COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. CITIZENSHIP OF THE UNION: DISCRIMINATION ON GROUNDS OF NATIONALITY

Judgment of the Court of Justice (Grand Chamber), 19 November 2024, Commission v Czech Republic (Ability to stand for election and membership of a political party), C-808/21

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Article 20 TFEU – Citizenship of the Union – Article 21 TFEU – Right to move and reside freely within the territory of the Member States – Article 22 TFEU – Right to vote and to stand as a candidate in municipal and European Parliament elections in the Member State of residence under the same conditions as nationals of that State – Citizens of the Union residing in a Member State of which they are not nationals – No right to be a member of a political party – Articles 2 and 10 TEU – Democratic principle – Article 4(2) TEU – Respect for the national identity of the Member States – Article 12 of the Charter of Fundamental Rights of the European Union – Role of political parties in expressing the will of citizens of the Union

Hearing an action for failure to fulfil obligations, the Court of Justice, sitting as the Grand Chamber, finds that by denying EU citizens who are not Czech nationals but who reside in the Czech Republic the right to become a member of a political party or political movement, that Member State has failed to fulfil its obligations under Article 22 TFEU.

The Czech Law on political parties and political movements [1] provides that citizens are to have the right of association in political parties and political movements and that every citizen aged 18 or over may join a party or movement. Accordingly, EU citizens who do not have Czech nationality but who reside in the Czech Republic do not enjoy that right.

Taking the view that that legislation is contrary to Article 22 TFEU, the European Commission brought an action for failure to fulfil obligations before the Court. It submits inter alia that, by conferring the right to become a member of a political party or political movement on Czech nationals alone, the Czech Republic prevents EU citizens who reside in that Member State but are not nationals thereof from exercising electoral rights in municipal and European Parliament elections under the same conditions as Czech nationals.

Findings of the Court

In the first place, the Court examines the scope of Article 22 TFEU, taking account of its wording, its context and the objectives it pursues.

Thus, first, according to the wording of that provision, EU citizens residing in a Member State of which they are not nationals are to have the right to vote and to stand as a candidate in municipal and European Parliament elections under the same conditions as nationals of that Member State, and those rights are to be exercised subject to detailed arrangements adopted by the Council of the European Union. That wording contains no reference to the conditions for acquiring membership of a political party or political movement. However, by referring to the conditions governing the right to vote and to stand for election applicable to nationals of the Member State of residence of such an EU citizen, Article 22 TFEU prohibits that Member State from making the exercise of that right by that EU citizen subject to conditions other than those applicable to its own nationals. That provision thus lays down a specific rule of non-discrimination on grounds of nationality and, consequently, applies to any national measure giving rise to a difference in treatment liable to undermine the effective exercise of the right to vote and to stand as a candidate in municipal and European Parliament elections.

1 Le zákon č. 424/1991 Sb., o sdružování v politických stranách a v politických hnutích (Law No 424/1991 on associations in political parties and political movements), as amended by zákon č. See Paragraph 1 and Paragraph 2(3) of that law.

Furthermore, the detailed arrangements for the exercise of the right to vote and to stand for election were adopted by the Council in Directives 93/109 [2] and 94/80, [3] which, even though they do not contain provisions relating to the conditions for the acquisition, by EU citizens residing in a Member State of which they are not nationals, of membership of a political party, cannot, even implicitly, limit the scope of the rights and obligations arising under Article 22 TFEU. In that regard, in the absence of specific provisions relating to those conditions, the determination of those conditions falls within the competence of the Member States. Nevertheless, when exercising that competence, the Member States are required to comply with their obligations under EU law, including Article 22 TFEU.

Secondly, as regards the context of Article 22 TFEU, the Court refers both to the other provisions of the FEU Treaty and to the provisions of the same rank contained inter alia in the EU Treaty and the Charter of Fundamental Rights of the European Union ('the Charter').

In that connection, first of all, Article 22 TFEU, read in conjunction with Article 20(2) TFEU, links the right to vote and to stand as a candidate in municipal and European Parliament elections to citizenship of the Union. Moreover, under Article 20(2) and Article 21 TFEU, citizenship of the Union confers on each EU citizen a primary and individual right to move and reside freely within the territory of the Member States. There is therefore a connection between, on the one hand, the right to freedom of movement and residence and, on the other, the right of EU citizens residing in a Member State of which they are not nationals to vote and to stand as a candidate in municipal and European Parliament elections.

Next, Article 10 TEU – which confers on EU citizens the right to be directly represented in the European Parliament and to participate in the democratic life of the European Union – underscores the connection between the principle of representative democracy within the European Union and the right to vote and to stand as a candidate in European Parliament elections attached to citizenship of the Union, guaranteed by Article 22(2) TFEU.

Lastly, Article 12(1) of the Charter enshrines the right of everyone to freedom of association at all levels, in particular in political, trade union and civic matters. That right corresponds to the right guaranteed in Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is one of the essential foundations of a democratic and pluralist society, in that it allows citizens to act collectively in areas of common interest and, in so doing, to contribute to the proper functioning of public life. Article 10(4) TEU and Article 12(2) of the Charter recognise the fundamental role of political parties at European level in expressing the will of EU citizens. Political parties, one of whose functions is to field candidates in elections, thus fulfil an essential function in the system of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU. Therefore, membership of a political party or political movement contributes significantly to the effective exercise of the right to stand for election, as conferred by Article 22 TFEU.

