Mr Stanislav Chemezov.

As regards the association criterion, the Court states that the common interests of associated persons must be understood not only in a strict sense, that is to say, as designating persons whose interests are linked within a common legal structure, but also more broadly and in the case of persons linked by a family relationship, where the objective existence of interwoven common interests, which is not necessarily formalised in such a legal structure, is characteristic. Since the associated person criterion is worded in the present tense, the existence of common interests must also be established at the time the contested acts are adopted.

In the present case, the Council has failed to demonstrate the existence of common interests linking the applicant and her father either when the September 2022 acts were adopted or when the March 2023 acts were adopted. Consequently, the maintenance of the applicant's name was de facto based solely on the family relationship with her father, and that cannot be accepted.

Accordingly, given that the Council erred in law in maintaining the applicant's name on the lists at issue as a person associated with Mr Stanislav Chemezov and that the reasons set out in the acts are not supported by a sufficient factual basis in so far as concerns association between the applicant and her father, the Court finds that there was no justification for maintaining the applicant's name on the lists at issue annexed to the maintaining acts of September 2022 and March 2023.

As regards, in the second place, the maintenance of the applicant's name on the lists at issue on the basis of the second part of criterion (g), as amended, the Court observes that that part of the criterion allows, inter alia, the inclusion on the lists at issue of immediate family members or other persons who benefit from a leading businessperson operating in Russia.

Having regard to the objectives pursued by the introduction of that criterion, namely to increase pressure on the Government of the Russian Federation and to avoid the risk of circumvention of the restrictive measures, the Court holds that the concept of 'benefit' within the meaning of that provision refers to any benefit of any kind, which is not necessarily undue, but which must be quantitatively or qualitatively not insignificant. It may therefore be a financial or non-financial benefit, such as a donation, a transfer of funds or economic resources, an intervention in order to promote the award of public contracts, an appointment or a promotion.

Furthermore, contrary to what the applicant maintains, the benefits referred to in the second part of criterion (g) as amended cannot be limited to the benefits granted, at the same time as their designation on the lists at issue, by leading businesspersons operating in Russia to an immediate family member or to other persons. However, the circumstances in which the benefit was conferred and the time that elapsed between the grant of a benefit by a businessperson operating in Russia and the date of their inclusion on the lists at issue are factors to be taken into account in assessing the merits of the inclusion, on those lists, of the name of the person who received that benefit. The benefit received by the person whose name is included on the lists at issue under the second part of criterion (g) as amended, or at least the consequences of that benefit, must in any event still exist at the time when the restrictive measures against that person are adopted.

Lastly, given that the restrictive measures in question are a continuation of the European Union's reaction to the policies and activities of the Russian authorities specifically concerning to Ukraine, initiated by the annexation of Crimea and the destabilisation of eastern Ukraine at the end of February 2014, the Council cannot, according to the principle of legal certainty, rely on benefits that were granted by leading businesspersons to their immediate family members or other persons before the end of February 2014.

In the present case, the Court finds that the factual basis relied upon by the Council was not sufficient to demonstrate that, when the maintaining acts of September 2023 were adopted, the applicant was benefitting from Mr Tokarev within the meaning of the second part of criterion (g), as amended. Accordingly, the Council made an error of assessment in adopting the maintaining acts of September 2023.

Judgment of the General Court (Fourth Chamber, Extended Composition), 18 September 2024, Belaruskali v Council, T-528/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion of the applicant's name on the list – Support for the regime – Financial support – State-owned undertaking – Benefitting from the regime – Repression of civil society – Error of assessment

In its judgment, the General Court dismisses the action brought by Belaruskali AAT against the acts by way of which that company was included, in 2022, [175] then maintained, in 2023, [176] by the Council of the European Union on the lists of persons and entities subject to restrictive measures in respect of the situation in Belarus. The Court clarifies the case-law concerning the examination of the legality and proportionality of individual restrictive measures.

This judgment arises in the context of a series of restrictive measures adopted by the European Union since 2004 in view of the situation in Belarus with regard to democracy, the rule of law and human rights, and the involvement of Belarus in the Russian aggression against Ukraine. The applicant, which is the sole producer of potassium fertilisers in Belarus and one of the largest producers in the world, saw its funds and economic resources frozen, on the grounds that it was benefitting from and supporting the regime of President Lukashenko, [177] and that it was responsible for the repression of civil society [178].

Findings of the Court

As regards the plea alleging error of assessment, the Court finds, in the first place, that the Council did not err in considering, when the initial acts were adopted, that the applicant was benefitting from and supporting the regime within the meaning of Article 4(1)(b) of Decision 2012/642.

The Council did not err in finding that the applicant was a public undertaking and one of the biggest potash producers in the world, providing 20% of global potash exports and which, as such, was a major source of revenue and foreign currency for the Lukashenko regime.

In that connection, the Court observes, in particular, that all of the applicant's capital is held by the Republic of Belarus, that its Director-General is appointed by President Lukashenko and that, in 2019, it made a net profit of more than 4.797 billion Belarusian roubles (BYN) (approximately EUR 1.8 billion). Furthermore, it pays dividends to the State, which is its sole shareholder, and it paid, in addition to taxes, compulsory contributions to the State target budget fund for national development, which is sufficient to establish the existence of financial support.

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175 Council Implementing Decision (CFSP) 2022/881 of 3 June 2022 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2022 L 153, p. 77), and Council Implementing Regulation (EU) 2022/876 of 3 June 2022 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2022 L 153, p. 1) (together, 'the initial acts').