Thirdly, with respect to the objective of Article 22 TFEU, that article seeks, first of all, to confer on EU citizens residing in a Member State of which they are not nationals the right to participate in the democratic electoral process of that Member State through the right to vote and to stand for election at European and local level. Next, that article aims to ensure equal treatment between EU citizens, which implies equal access to the means available under the domestic legal system to nationals of that Member State for the purpose of exercising that right in municipal and European Parliament elections. Lastly, it follows from the connection between, on the one hand, freedom of movement and residence and, on the other, the right to vote and to stand as a candidate in those elections that the latter is intended, amongst other things, to promote the gradual integration of the EU citizen concerned in the society of the host Member State. Article 22 TFEU is thus intended to ensure that EU citizens residing in a Member State of which they are not nationals are represented, as a corollary to their integration in the society of the host Member State.

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2 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34), as amended by Council Directive 2013/1/EU of 20 December 2012 (OJ 2013 L 6, p. 27).

3 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ 1994 L 368, p. 38).

In the second place, it is in the light of those clarifications on the scope of Article 22 TFEU, read in the light of Articles 20 and 21 TFEU, Article 10 TEU and Article 12 of the Charter, that the Court considers whether the result of the difference in treatment on grounds of nationality established by Czech law, as regards the possibility of becoming a member of a political party or political movement, is that EU citizens who reside in the Czech Republic but are not nationals thereof do not enjoy equal access to the means available to Czech nationals for the purposes of effectively exercising their right to stand for election, in breach of Article 22 TFEU.

In that regard, it is admittedly possible, in the Czech Republic, for a candidate who is not a member of a political party or political movement to be included on a list of candidates submitted by such a party or movement, or by a coalition thereof, in municipal and European Parliament elections. However, first, since it will be for the members of the political party or political movement to choose the candidates to be included on their lists, the fact that an EU citizen who resides in the Czech Republic but is not a national thereof and who wishes to take part in those elections is not able to become a member of a political party or political movement is liable to preclude that person from participating in the decision of that party or movement concerning his or her inclusion on that list of candidates. That circumstance places such EU citizens in a less favourable position than Czech nationals, who are members of a political party or political movement in that Member State, as regards the possibility of standing as a candidate in municipal and European Parliament elections on the list of a such a political party or political movement, or of a coalition thereof.

Secondly, the fact that Czech nationals may choose to stand as candidates either as members of a political party or political movement or as independents, whereas EU citizens who reside in the Czech Republic but are not nationals thereof are only afforded the latter possibility, demonstrates that those EU citizens are unable to exercise their right to stand as a candidate in those elections under the same conditions as Czech nationals.

In the third and last place, the Court examines whether that difference in treatment concerning access to the means enabling the right to vote and to stand as a candidate in municipal and European Parliament elections to be exercised effectively may be justified by reasons relating to respect for the national identity of a Member State, within the meaning of Article 4(2) TEU.

First of all, it is true that the organisation of national political life, to which political parties and political movements contribute, is part of national identity. However, since the right to vote and to stand for election conferred by Article 22 TFEU on EU citizens residing in a Member State of which they are not nationals concerns municipal and European Parliament elections in that Member State, that provision neither requires the Member State concerned to grant those citizens the right to vote and to stand as a candidate in national elections, nor prohibits it from adopting specific rules on decision-making within a political party or political movement regarding the nomination of candidates in national elections, rules which would preclude members of the party or movement who are not nationals of that State from taking part in such decision-making.

Next, Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Articles 2 and 10 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions. In that regard, the principle of democracy and the principle of equal treatment are values on which the European Union is founded, in accordance with Article 2 TEU. That provision is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order and are given concrete expression in principles containing legally binding obligations for the Member States. Furthermore, the principle of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU, gives concrete form to the value of democracy referred to in Article 2 TEU.

Lastly, by guaranteeing EU citizens residing in a Member State of which they are not nationals the right to vote and to stand as a candidate in municipal and European Parliament elections in that Member State, under the same conditions as nationals thereof, Article 22 TFEU gives concrete expression to the principles of democracy and of equal treatment of EU citizens, principles which are an integral part of the identity and common values of the European Union, to which the Member States adhere and whose observance they must ensure in their territories. Consequently, allowing such EU citizens to become members of a political party or political movement in their Member State

of residence so as to implement in full the principles of democracy and equal treatment cannot be regarded as undermining the national identity of that Member State.

Judgment of the Court of Justice (Grand Chamber), 19 November 2024, Commission v Poland (Ability to stand for election and membership of a political party), C-814/21

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Article 20 TFEU – Citizenship of the Union – Article 21 TFEU – Right to move and reside freely within the territory of the Member States – Article 22 TFEU – Right to vote and to stand as a candidate in municipal and European Parliament elections in the Member State of residence under the same conditions as nationals of that State – Citizens of the Union residing in a Member State of which they are not nationals – No right to be a member of a political party – Articles 2 and 10 TEU – Democratic principle – Article 4(2) TEU – Respect for the national identity of the Member States – Article 12 of the Charter of Fundamental Rights of the European Union – Role of political parties in expressing the will of citizens of the Union

Hearing an action for failure to fulfil obligations, the Court of Justice, sitting as the Grand Chamber, finds that by denying EU citizens who are not Polish nationals but who reside in Poland the right to be a member of a political party, that Member State has failed to fulfil its obligations under Article 22 TFEU.

The Polish Law on political parties [4] provides that nationals of the Republic of Poland aged 18 or over may be members of a political party. Accordingly, EU citizens who do not have Polish nationality but who reside in Poland do not enjoy that right.

Taking the view that that legislation is contrary to Article 22 TFEU, the European Commission brought an action for failure to fulfil obligations before the Court. It submits inter alia that, by allowing only Polish nationals to be members of a political party, Poland prevents EU citizens who reside in that Member State but are not nationals thereof from exercising electoral rights in municipal and European Parliament elections under the same conditions as Polish nationals.

Findings of the Court

In the first place, the Court examines the scope of Article 22 TFEU, taking account of its wording, its context and the objectives it pursues.

Thus, first, according to the wording of that provision, EU citizens residing in a Member State of which they are not nationals are to have the right to vote and to stand as a candidate in municipal and European Parliament elections under the same conditions as nationals of that Member State, and those rights are to be exercised subject to detailed arrangements adopted by the Council of the European Union. That wording contains no reference to the conditions for acquiring membership of a political party. However, by referring to the conditions governing the right to vote and to stand for election applicable to nationals of the Member State of residence of such an EU citizen, Article 22 TFEU prohibits that Member State from making the exercise of that right by that EU citizen subject to conditions other than those applicable to its own nationals. That provision thus lays down a specific rule of non-discrimination on grounds of nationality and, consequently, applies to any national measure giving rise to a difference in treatment liable to undermine the effective exercise of the right to vote and to stand as a candidate in municipal and European Parliament elections.

Furthermore, the detailed arrangements for the exercise of the right to vote and to stand for election were adopted by the Council in Directives 93/109 [5] and 94/80, [6] which, even though they do not

4 The ustawa o partiach politycznych (Law on political parties) of 27 April 1997 (Dz. U. of 1997, No 98, item 604). See Article 2(1) of that law.

contain provisions relating to the conditions for the acquisition, by EU citizens residing in a Member State of which they are not nationals, of membership of a political party, cannot, even implicitly, limit the scope of the rights and obligations arising under Article 22 TFEU. In that regard, in the absence of specific provisions relating to those conditions, the determination of those conditions falls within the competence of the Member States. Nevertheless, when exercising that competence, the Member States are required to comply with their obligations under EU law, including Article 22 TFEU.

Secondly, as regards the context of Article 22 TFEU, the Court refers both to the other provisions of the FEU Treaty and to the provisions of the same rank contained inter alia in the EU Treaty and the Charter of Fundamental Rights of the European Union ('the Charter').

In that connection, first of all, Article 22 TFEU, read in conjunction with Article 20(2) TFEU, links the right to vote and to stand as a candidate in municipal and European Parliament elections to citizenship of the Union. Moreover, under Article 20(2) and Article 21 TFEU, citizenship of the Union confers on each EU citizen a primary and individual right to move and reside freely within the territory of the Member States. There is therefore a connection between, on the one hand, the right to freedom of movement and residence and, on the other, the right of EU citizens residing in a Member State of which they are not nationals to vote and to stand as a candidate in municipal and European Parliament elections.

Next, Article 10 TEU – which confers on EU citizens the right to be directly represented in the European Parliament and to participate in the democratic life of the European Union – underscores the connection between the principle of representative democracy within the European Union and the right to vote and to stand as a candidate in European Parliament elections attached to citizenship of the Union, guaranteed by Article 22(2) TFEU.

Lastly, Article 12(1) of the Charter enshrines the right of everyone to freedom of association at all levels, in particular in political, trade union and civic matters. That right corresponds to the right guaranteed in Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is one of the essential foundations of a democratic and pluralist society, in that it allows citizens to act collectively in areas of common interest and, in so doing, to contribute to the proper functioning of public life. Article 10(4) TEU and Article 12(2) of the Charter recognise the fundamental role of political parties at European level in expressing the will of EU citizens. Political parties, one of whose functions is to field candidates in elections, thus fulfil an essential function in the system of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU. Therefore, membership of a political party contributes significantly to the effective exercise of the right to stand for election, as conferred by Article 22 TFEU.

Thirdly, with respect to the objective of Article 22 TFEU, that article seeks, first of all, to confer on EU citizens residing in a Member State of which they are not nationals the right to participate in the democratic electoral process of that Member State through the right to vote and to stand for election at European and local level. Next, that article aims to ensure equal treatment between EU citizens, which implies equal access to the means available under the domestic legal system to nationals of that Member State for the purpose of exercising that right in municipal and European Parliament elections. Lastly, it follows from the connection between, on the one hand, freedom of movement and residence and, on the other, the right to vote and to stand as a candidate in those elections that the latter is intended, amongst other things, to promote the gradual integration of the EU citizen concerned in the society of the host Member State. Article 22 TFEU is thus intended to ensure that EU citizens residing in a Member State of which they are not nationals are represented, as a corollary to their integration in the society of the host Member State.

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5 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34), as amended by Council Directive 2013/1/EU of 20 December 2012 (OJ 2013 L 26, p. 27).

6 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ 1994 L 368, p. 38).

In the second place, it is in the light of those clarifications on the scope of Article 22 TFEU, read in the light of Articles 20 and 21 TFEU, Article 10 TEU and Article 12 of the Charter, that the Court considers whether the result of the difference in treatment on grounds of nationality established by Polish law, as regards the possibility of becoming a member of a political party, is that EU citizens who reside in Poland but are not nationals thereof do not enjoy equal access to the means available to Polish nationals for the purposes of effectively exercising their right to stand for election, in breach of Article 22 TFEU.

In that regard, it is admittedly possible, in Poland, for an independent candidate who is not a member of a political party to be nominated by an electoral committee of a political party. However, first, since it will be for the members of the political party to choose the candidates to be nominated, the fact of not being a member of a political party in principle precludes an EU citizen who resides in Poland but is not a national thereof from participating in the decision to be taken by that party concerning his or her nomination by its electoral committee. That circumstance places such EU citizens in a less favourable position than Polish nationals, who are members of a political party, as regards the possibility of standing as a candidate in municipal and European Parliament elections on the list of a political party.

Secondly, the fact that Polish nationals may choose to stand as candidates either as members of a political party or as independents, whereas EU citizens who reside in Poland but are not nationals thereof are only afforded the latter possibility, demonstrates that those EU citizens are unable to exercise their right to stand as a candidate in those elections under the same conditions as Polish nationals.