176 Council Decision (CFSP) 2023/421 of 24 February 2023 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2023 L 61, p. 41), and Council Implementing Regulation (EU) 2023/419 of 24 February 2023 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2023 L 61, p. 1).

177 See Article 4(1)(b) of Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus (OJ 2012 L 285, p. 1), and Article 2(1) and (5) of Regulation No 765/2006, as amended by Council Regulation (EU) No 1014/2012 of 6 November 2012 (OJ 2012 L 307, p. 1).

178 See Article 4(1)(a) of Decision 2012/642 and Article 2(4) of Regulation No 765/2006.

The Court also notes that, under the Lukashenko regime, the Belarusian economy is characterised by the regime's control over both the public and private sectors and by a system that rewards loyalty to the regime. Thus, those items of evidence, together with the existence of the monopoly exercised by the applicant, as a State-owned undertaking, on a market as important, from the perspective of the Belarusian economy, as the potassium fertilisers market enabled the Council to find that the applicant was benefitting from the Lukashenko regime.

In the second place, the Court finds that the Council did not err in finding, when adopting the initial acts, that the intimidation and dismissal of the applicant's workers who had taken part in the strikes and peaceful protests in the aftermath of the August 2020 presidential elections, were sufficient for it to be considered that the applicant was responsible for the repression of civil society in Belarus and supported the Lukashenko regime within the meaning of Article 4(1)(a) of Decision 2012/642.

First, in so far as concerns the intimidation of the applicant's workers, the Court notes, on the one hand, that the scale of the dismissals, which were linked to worker participation in a peaceful strike, quite reasonably spawned a climate of fear among those workers. In that sense, the applicant used dismissal as a tool in deterring its workers from taking part in any form of challenge.

On the other hand, participation in the strike gave rise to numerous instances of violence against, and the detention of, the applicant's workers by the public authorities. Having regard to the applicant's close ties with the Lukashenko regime, there can be no doubt as to their joint involvement in those acts of repression.

Furthermore, President Lukashenko's statement that the protestors could be replaced by miners from Ukraine forms part of a wider trend of threats and intimidation on the part of the public authorities. It in fact reveals an attitude of contempt, on the part of President Lukashenko, for the right to strike and the concerns of the applicant's workers.

Second, as regards the dismissal of workers following the start of the strike, the Court observes, first, that the strict application of Belarusian law cannot justify all forms of repression taken against workers expressing their political views. In fact, a situation in which the compliance with national law of a specific action would serve to preclude, solely on those grounds, the possibility of inclusion on the lists at issue would mean that the listing criteria were rendered meaningless, since that would cancel out the Council's broad discretion in that respect.

Second, those actions manifestly attest to a deliberate intention to sanction workers for their participation in activities expressing their opposition to President Lukashenko.

As regards the plea alleging infringement of the principles of legality and proportionality by the initial acts, the Court finds, first of all, that the Council's approach of targeting persons, entities and bodies whose acts or activities contribute to the repression of civil society and democratic opposition is consistent with the objective pursued by the initial acts. [179] In any event, it cannot be regarded as unlawful in the light of that objective.

In so far as concerns the question whether the initial acts are appropriate, the Court rejects the applicant's argument that those acts have completely prevented it from exporting potash. Neither the initial acts nor the sectoral restrictive measures prohibit the export of Belarusian potash to third countries.

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[179] It is apparent from recital 6 of Decision 2012/642 that, in so far as concerns persons and entities benefiting from or supporting the Lukashenko regime, the objective is to target any person or entity supporting that regime, in particular - but not exclusively - persons or entities providing financial or material support thereto.

The applicant is mistaken in claiming that the initial acts - which were adopted subsequent to the sectoral restrictive measures and consist in the freezing of the applicant's funds - prevented the export or transfer of potash within the European Union [180].

Moreover, the Court holds that the applicant has failed to demonstrate that the initial acts constituted a disproportionate interference with its freedom to conduct a business or with Belarusian society, or that they undermined global food security. On this point, the Court points out that the items of evidence raised by the applicant do not concern the initial acts, which imposed the freezing of funds, but relate primarily to the trading of fertilisers, including potash fertilisers, on the global market. Furthermore, while those documents make reference to the global food crisis, they do not concern the impact of the initial acts on that global food crisis.

Finally, the Court rejects the applicant's argument that the Council could have used less restrictive measures in order to ease the impact of inclusion on the lists at issue. The applicant in fact proposed, first, that conditions be established in order that the national authorities of the Member States be able to grant authorisations to EU persons and operators to enter into transactions with the applicant for the import, purchase and transfer of potash fertilisers and to provide related financing services and, second, the introduction of quotas for the supply of such fertilisers to the European Union.

However, that line of argument does not actually relate to the initial acts, which are individual in scope, but to the sectoral restrictive measures, which are general in scope.

Moreover, on the one hand, that line of argument does not demonstrate that the applicant is completely prevented from exporting its products. It is in fact not excluded that the applicant be able to transport its products to the ports of other countries outside the European Union.

On the other hand, the alternative measures proposed concern the possibilities of exporting potash fertilisers to the European Union and, consequently, would not make it possible efficiently to achieve the objectives pursued.