In the third and last place, the Court examines whether that difference in treatment concerning access to the means enabling the right to vote and to stand as a candidate in municipal and European Parliament elections to be exercised effectively may be justified by reasons relating to respect for the national identity of a Member State, within the meaning of Article 4(2) TEU.

First of all, it is true that the organisation of national political life, to which political parties contribute, is part of national identity. However, since the right to vote and to stand for election conferred by Article 22 TFEU on EU citizens residing in a Member State of which they are not nationals concerns municipal and European Parliament elections in that Member State, that provision neither requires the Member State concerned to grant those citizens the right to vote and to stand as a candidate in national elections, nor prohibits it from adopting specific rules on decision-making within a political party regarding the nomination of candidates in national elections, rules which would preclude members of the party who are not nationals of that State from taking part in such decision-making.

Next, Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Articles 2 and 10 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions. In that regard, the principle of democracy and the principle of equal treatment are values on which the European Union is founded, in accordance with Article 2 TEU. That provision is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order and are given concrete expression in principles containing legally binding obligations for the Member States. Furthermore, the principle of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU, gives concrete form to the value of democracy referred to in Article 2 TEU.

Lastly, by guaranteeing EU citizens residing in a Member State of which they are not nationals the right to vote and to stand as a candidate in municipal and European Parliament elections in that Member State, under the same conditions as nationals thereof, Article 22 TFEU gives concrete expression to the principles of democracy and of equal treatment of EU citizens, principles which are an integral part of the identity and common values of the European Union, to which the Member States adhere and whose observance they must ensure in their territories. Consequently, allowing such EU citizens to become members of a political party in their Member State of residence so as to implement in full the principles of democracy and equal treatment cannot be regarded as undermining the national identity of that Member State.

II. JUDICIAL COOPERATION IN CRIMINAL MATTERS: COMPENSATION FOR THE VICTIMS OF CRIME

Judgment of the Court of Justice (Fifth Chamber), 7 November 2024, Beobank, C-126/23

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2004/80/EC – Article 12(2) – National schemes on compensation to victims of violent intentional crime – Homicide – Compensation for close family members of the deceased – Concept of 'victim' – 'Tiered' compensation scheme according to the order of succession – National legislation excluding the payment of compensation to other family members of the deceased when there are children or a surviving spouse – Parents and siblings of the deceased – 'Fair and appropriate' compensation

In the context of a reference for a preliminary ruling, the Court of Justice rules on the compatibility with Directive 2004/80 [7] of the Italian scheme on compensation for victims of violent intentional crime which, in the case of a homicide, makes the right to compensation of the parents of the deceased person subject to the absence of a surviving spouse and children of that deceased person and the right to compensation of the victim's siblings subject to the absence of those parents.

On 18 September 2018, the Tribunale di Padova (District Court, Padua, Italy) sentenced the perpetrator of the homicide of his ex-partner to a term of imprisonment of 30 years and ordered that he should provisionally pay: EUR 400 000 to each of the deceased person's two children, EUR 120 000 to her father, mother and sister, and EUR 30 000 to her surviving spouse, from whom she was separated, but not divorced. In accordance with the national legislation, [8] as the perpetrator of the homicide had no assets or income and had been granted free legal aid, the Italian State paid, to each of the two children only, EUR 20 000 in compensation, while the separated husband was granted compensation of EUR 16 666.66. On 1 February 2022, the victim's parents, sister and children brought proceedings before the Tribunale Ordinario di Venezia (District Court, Venice, Italy) seeking to have the amounts claimed from the Italian State by way of compensation to be fixed taking into account the amount of harm determined by the judgment convicting the perpetrator of that homicide.

Since it had doubts as to the compatibility with EU law of the national legislation providing for the setting of the amounts owed to members of the family of the homicide victim on the basis of the degree of their relationship, the District Court, Venice, made a request to the Court for a preliminary ruling.

Findings of the Court

As a preliminary point, the Court states that concept of 'victims', within the meaning of Article 12(2) of Directive 2004/80, must be understood as being capable of including indirect victims of a violent intentional crime, such as the close family members of the person who died as a result of that crime, where they suffer, indirectly, the consequences of that crime.

Since Directive 2004/80 does not contain any definition of the concept of 'victims' and makes no reference to national law as regards the meaning to be given to it, that concept must be regarded as an autonomous concept of EU law, which must be interpreted in a uniform manner in the territory of the European Union in accordance with the usual meaning of the term in question in everyday language, taking into account the objectives pursued by the legislation of which it forms part and the context in which it is used.

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7 Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ 2004 L 261, p. 15). Under Article 12(2) of that directive, all Member States must ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.

8 Decreto ministeriale – Determinazione degli importi dell'indennizzo alle vittime dei reati intenzionali violenti (Ministerial Decree on the determination of the amounts of compensation payable to the victims of violent intentional crimes) of 22 November 2019 (GURI No 18 of 23 January 2020, p. 9).

As regards, first, the usual meaning of the term 'victims' in everyday language, it may be understood as covering both persons who have themselves been subjected to violent intentional crime, as direct victims, and their close family members where those family members suffer, in turn, the consequences of that crime, as indirect victims.