2. ACTIONS FOR DAMAGES

Judgment of the Court of Justice (Grand Chamber), 10 September 2024, KS and Others v Council and Others, C-29/22 P and C-44/22 P

Link to the full text of the judgment

Appeal – Common foreign and security policy (CFSP) – Joint Action 2008/124/CFSP – European Union Rule of Law Mission in Kosovo (Eulex Kosovo) – Action for damages – Damage allegedly suffered as a result of various acts and omissions by the Council of the European Union, the European Commission and the European External Action Service (EEAS) in the implementation of that joint action – Insufficient investigation of the torture, disappearance and killing of persons – Jurisdiction of the Court of Justice of the European Union to rule on that action – Last sentence of the second subparagraph of Article 24(1) TEU – Article 275 TFEU)

[180] Article 2g of Decision 2012/642 and Article 1g of Regulation No 765/2006, introduced by Council Decision (CFSP) 2021/1031 of 24 June 2021 amending Council Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2021 L 224I, p. 15) and Council Regulation (EU) 2021/1030 of 24 June 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (OJ 2021 L 224I, p. 1), which expressly provide that the purchase, import or transfer from Belarus of potash products is to be prohibited.

By setting aside the order in KS and KD v Council and Others of the General Court ('the order under appeal'), [181] in so far as that court declared that it manifestly lacked jurisdiction to hear and determine the action brought by KS and KD on the ground that it related to political or strategic choices made in the context of the common foreign and security policy (CFSP), [182] the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the limitation of the jurisdiction of the Courts of the European Union in relation to the CFSP, laid down in the last sentence of the second subparagraph of Article 24(1) TEU [183] and the first paragraph of Article 275 TFEU. [184] KS and KD are close family members of persons tortured, disappeared or killed in Kosovo in 1999, during the conflict that took place in that country. In 2008, by Joint Action 2008/124, [185] the European Union established a Rule of Law Mission in that third country, known as Eulex Kosovo, responsible, inter alia, for investigating such crimes. In 2009, on the basis of that joint action, the European Union established the Human Rights Review Panel ('the review panel'), with responsibility, for its part, for examining complaints of human rights breaches committed by Eulex Kosovo in the implementation of its mandate.

Following complaints lodged by KS and KD, the review panel concluded, in November 2015 and October 2016, that several fundamental rights protected by the European Convention on Human Rights ('ECHR') had been infringed. [186] In March 2017, the review panel decided to close the cases concerned, while noting, in each case, only partial implementation, by the Head of Eulex Kosovo, of the recommendations which it had addressed to him.

In December 2017, by the order KS v Council and Others, [187] the General Court dismissed, on the ground that it manifestly lacked jurisdiction to hear and determine it, the action brought by KS against the Council of the European Union, the European Commission and the European External Action Service (EEAS), seeking in particular 'annulment/amendment to the Joint Action 2008/124' and to establish non-contractual liability for the breach of several provisions of the ECHR.

In November 2021, by the order under appeal, the General Court dismissed, on the same ground, the action brought by KS and KD seeking compensation for the damage they claim to have suffered as a result of various acts and omissions by the Council, the Commission and the EEAS, relating, in particular, to investigations carried out, during the Eulex Kosovo mission, into the torture, disappearance and killing of members of their families. KS and KD had in the meantime applied, in June 2021, for measures of inquiry, seeking the production of the full version of Eulex Kosovo's Operation Plan (OPLAN), beginning from the creation of that mission in 2008.

Hearing two appeals brought by KS and KD (Case C-29/22 P) and by the Commission (Case C-44/22 P), respectively, the Court of Justice sets aside in part that order of the General Court and refers the case back to it for a ruling on the admissibility and, if necessary, the merits of that action.

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181 Order of 10 November 2021, KS and KD v Council and Others (v 771/20, EU:T:2021:798).

182 The abovementioned order is set aside in so far as the action brought by KS and KD concerned, inter alia, the breach of several fundamental rights and the misuse or abuse of executive power by a body and institutions of the European Union. The appeals are dismissed as to the remainder.

183 Under that provision, 'the Court of Justice of the European Union shall not have jurisdiction with respect to [CFSP provisions], with the exception of its jurisdiction to monitor compliance with Article 40 [TEU] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU]'.

184 As provided in Article 275 TFEU, 'the Court of Justice of the European Union shall not have jurisdiction with respect to [CFSP] provisions nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 [TEU] and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V [TEU].'

185 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2008 L 42, p. 92).

186 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

187 Order of 14 December 2017, KD v Council and Others (T-840/16, EU:T:2017:938).

In the order under appeal, the General Court found, inter alia, that the action brought by KS and KD arose from acts or conduct which fell within the scope of political or strategic issues connected with defining the activities, priorities and resources of Eulex Kosovo and with the decision to set up a review panel as part of that mission and that, in accordance with Joint Action 2008/124, the establishment and activities of the Eulex Kosovo mission came within the CFSP provisions of the EU Treaty. In addition, the General Court held, in essence, that, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the Court of Justice of the European Union did not, as a rule, have jurisdiction with respect to the provisions relating to the CFSP and acts adopted on the basis of those provisions, and that the exceptions to that principle, provided for in that first provision and in the second paragraph of Article 275 TFEU, were not applicable in the present case, on the ground that the action concerned neither restrictive measures against natural or legal persons, within the meaning of the latter provision, nor compliance with Article 40 TEU. [188]

Findings of the Court

Since KS and KD and the Commission have challenged the foregoing assessment, the Court examines the merits of the General Court's interpretation of the abovementioned aspects.

- *The interpretation of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU*

In order to interpret the provisions of the Treaties providing for the limitation of the jurisdiction of the Courts of the European Union as regards the CFSP, the Court notes, first of all, that the inclusion of that policy in the EU constitutional framework means that the basic principles of the EU legal order also apply to it. Those include, in particular, respect for the rule of law and fundamental rights, values which require, inter alia, that EU authorities be subject to judicial review.