As regards, second, the objective pursued by Article 12(2) of Directive 2004/80, that provision is intended to guarantee to Union citizens the right to fair and appropriate compensation for the injuries they suffer on the territory of the Member State in which they find themselves, by requiring each Member State to introduce a compensation scheme for victims of any violent intentional crime committed on its territory. If the concept of 'victims', within the meaning of Article 12(2) of Directive 2004/80, were to be interpreted as including exclusively within the scope ratione personae of that provision direct victims of violent intentional crime, the offences constituting such crime which led to the death of the direct victim would fall outside the scope ratione materiae of that provision, in disregard of its objective. According to such an interpretation, the Member State concerned is not required to pay any compensation under the national scheme on compensation which that provision requires it to establish, since, in such a case, as the only 'victim' of the violent intentional crime has died, no other person, such as, inter alia, the surviving spouse or the children, should, in principle, be compensated in that same capacity. Such an interpretation would deprive Article 12(2) of Directive 2004/80 of much of its practical effect, since it would require the Member States to establish a national scheme on compensation for violent intentional crime only where the direct victim of that crime survives his or her injuries, but not when that person dies as a result of those injuries.

Next, as regards the compatibility of the Italian scheme on compensation for violent intentional crime with EU law, the Court states that Article 12(2) of Directive 2004/80 precludes the legislation of a Member State which provides for a scheme on compensation for violent intentional crimes that, in the case of homicide, makes the right to compensation of the parents of the deceased person subject to the absence of a surviving spouse and children of that deceased person and the right to compensation of the victim's siblings subject to the absence of those parents.

It is true that Member States may, in the exercise of their discretion, decide, as the Italian Republic has done, to establish a national scheme on compensation for victims of violent intentional crime which limits the benefit of that scheme to the close family members of the deceased, while giving priority, moreover, to some of those family members, such as the surviving spouse and children, over other family members, such as parents and siblings.

However, such a scheme cannot, in accordance with the logic of succession, automatically exclude certain family members from entitlement to all compensation solely because of the presence of other family members, without it being possible to take into account considerations other than that order of succession, such as, inter alia, the material consequences for those family members of the homicide of the person concerned, or the fact that those family members were the dependants of the deceased person or lived with him or her.

Such a national scheme on compensation does not take account of the suffering and seriousness of the consequences of the offence for those family members and, therefore, does not adequately contribute to the reparation of the material and non-material damage suffered by them. In particular, depriving certain family members, as a rule, of any compensation must be regarded as irreconcilable with such requirements where, as in the case in the main proceedings, a criminal court has awarded those family members compensation, which is, moreover, not insignificant, for the harm suffered as a result of the death of the direct victim of the violent intentional crime, but where the perpetrator is unable, on account of his or her insolvency, to pay those damages himself or herself.

It follows that such a scheme, under which victims are excluded without any regard for the extent of the harm they have suffered, on account of a predefined order of priority among the various victims who are eligible to be compensated and based solely on the nature of the family ties, from which mere presumptions are drawn regarding the existence or significance of that harm, cannot result in 'fair and appropriate compensation' within the meaning of Article 12(2) of Directive 2004/80.

III. JUDICIAL COOPERATION IN CIVIL MATTERS: BRUSSELS IA REGULATION

Judgment of the Court of Justice (Second Chamber), 14 November 2024, Oilchart International, C-394/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction and the enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Scope – Article 1(2)(b) – Exclusion – Concept of 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' – Action deriving directly from insolvency proceedings and closely linked with them – Action for the payment of a claim lodged after the debtor company was put into liquidation and the declaration of that claim lodged in the insolvency estate – Regulation (EC) No 1346/2000

Ruling on a preliminary reference from the hof van beroep te Antwerpen (Court of Appeal, Antwerp, Belgium), the Court of Justice clarifies the scope of the Brussels Ia Regulation [9] with regard to an action for the payment of goods supplied brought against a company after it had been declared insolvent.

Oilchart International NV ('Oilchart'), a Belgian company, delivered, on behalf of O.W. Bunker (Netherlands) BV ('OWB'), a company incorporated under Netherlands law, fuel to a vessel moored in the port of Sluiskil (Netherlands). The related invoice issued by Oilchart remained unpaid.

In November 2014, a Netherlands court declared OWB insolvent. Oilchart submitted the claim resulting from that invoice for verification with OWB's liquidators.

Owing to a series of unpaid invoices, Oilchart brought proceedings resulting in the precautionary seizure of certain seagoing vessels to which it had delivered fuel. In order to have the precautionary seizures lifted, guarantees were issued in favour of Oilchart, which could be invoked on the basis of a court ruling or an arbitral award in Belgium against either OWB or the owner of the vessel concerned.

In March 2015, Oilchart brought an action against OWB before a Belgian court seeking, inter alia, payment of the unpaid invoice. While accepting that it had jurisdiction to rule on the action, that court, by declared the action to be inadmissible on the basis of Netherlands insolvency law. Oilchart lodged an appeal against that judgment before the referring court.

As OWB did not appear either before the first instance court or before the referring court, the latter court considered that it was required to examine its international jurisdiction, in accordance with the Brussels Ia Regulation. [10] The referring court wonders whether the action in the main proceedings has a close connection with the insolvency proceedings, with the result that the court dealing with insolvency proceedings has jurisdiction under Regulation No 1346/2000. [11] It states that Oilchart's action was brought after OWB was placed in liquidation and without that fact being mentioned, under a particular Netherlands provision relating to actions which are not connected with the insolvency estate but which concern the personal interests of the insolvent company.

Findings of the Court

The Court recalls that the respective scope of the Brussels Ia Regulation and Regulation No 1346/2000 are clearly defined. Only actions which derive directly from insolvency proceedings and are closely

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

10 According to Article 28(1) of that regulation: 'where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court declare of its own motion that it has no jurisdiction unless its jurisdiction derives from the provisions of that regulation'.

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

connected with them are excluded from the scope of the former regulation, pursuant to Article 1(2)(b) [12] thereof.