However, in the first place, the Court notes that, in accordance with the first sentence of the second subparagraph of Article 24(1) TEU, 'the [CFSP] is subject to specific rules and procedures', including those limiting the jurisdiction of the Court of Justice of the European Union with respect to the provisions relating to the CFSP and the acts adopted on the basis of those provisions. Nonetheless, such a limitation of jurisdiction can be reconciled both with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and with Articles 6 and 13 ECHR.

In that regard, first, the Court has already held that Article 47 of the Charter cannot confer jurisdiction on the Court where the Treaties exclude it, nor change the system of judicial review laid down by the Treaties, to which the rules relating to the admissibility of direct actions belong. Furthermore, the principles of conferral and of institutional balance also apply in the area of the CFSP. Accordingly, the claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights is not in itself sufficient for the Court of Justice of the European Union to declare that it has jurisdiction to hear and determine that action. Second, the Court must indeed ensure that the interpretation which it gives to Article 47 of the Charter, the first and second paragraphs of which correspond to Article 6(1) and Article 13 ECHR, safeguards a level of protection which does not fall below the level of protection established in those provisions of the ECHR, as interpreted by the European Court of Human Rights. However, on the one hand, the right guaranteed in Article 6(1) ECHR is not absolute and may be subject to legitimate restrictions. Nor, on the other hand, can the protection afforded by Article 13 ECHR, which guarantees the availability at national level of a remedy to enforce the substance of the ECHR rights and freedoms, be regarded as being absolute, since the context in which an alleged violation - or category of violations - occurs is capable of justifying a limitation on the conceivable remedy.

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[188] Article 40 TEU provides: 'The implementation of the [CFSP] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 [TFEU]. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.'

Consequently, the General Court did not err in law in holding, in essence, that neither the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, on the one hand, [189] nor the pleading of breaches of fundamental rights, on the other hand, justified, in themselves, a finding by that court that it had jurisdiction to hear the action brought by KS and KD. In addition, Article 6(2) TEU, which provides for the accession of the European Union to the ECHR, cannot be interpreted as having the effect of extending the jurisdiction of the Court of Justice of the European Union in relation to the CFSP, the rules applicable to that accession providing that the accession agreement is not to affect the competences of the European Union or the powers of its institutions.

In the second place, as regards more specifically the application of the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU to actions to establish non-contractual liability of the European Union, governed by Articles 268 and 340 TFEU, the Court notes that neither the exclusive nature of the jurisdiction conferred on the Court of Justice of the European Union to rule on such actions nor the independent nature of that category of actions can have the effect of extending the limits of the jurisdiction conferred on that institution by the Treaties. The last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, which limit the jurisdiction of the Courts of the European Union as regards the CFSP, must, so far as actions relating to the CFSP are concerned, be regarded as leges speciales in relation to Articles 268 and 340 TFEU. Accordingly, it cannot be accepted that the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU do not apply to actions seeking to establish the non-contractual liability of the European Union.

In the third and last place, the Court of Justice, relying on the judgment in Carvalho and Others v Parliament and Council, [190] which expresses a principle of interpretation applicable to all the legal remedies provided for by the Treaties, also confirms the General Court's interpretation of the provisions of the Treaties relating to the jurisdiction of the Courts of the European Union in the light of the fundamental right to effective judicial protection, to the effect that that fundamental right cannot have the effect of setting aside the conditions expressly laid down in the FEU Treaty.

- *Relation of the acts and omissions at issue to the political or strategic choices made in the context of the CFSP and concerning the definition and implementation of the CFSP*

The Court recalls that, in examining the jurisdiction of the Court of Justice of the European Union to hear and determine an action concerning acts or omissions falling within the scope of the CFSP, it is necessary to ascertain, first, whether the situation at issue falls within one of the situations provided for in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, in which that jurisdiction is expressly allowed. [191] If that is not the case, it is necessary, second, to assess whether the jurisdiction of the Court of Justice of the European Union may be based on the fact that the acts and omissions at issue are not directly related to the political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the Common Security and Defence Policy (CSDP). [192] Thus, while the Court of Justice of the European Union has jurisdiction to assess the legality of acts or omissions not directly related to those political or strategic choices or to interpret

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189 Read in the light of Article 47 of the Charter, Article 6(1) and Article 13 ECHR and Article 2, Article 3(5) and Articles 6, 19, 21 and 23 TEU.

190 Judgment of 25 March 2021, Carvalho and Others v Parliament and Council (C-565/19 P, EU:C:2021:252, paragraphs 69 and 78).

191 Judgments of 28 March 2017, Rosneft (C-72/15, EU:C:2017:236, paragraph 60), and of 6 October 2020, Bank Refah Kargaran v Council (C-134/19 P, EU:C:2020:793, paragraph 27).

192 This is apparent from the case-law of the Court arising from paragraph 49 of the judgment of 12 November 2015, Elitaliana v Eulex Kosovo (439/13 P, EU:C:2015:753); paragraph 55 of the judgment of 19 July 2016, H v Council and Others (C-455/14 P, EU:C:2016:569); and paragraph 66 of the judgment of 25 June 2020, SatCen v KF (C-14/19 P, EU:C:2020:492).

them, it does not have jurisdiction if those acts or omissions are directly related to those political or strategic choices. [193]

In that regard, the Court of Justice examines the General Court's assessment, [194] carrying out a specific analysis of each of the acts and omissions falling within the CFSP, and in particular the CSDP, which are the subject of the action brought by KS and KD. [195]

In the present case, in the first place, it is apparent from the order under appeal that the General Court found that that action did not fall within the possible situations in which the provisions of the Treaties expressly provide that the Court of Justice of the European Union has jurisdiction in CFSP matters, which indeed is not in dispute in the present appeals. In the second place, the General Court held, in essence, that the acts and omissions referred to in that action [196] were directly related to that policy, having regard to their political and strategic nature and to their link with the definition and implementation of the CFSP, which is why it declared that it had no jurisdiction to hear and determine that same action.

In that regard, the Court of Justice finds, first, that the resources made available to a CFSP mission, and in particular a CSDP mission, are, as the General Court was fully entitled to hold, directly related to the political or strategic choices made within the framework of the CFSP.

By contrast, the General Court erred in law inasmuch as it held that the alleged lack of appropriate personnel fell within political or strategic issues which concern the definition and implementation of the CFSP. Indeed, the capacity of the Eulex Kosovo mission to employ staff [197] constitutes an act of day-to-day management forming part of the performance of that mission's mandate. Thus, the decisions taken by Eulex Kosovo as to the choice of personnel employed by that mission are not directly linked to the political or strategic choices made by it in the context of the CFSP.

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193 Consequently, the Court of Justice of the European Union does not have jurisdiction to assess the legality of, or interpret, acts or omissions directly related to the definition, conduct and implementation of the CFSP, and especially the CSDP, that is to say, in particular the identification of the European Union's strategic interests and the definition of both the actions to be taken and the positions to be adopted by the European Union as well as of the general guidelines of the CFSP, within the meaning of Articles 24 to 26, 28, 29, 37, 38, 42 and 43 TEU.

194 That assessment is to be found in paragraphs 28 to 39 of the order under appeal.

195 In order to do so, the Court takes account of the fact that the aim of legal certainty does not require that the Courts of the European Union have to consider the substance of the case in order to establish whether they have jurisdiction.

196 Those acts and omissions are referred to in paragraph 20 of the judgment. In essence, they are:
the insufficient investigation of the disappearance and killing of KS and KD's family members, owing to Eulex Kosovo's lack of the necessary resources and appropriate personnel to perform its executive mandate;
the absence of provisions for legal aid for qualifying applicants in proceedings before the review panel and the establishment of that panel without the power to enforce its decisions or to provide a remedy for breaches found to have been committed;
the failure to take remedial action to remedy some or all of the breaches referred to in the first and second indents, despite the fact that the findings of the review panel were brought to the European Union's attention by the Head of Eulex Kosovo;
the misuse or abuse of executive power by the Council and the EEAS, in particular by their assertions that Eulex Kosovo had done the best that it could to investigate the abduction and probable murder of the husband of KS and the murder of the husband and the son of KD;
the misuse of or failure to use executive power properly as a result of the removal of Eulex Kosovo's executive mandate by Council Decision (CFSP) 2018/856 of 8 June 2018 amending Joint Action 2008/124 on the European Union Rule of Law Mission in Kosovo (OJ 2018 L 146, p. 5), while the breaches referred to in the first and second indents remained extant;
the misuse or abuse of executive or public power for failing to ensure that the case of KD, a prima facie well-founded war crimes case, be subject to a legally sound review by Eulex Kosovo and/or the Specialist Prosecutor's Office for investigation and prosecution before the Kosovo Specialist Chamber.

197 That capacity is apparent from the wording of Article 15a of Joint Action 2008/124, as amended by Council Decision 2014/349/CFSP of 12 June 2014 (OJ 2014 L 174, p. 42).

Second, the Court of Justice reaches the same conclusion of an error of law on the part of the General Court as regards the absence of provisions for legal aid in proceedings before the review panel. Indeed, that part of the action brought by KS and KD concerns the procedural rules of that panel, which are not directly related to the political or strategic choices made in the context of the CFSP.

Similarly, as regards the lack of enforcement powers conferred on the review panel or of remedies for breaches found by it to have been committed, the Court, relying on the objectives underlying the establishment of the Eulex Kosovo mission, [198] states that the decision whether or not to make the acts and omissions of that mission subject to a review mechanism meeting internationally recognised standards does not directly relate to the political or strategic choices concerning that mission, but only to an aspect of its administrative management.

Third, the Court states that the absence of both remedial action to remedy the breaches of fundamental rights found by the review panel and a legally sound review of the case of KD concern the failure to adopt individual measures relating to the particular situations of KS and KD and are, therefore, not directly related to the political or strategic choices made in the context of the CFSP. The same is true of the assertion of the Council and the EEAS that the Eulex Kosovo mission had done the best that it could to investigate the crimes at issue. The General Court therefore also erred in law with regard to those aspects of the action.

By contrast, fourth, the decision to remove the executive mandate of a CFSP mission, and in particular of a CSDP mission, is directly related to such political or strategic choices made in the context of the CFSP, for the purposes of Article 28(1) and Article 43(2) TEU. Accordingly, the General Court did not err in law in so far as it declared that it lacked jurisdiction to rule on the complaints concerning the removal of Eulex Kosovo's executive mandate by Decision 2018/856. [199]

- *The action before the General Court*

The Court of Justice, finding that it does not have the necessary information in order to give final judgment on the pleas of inadmissibility raised by the Council, the Commission and the EEAS or on the merits of the action brought by KS and KD, refers the case back to the General Court for a ruling on the admissibility and, if necessary, the merits of that action, as well as on the application for access to Eulex Kosovo's OPLAN.

198 See Articles 1 and 2 of Joint Action 2008/124.

199 That decision terminated the obligation of that mission, enshrined in Article 3(d) of Joint Action 2008/124, to ensure that certain crimes 'are properly investigated, prosecuted, adjudicated and enforced'.