As regards the first criterion, it is clear from the settled case-law of the Court that the decisive criterion for identifying the area within which an action comes is not the procedural context of that action, but its legal basis. According to that approach, it must be determined whether the right or the obligation which forms the basis of the action has its source in the ordinary rules of civil and commercial law or in derogating rules specific to insolvency proceedings.

In the present case the action at issue in the main proceedings seeks an order that a company make payment for goods delivered pursuant to a contract concluded before the opening of insolvency proceedings regarding that company. According to the contracts agreed subsequently with a view to obtaining release from the precautionary seizure that had been imposed, such an order is necessary in order for the applicant in the main proceedings to be able to enforce the bank guarantees drawn up in its favour. Both the contractual obligations relied on in the context of the court action and the enforcement mechanisms provided for in respect of those obligations are based on contract law and are independent of the specific rules applicable to insolvency proceedings. In addition, a court action for payment for goods delivered may be brought outside any insolvency proceedings.

Furthermore, neither the opening of insolvency proceedings nor, subsequently, an action brought by the liquidator for recovery of payment in the interests of the creditors, have the effect of altering the legal basis of an action which is covered by the ordinary rules of civil and commercial law with a view to bringing it within the scope of rules specific to insolvency proceedings.

The second criterion, namely the closeness of the link between a court action and the insolvency proceedings, allows account to be taken of contextual factors other than those relating to the legal basis of the action.

In the case in the main proceedings it cannot be denied that there is such a connection since the action brought after OWB was put into liquidation in the context of which Oilchart produced a declaration of a claim in the insolvency estate for the same claim as that cited in that action. However, it does not appear that the fact that the claim sought to be recovered before the referring court is the same as the claim lodged with the liquidator is sufficient for that same action to be covered by the exclusion under the Brussels Ia Regulation.

The Court emphasises that the determination of the court which has jurisdiction does not in any way prejudge the law applicable to the claim at issue in the main proceedings, or the relevant rules for determining the law applicable to the action in the main proceedings. Both the question of admissibility of an individual action against an insolvent company and that of the treatment of such an action where there is a declaration of claim made in the insolvency estate are covered not by rules allocating jurisdiction but by conflict of laws rules for determining the applicable law.

The Court adds that, while Regulation No 1346/2000 is intended, in principle, to reach a correspondence between courts which have international jurisdiction and the law applicable to insolvency proceedings, that correspondence between the applicable law and the courts with jurisdiction cannot be guaranteed in all circumstances, to the extent inter alia that Article 3(1) of Regulation No 1346/2000 merely addresses the question of the courts with jurisdiction to open insolvency proceedings and that Article 4 of that regulation is of broader scope, in that it applies to insolvency proceedings as well as to their effects,

Consequently, the Court concludes that Article 1(2)(b) of that regulation does not apply to an action brought in a Member State against a company seeking payment for goods delivered which does not mention either the insolvency proceedings opened previously against that company in another Member State or the fact that the claim was already declared in the insolvency estate.

12 That twofold criterion appears in recital 6 of Regulation No 1346/2000 and was confirmed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19), not applicable ratione temporis to the present case.

IV. COMPETITION

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

Judgment of the General Court (Fifth Chamber, Extended Composition), 6 November 2024, Crédit agricole and Others v Commission (Suprasovereign, sovereign and agency bonds), T-386/21 and T-406/21

Link to the full text of the judgment

Competition – Agreements, decisions and concerted practices – Suprasovereign bond, sovereign bond and agency bond sector denominated in United States dollars – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Coordination of prices and bond-trading activities – Exchanges of commercially sensitive information – Single and continuous infringement – Restriction of competition by object – Calculation of the amount of the fine – Basic amount – Proxy for the value of sales – Action for annulment – Unlimited jurisdiction

The General Court, sitting in extended composition, has essentially confirmed the decision of the European Commission [13] finding that the banks Crédit agricole SA and Crédit agricole Corporate and Investment Bank ('Crédit agricole') and Credit Suisse Group AG and Credit Suisse Securities (Europe) Ltd ('Credit Suisse') had participated in a cartel in the sector of suprasovereign bonds, sovereign bonds and public agency bonds denominated in United States dollars ('SSA bonds'). The Court therefore upholds the fines imposed on those banks for infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA).

In 2015, Deutsche Bank submitted a leniency application to the Commission, informing it of the existence of a cartel on the secondary market for SSA bonds. SSA bonds are debt securities that enable their issuer to raise funds to finance certain expenses or investments. They are offered for sale for the first time by, or on behalf of, their issuer on the primary market. They are then traded 'over the counter' between investors on the secondary market, without a central exchange.

On that secondary market, the banks try to generate income by capturing the difference between the bid price and the ask price of the SSA bonds.

Having opened an investigation into the practices denounced by Deutsche Bank, the Commission found that traders from several banks, including Crédit agricole and Credit Suisse, had collaborated and exchanged information in order to obtain a competitive advantage on the secondary market for SSA bonds. Taking the view, moreover, that that conduct formed part of an overall plan pursuing the same anticompetitive objective, the Commission considered that the banks concerned had committed a single and continuous infringement of Article 101(1) TFEU by entering into agreements or concerted practices with the object of restricting or distorting competition in the SSA bond sector in the EEA. As a result, fines of EUR 3 993 000 and EUR 11 859 000 were imposed on Crédit agricole and Credit Suisse respectively.

UBS Group AG, as successor in title to Credit Suisse, and Crédit agricole brought two actions before the Court for annulment of the Commission's decision in so far as it concerns them. Crédit agricole also asked the Court to reduce the amount of the fine imposed on it, in the exercise of its unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation No 1/2003.

Findings of the General Court

13 Commission Decision C(2021) 2871 final of 28 April 2021 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40346 – SSA Bonds) ('the contested decision').