XIV. BUDGET AND SUBSIDIES OF THE EUROPEAN UNION: IMPLEMENTATION OF THE EU BUDGET

Judgment of the General Court (Ninth Chamber, Extended Composition), 4 September 2024, IMG v Commission, T-509/21

Link to the full text of the judgment

EU Financial Regulations – Implementation of the EU budget under indirect management by an international organisation – Decision refusing to recognise a legal person as an international organisation – Action for annulment – Lawfulness of the authority to act granted to the applicant's lawyers – Admissibility – Decision adopted in compliance with a judgment of the Court of Justice – Article 266 TFEU – Res judicata – Principle of good administration – Legal certainty – Regulation (EU, Euratom) No 966/2012 – Article 58 – Delegated Regulation (EU) No 1268/2012 – Article 43 – Regulation (EU, Euratom) 2018/1046 – Article 156 – Concepts of 'international organisation' and 'international agreement' – Errors in law – Manifest error of assessment – Non-contractual liability

Sitting in extended composition, the General Court dismisses the action brought by International Management Group (IMG) seeking first, annulment of the decision of 8 June 2021 by which the European Commission refused to accord it, with retroactive effect from 16 December 2014, the status of an international organisation provided for by the EU Financial Regulations for the implementation of EU funds using the indirect management method ('the contested decision') [200] and, second, compensation for the material and non-material damage which it claims to have sustained. The examination of the lawfulness of the contested decision gives the Court the opportunity to clarify, first, the appropriate extent of review by the Courts of the European Union in that regard and, second, the concepts of 'international agreement' and 'international organisation', as defined by instruments of public international law and the case-law, in particular that of international courts.

IMG, the applicant, was created on 25 November 1994 to provide the States and international organisations participating in the reconstruction of Bosnia and Herzegovina with an entity specifically created for that purpose.

On 7 November 2013, the Commission adopted the implementing decision on the Annual Action Programme 2013 in favour of Myanmar/Burma [201] to be financed from the general budget of the European Union, on the basis of Regulation No 966/2012. [202] That decision provided, inter alia, for a trade development programme, the cost of which was to be financed by the European Union and implemented by joint management with the applicant.

On 17 February 2014, the European Anti-Fraud Office (OLAF) informed the Commission that it had opened an investigation into the applicant's status. On 15 December 2014, the Commission received the report drawn up by OLAF following its investigation. In that report, OLAF stated, in essence, that

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

201 Implementing Decision C(2013) 7682 final.

202 Article 84 of Regulation No 966/2012.

the applicant was not an international organisation within the meaning of Regulation No 1605/2002 [203] and Regulation No 966/2012 which succeeded it.

On 16 December 2014, the Commission decided to entrust the implementation, by indirect management, of the trade development programme provided for in the abovementioned implementing decision to an organisation other than the applicant ('the decision of 16 December 2014').

Lastly, on 8 May 2015, the Commission sent a letter to the applicant informing it of how it intended to follow up on the OLAF report, in which it stated that it had decided, inter alia, that, until there was absolute certainty regarding the applicant's status as an international organisation, it would not enter into any new delegation agreement with it using the indirect management method provided for by Regulation No 966/2012 ('the decision of 8 May 2015').

The applicant brought two actions before the General Court seeking, first, annulment of the decision of 16 December 2014 and, second, annulment of the decision of 8 May 2015 and compensation for the harm caused by that decision. Following the dismissal of those two actions, by judgments of 2 February 2017, International Management Group v Commission, [204] and of 2 February 2017, IMG v Commission, [205] the applicant brought an appeal before the Court of Justice. By judgment of 31 January 2019, International Management Group v Commission, [206] the Court of Justice set aside those two judgments of the General Court, annulled the decisions of 16 December 2014 and 8 May 2015, and referred Case T-381/15 back to the General Court for a ruling on the claim for compensation submitted by the applicant in respect of the harm allegedly caused by the decision of 8 May 2015.

By judgment of 9 September 2020, IMG v Commission, [207] the General Court rejected the applicant's claim for compensation for the harm allegedly caused by the decision of 8 May 2015. The applicant brought an appeal before the Court of Justice.

On 8 June 2021, after exchanges with the applicant which submitted its observations, the Commission finally adopted the contested decision.

By judgment of 22 September 2022, IMG v Commission, [208] the Court of Justice set aside the judgment of the General Court of 9 September 2020 in part and referred Case T-381/15 RENV back to the General Court for a ruling on the applicant's claim for damages for the material harm allegedly caused by the decision of 8 May 2015.

Findings of the Court

First, the Court rejects the applicant's claims for annulment of the contested decision.

The Court finds, first of all, that the contested decision sufficiently set out the legal and factual considerations on which it was based and which were such as to enable the applicant to assess its lawfulness and to enable the Court to exercise its power of review.

Next, the Court rejects the applicant's first plea in law, alleging several errors in law, in particular infringement of Article 266 TFEU, of the force of res judicata, of the principle of non-retroactivity of EU measures and of the principle of equal treatment. The Court also rejects the third plea in law, alleging

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[203] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

[204] Judgment of 2 February 2017, International Management Group v Commission (T-29/15, not published, EU:T:2017:56).

[205] Judgment of 2 February 2017, IMG v Commission (T-381/15, not published, EU:T:2017:57).

[206] Judgment of 31 January 2019, International Management Group v Commission (C-183/17 P and C-184/17 P, EU:C:2019:78).

[207] Judgment of 9 September 2020, IMG v Commission (T-381/15 RENV, EU:T:2020:406).

[208] Judgment of 22 September 2022, IMG v Commission (C-619/20 P and C-620/20 P, EU:C:2022:722).

breach of the principle of legal certainty, and the second plea in law, alleging breach of the duty of diligence and of the principle of impartiality.

Lastly, the Court rejects the fourth plea in law, alleging manifest errors of assessment and errors in law by which the applicant complained that the Commission refused to classify the act establishing it as an international agreement establishing an international organisation and to recognise its status as an international organisation notwithstanding the subsequent practice of its members.

- *The extent of review by the Courts of the European Union in the present case*

In the context of the examination of the fourth plea in law, the Court provides clarification as to the extent of review by the Courts of the European Union of the lawfulness of a decision, such as the contested decision. It recalls, in that regard, that the Commission enjoys a broad discretion when exercising its responsibility for implementing the EU budget, in particular when it chooses to implement that budget using the indirect management method and that, in accordance with that method of management, it entrusts budget implementation tasks to international organisations. Thus, where the Commission exercises the powers set out above, the adverse decisions it adopts in that context are subject to review by the Court which is limited to the manifest error of assessment, without prejudice to the examination of other grounds of illegality which may be relied on in an action for annulment, in accordance with the second paragraph of Article 263 TFEU.

Nevertheless, where, as in the present case, the Commission refuses to entrust budget implementation tasks to an organisation using the indirect management method on the ground that that organisation does not have the status of an international organisation, the lawfulness of such a decision is subject to review by the Court, both as regards an error in law and a manifest error of assessment.

In such a case, the implementation by the Commission of the general rules which make it possible to define and identify international organisations falls within the scope of a review of the error in law, whereas the interpretation of the rules of the organisation which claims to be an international organisation for the purpose of implementing the EU budget using the indirect management method and the interpretation of the positions adopted by its members, which are likely to be somewhat complex, are subject to a review limited to manifest errors of assessment.

- *The concepts of 'international organisation' and 'international agreement' provided for by the EU Financial Regulations for the implementation of its budget using the indirect management method*

As a preliminary point, the Court recalls that the concept of 'international organisation' as defined by the successive provisions of the EU Financial Regulations [209] covers international public sector organisations set up by international agreements. EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions.

However, in so far as the concepts of 'international organisation' and 'international agreement' are used in the EU Financial Regulations for the specific purpose of implementing its budget, they must be interpreted narrowly, in order to protect the financial interests of the European Union.

Thus, in a dispute such as that in the present case, the Court must apply the concepts of public international law to which the EU Financial Regulations refer by having recourse to the instruments of that law which define those concepts, as interpreted in accordance with the case-law. In particular, in the present case, the Court interprets the concepts of 'international organisation' and 'international agreement' provided for in the EU Financial Regulations for the implementation of its budget under

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[209] The term 'international organisation', referred to in Article 53 and Article 53(d) of Regulation No 1605/2002, in Article 58 of Regulation No 966/2012 and in Article 62 of Regulation 2018/1046, has been defined, in almost identical terms, in Article 43(2) of Regulation No 2342/2002 and then in Article 43(1) of Delegated Regulation No 1268/2012, which repealed and replaced Regulation No 2342/2002, and in Article 156 of Regulation 2018/1046. Thus, under those three provisions, that concept covers organisations governed by public international law created by international agreements.

indirect management in the light of the customary principles of public international law contained, inter alia, in the Vienna Convention and the Draft articles on the responsibility of international organisations. [210]

In that regard, it follows from Article 2(1)(i) of the Vienna Convention that the expression 'international organisation' means an intergovernmental organisation. Moreover, Article 2(a) of the Draft articles states that that expression means an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality and that international organisations may include as members, in addition to States, other entities.

In the first place, as regards the condition relating to establishment by a treaty or other instrument governed by international law, it follows from Article 2(1)(a) of the Vienna Convention that 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Thus, that instrument or those instruments may be the expression of the joint intentions on the part of two or more subjects of international law, which those instruments establish formally. Furthermore, it follows from the case-law of the international courts that, irrespective of its political significance, a document signed by States cannot constitute an international agreement if it does not contain any provision creating rights or obligations to which those States have consented. [211]

In the second place, as regards the condition relating to possession of its own international legal personality, it follows from the case-law of the international courts that, first, the recognition of an international organisation is subject to the organisation concerned having a legal personality. An entity established by States and, where appropriate, by one or more international organisations, does not, in the absence of a legal personality of its own, have the character of an international organisation, but rather that of a body which is dependent either on the States which established it, [212] or on an international organisation which hosts that entity. [213]

Second, it also follows from the case-law of the international courts that international organisations enjoy, in principle, privileges and immunities which are necessary for the performance of their tasks. [214] Unlike the immunity of States from jurisdiction, based on the principle par in parem non habet imperium, the immunities of international organisations are, as a general rule, conferred by the treaties establishing those organisations and have a functional character, inasmuch as they are intended to avoid any interference with the functioning and independence of the organisations concerned.

Third, it follows from the case-law that the constituent instruments of international organisations are treaties of a particular type in that their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Thus, international

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210 Draft articles on the responsibility of international organisations adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10) (Yearbook of the International Law Commission, 2011, Vol. II, Part Two; 'the Draft Articles').

211 See judgment of the International Court of Justice of 1 October 2018, Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), ICJ Reports 2018, p. 507, paragraphs 105 and 106 and the case-law cited.

212 See, to that effect, judgment of the International Court of Justice of 26 June 1992, Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, ICJ Reports 1992, p. 240, paragraph 47.

213 See, to that effect, Advisory Opinion of the International Court of Justice, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, of 1 February 2012, ICJ Reports 2012, p. 10, paragraphs 57 and 61.