As a preliminary point, the Court notes that, in the contested decision, the Commission found the existence of a single and continuous infringement committed by Crédit agricole. Accordingly, it dismisses Crédit agricole's arguments that the Commission found the existence of five autonomous infringements classified as 'restrictions by object' as being based on an erroneous reading of the contested decision.

Next, the Court states that the applicants' pleas for annulment are based, in essence, on three categories of criticism alleging:

– first, errors in the classification of the conduct in question as a 'single and continuous infringement' of Article 101(1) TFEU and the extent of their participation in that infringement;

– secondly, errors in the classification of that infringement as a 'restriction by object'; and

– thirdly, errors in determining the amount of the fines imposed.

Before addressing those three sets of pleas in law common to both actions, the Court first examines Crédit agricole's plea in law alleging breach of the principle of the presumption of innocence.

Respect for the presumption of innocence

With regard to respect for the presumption of innocence, Crédit agricole argued that the Commission had wrongly assumed that the traders involved, and in particular its own trader, were aware of all the information exchanged on the permanent chat rooms to which they were connected, regardless of their active participation in those exchanges.

That complaint is rejected by the Court, which emphasises that the forums in question were characterised by the real-time delivery of messages to all those connected. In view of that particularity, the Commission was entitled to consider that Crédit agricole had been aware of the discussions held on those forums as soon as its trader had logged on, even if the trader had not actively participated in those discussions or even if he had had access to numerous other concomitant sources of information. That could only have been the case if Crédit agricole had demonstrated, by means of certain and precisely time-stamped evidence, that its trader had not in fact become aware of the offending message(s). Crédit agricole had not provided such proof. In that respect, the terms of the discussions in question differ from those which gave rise to the judgment in Eturas and Others. [14]

By contrast, the Court finds that the Commission breached the principle of the presumption of innocence by fixing the starting point of Crédit agricole's participation in the breach at the date of its trader's first connection to the chat room in question using that bank's identifiers, which occurred on 10 January 2013.

In order to accept that first connection as evidence of anticompetitive conduct marking the beginning of Crédit agricole's participation in the breach, it was for the Commission to show that, on the very day of that first connection, the Crédit agricole trader had at least passively participated in an anticompetitive discussion. In the present case, neither the contested decision nor the documents before the Court show that messages of an anticompetitive nature were exchanged on the chat room at issue on 10 January 2013 after the Crédit agricole trader had logged on for the first time.

The participation of the applicants in a single and continuous infringement

As regards the pleas challenging the classification of the conduct at issue as a 'single and continuous infringement' attributable to the applicants, the Court observes, as a first step, that only conduct forming part of an 'overall plan' pursuing a single anticompetitive objective may be classified as a single and continuous infringement.

As regards the single nature of the infringement, the Court considers that the Commission correctly considered that the sole anticompetitive objective pursued by the traders of the banks concerned was to maximise the latter's income while limiting the losses which could result from the uncertainty linked to the conduct of other traders.

14 Judgment of 21 January 2016, Eturas and Others (C74/14, EU:C:2016:42).

Since the Commission has demonstrated to the requisite legal standard that the conduct adopted by the traders of the banks concerned between January 2010 and February 2013 formed part of an overall plan pursuing that single anticompetitive objective, the Court also considers that the prohibition imposed by Deutsche Bank in February 2013 on its traders to use permanent multilateral chat rooms did not prevent the traders of the banks concerned from achieving that objective. On that point, the Court states that the unique nature of an infringement results from the uniqueness of the objective pursued by the participants in the cartel. It was not disputed that the traders of the banks concerned had circumvented the prohibition addressed to the Deutsche Bank traders in February 2013 by means of a network of bilateral discussions, which functioned in the same way as the permanent multilateral chat rooms.

As regards the continuous nature of the infringement, the Court confirms that the context in which the cartel found supports the Commission's conclusion that the banks concerned participated in a continuous infringement between January 2010 and March 2015. Although the exchanges between the traders of those banks became less frequent after February 2013, the fact remains that they continued their discussions of an anticompetitive nature on a recurring basis, freely exchanging information on their ongoing trading activities.

Crédit agricole's argument that it did not participate in the infringement during certain periods is not such as to call into question the continuing nature of the infringement as a whole, since the interruptions relied on by Crédit agricole do not take account of the conduct of the other participants.

As regards imputability to the applicants of the single and continuous infringement, the Court points out, secondly, that that imputability must be assessed in the light of two factors, namely, first, their intentional contribution to the common objectives pursued by all the banks concerned and, secondly, their knowledge of the infringing conduct envisaged or implemented by those banks in pursuit of the same objectives or the fact that they could reasonably have foreseen it and had been prepared to accept the risk.

Having made that clarification, the Court rejects all the arguments put forward by the applicants in order to contest both their intentional contribution to the overall plan identified by the Commission and their knowledge of all the infringing conduct in question or, as the case may be, their ability to foresee it.

In that context, the Court notes that the Commission's conclusion that Crédit agricole could, at the very least, reasonably have foreseen all of the infringing conduct of the other banks is corroborated in particular by the fact that, before taking up his duties at Crédit agricole, its trader had, as a trader at another bank, participated directly in the infringing conduct at issue.

On that point, the Court emphasises that knowledge acquired by an employee prior to his or her arrival in the service of a new undertaking and which he or she in fact makes available to that new employer may be regarded as knowledge shared by his or her new employer. Moreover, it is settled case-law that the Commission may rely on contacts prior to or subsequent to the period of the infringement in order to build up an overall picture and to show the preparatory stages of the cartel as well as to corroborate the interpretation of certain items of evidence.

In the light of the foregoing, the Court rejects all of the applicants' complaints challenging, first, the classification of the conduct at issue as a 'single and continuous infringement' and, secondly, the imputability of that infringement to the applicants.