214 See, to that effect, judgment of the Permanent Court of Arbitration of 22 November 2002, Dr. Reineccius and Others v. Bank for International Settlements, Case No 2000-04, paragraph 108; Advisory Opinion of the International Court of Justice, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, of 1 February 2012, ICJ Reports 2012, p. 10, paragraph 58, and judgment of the International Court of Justice of 20 April 2010, Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports 2010, p. 14, paragraph 88.

organisations are governed by the 'principle of speciality', that is to say they are invested by the States which create them with powers, the limits of which are a function of the common interests the promotion of which those States entrust to them and which are normally the subject of an express statement in their constituent instruments. [215]

Thus, an international organisation cannot be reduced to merely an optional mechanism made available to the parties which each may use or not, as it pleases. By creating an international organisation and investing it with all the resources necessary for its operation, its founders demonstrate their intention to provide the best possible guarantees of stability, continuity and effectiveness to the performance of the tasks entrusted to that organisation, with the result that they cannot depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. [216]

- *The classification by the Court of IMG's founding act as an 'international agreement'*

The Court examines the content and scope of the resolution of 25 November 1994 in order to determine whether that document contains legally binding commitments for its signatories.

In that regard, the Court notes that it is apparent from the wording of the resolution of 25 November 1994 that its signatories approved the applicant's organisational rules, in particular by confirming its General Manager and deciding to set up a steering committee within it. In particular, although that resolution did not impose any obligation on its authors to become members of the applicant, the fact remains that point 5 thereof laid down an obligation for the States that were signatories to decide to integrate the applicant into the overall framework for the reconstruction of Bosnia and Herzegovina or to phase out its activities. Thus, that resolution did contain at least one legally binding commitment for its signatories, and therefore it cannot be regarded as a declaration the scope of which is exclusively political.

Consequently, the Court finds that the Commission vitiated the contested decision by an error in law in considering that the resolution of 25 November 1994 was a political declaration which was not legally binding.

The Court also considers that the Commission vitiated the contested decision by an error in law in refusing to classify that resolution as an international agreement on account of the absence of full powers of the participants in the meeting of the same day, since the signature of that resolution was subsequently confirmed by at least two States.

In that regard, the Court recalls that, where a document is signed by persons who do not have the necessary authority to engage the States to which they belong, in accordance with Article 7(1) of the Vienna Convention, such a document cannot be regarded as a legally binding international agreement, unless those persons are authorised to engage those States without having to produce full powers, pursuant to paragraph 2 of that article. [217]

However, in the present case, the Court finds that, by participating in the adoption of the applicant's initial or subsequent statutes or by sitting on its steering committee or its standing committee, the States that were signatories to the resolution of 25 November 1994 acted in such a way as to make the acts of signature of that act by their representatives appear as performed and thus subsequently

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215 See, to that effect, Advisory Opinion of the International Court of Justice of 8 July 1996, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports 1996, p. 66, paragraphs 19 and 25, judgments of the International Court of Justice of 11 June 1998, Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, ICJ Reports 1998, p. 275, paragraphs 64 to 67, and of 20 April 2010, Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports 2010, p. 14, paragraph 89.

216 See, to that effect, judgment of the International Court of Justice of 20 April 2010, Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports 2010, p. 14, paragraphs 90 and 91.

217 See, to that effect, judgment of the International Tribunal for the Law of the Sea of 14 March 2012, Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Reports 2012, p. 4, paragraphs 96 and 98.

confirmed, within the meaning of Article 8 of the Vienna Convention, the signature of that resolution, the purpose of which was to establish the applicant.

However, the Court considers that those errors in law remain, at this stage of the examination, irrelevant to the lawfulness of the contested decision, since they do not affect the condition laid down in the EU Financial Regulations that the applicant, in order to be eligible to implement the EU budget using the indirect management method provided for the benefit of international organisations, must have been founded by an international agreement the purpose of which was to establish it as an international organisation. Therefore, the illegalities found are not, by themselves, such as to entail the annulment of the contested decision.

- *- The Court's interpretation of the intention of the signatories to IMG's founding act and of the subsequent practice of the signatory States and the Member States of that entity*

In the present case, the Court takes the view that the Commission did not vitiate the contested decision by an error in law in finding that the resolution of 25 November 1994 had neither the purpose nor the effect of conferring on the applicant the status of an international organisation.

In that regard, the Court recalls that, pursuant to Article 31 of the Vienna Convention, which expresses general customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of that treaty in their context and in the light of its object and purpose.

Next, the Court considers that the Commission did not err in law in finding, in the contested decision, that subsequent practice, following the adoption of the resolution of 25 November 1994, and then the adoption of the initial statute and the 2012 statute, did not demonstrate a sufficiently wide and clear recognition of the applicant's status as an international organisation, both on the part of the signatories to that resolution and on the part of its members.

In that regard, the Court relies on the case-law according to which instruments cannot be regarded as a subsequent agreement or subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty, within the meaning of Article 31(3)(a) and (b) of the Vienna Convention, if those instruments were adopted without the support of all the States parties to that treaty. [218]

Second, the Court rejects the applicant's claim for compensation for the material and non-material damage which it claims to have sustained, recalling inter alia that the claims seeking annulment of the contested decision were rejected, and therefore the first condition for the European Union to incur non-contractual liability and relating to existence of a breach of a rule of law intended to confer rights on individuals has not been satisfied.

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[218] See, to that effect, judgment of the International Court of Justice of 31 March 2014, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), ICJ Reports 2014, p. 226, paragraph 83.

Nota bene:

The résumé of the following case is currently being finalised and will be published in a future issue of the Monthly Case-Law Digest:

– Judgment of the General Court (Fourth Chamber, Extended Composition), 11 September 2024, CQ v Court of Auditors, T-386/19