Classification of the conduct at issue as a 'restriction by object'

Referring to the case-law of the Court of Justice, the General Court points out that, for the purposes of classifying the conduct at issue as a 'restriction by object', it was for the Commission to show that that conduct did not present an extremely high threshold of harm to competition, as Crédit agricole argued, but only a sufficient degree of harm to competition.

The Court also states that the assessment of the degree to which conduct is harmful to competition must be made in the light of the objective characteristics of that conduct and without regard to the particular situation of each undertaking that participated in it. Thus, the minor role played by one undertaking in a cartel is not such as to influence the classification of that cartel as a 'restriction by object' in respect of all of the undertakings that participated in it. For the same reasons, Crédit

agricole cannot usefully rely on the fact that it did not take part in certain discussions to contest the classification of the conduct in question as a 'restriction by object'.

In the light of those clarifications, the Court then rejects the applicants' complaints alleging errors made by the Commission, first, in assessing the economic context of the conduct at issue, secondly, in assessing whether it was harmful to competition and, thirdly, in assessing whether it was justified by reason of its pro-competitive effects.

As regards, in the first place, the assessment of the economic context of the conduct at issue, the Court finds that, while in a complex market such as the present one the Commission cannot limit its analysis of that context to what is strictly necessary in order to conclude that there is a restriction of competition by object, the applicants have failed to demonstrate any inadequacy in the Commission's analysis of the economic and legal context.

As regards, in the second place, the assessment of whether the conduct at issue was harmful to competition, the Court endorses the Commission's conclusion that, on the secondary market in SSA bonds, the exchanges of commercially sensitive information between the banks concerned, all of which were 'market makers', [15] were sufficiently harmful to competition to contribute to the classification of the conduct examined, as a whole, as a 'restriction by object'.

That conclusion cannot be called into question by Crédit agricole's allegation that the secondary market in SSA bonds is a market in which there is a significant asymmetry of information between market makers, so that the increase in that pre-existing asymmetry as a result of the exchanges of information in question would not be sufficiently harmful to competition. Even supposing that such asymmetry of information existed, Crédit agricole's argument comes up against the useful effect that must be guaranteed by the concept of 'restriction by object' and, more generally, by Article 101 TFEU.

As regards, in the third place, the applicants' arguments that the conduct at issue is justified in the light of its pro-competitive effects, the Court points out that the pro-competitive effects alleged by the applicants need not, as such, be taken into consideration when classifying the conduct at issue as a 'restriction by object'.

In any event, even supposing that the alleged 'favourable' effects of the conduct at issue could or should be taken into account, in one way or another, for the purposes of classifying it as a 'restriction by object', the applicants have not demonstrated the existence of any favourable implications such as to call into question the classification of that conduct as a 'restriction by object'.

In so far as the applicants also presented the conduct at issue as 'ancillary restraints' on the performance of their function as a market makers in SSA bonds, the Court observes that the case-law relating to the exception of ancillary restraints on legitimate agreements is, in any event, not applicable in the present case, since the applicants had not shown that their activity as market makers would have been impossible in the absence of the infringing conduct.

In addition, the Court rejected the arguments that market makers in SSA bonds were systematically at an informational disadvantage compared with counterparties that did not have a permanent presence on the market, so that they had to compensate for that information deficit by seeking information from a number of sources.

It cannot be accepted that undertakings try to offset the effects of factual situations which they consider to be excessively unfavourable, such as possible asymmetries of risk existing between operators on a market, by collusive practices designed to correct those disadvantages. Such factual situations cannot justify an infringement of Article 101 TFEU, especially as the applicants were not acting on the secondary market in SSA bonds solely as market makers and were carrying on that activity voluntarily.

15 'Market makers' are institutions or individuals willing to buy or sell financial products on the secondary market for SSA bonds on a general and continuous basis rather than on a transaction-by-transaction basis, at prices determined by them.

Determination of the amount of the fines imposed on the applicants

In determining the amount of the fines imposed on the applicants, the Commission essentially followed the method set out in the 2006 Guidelines. [16] However, as regards the calculation of the basic amounts, the Commission decided to use a proxy value instead of the value of sales provided for in point 13 of those guidelines. As a starting point for the calculation of that proxy value, the Commission has taken the annualised notional volumes and values of SSA bonds ('the annualised notional amounts') that the banks concerned traded during their individual periods of participation in the infringement at issue. Those annualised notional amounts were then multiplied by an adjustment factor that the Commission constructed using 33 representative categories of SSA bond issued by eight issuers.

In that context, the applicants complained in particular that the Commission had infringed the 2006 Guidelines by relying on a set of representative SSA bonds and not on data from their own transactions to calculate the adjustment factor and by using public data from the Bloomberg platform, which inflated the adjustment factor ('the BGN data').

Credit Suisse also criticised the Commission for overstating the proxy value by including hedging transactions in the notional amounts applied to it.

As a preliminary point, the Court finds that, although, by adopting the 2006 Guidelines, the Commission has limited itself in the exercise of the wide discretion it enjoys as regards the method of calculating fines, it is entitled to depart from them, provided that it gives reasons and justifies its choice to the requisite legal standard.

However, where the Commission departs from the 2006 Guidelines not in their entirety – as point 37 authorises it to do – but only, as in the present case, from point 13, it cannot depart from the guiding principles and underlying logic of those guidelines. Thus, in implementing the methodology it defines, it must, in particular, ensure that it takes account of the best available data, subject to the thorough review, in law and in fact, of the EU judicature.

In the light of those clarifications, the Court notes, in the first place, that, in the contested decision, the Commission stated its reasons and justified to the requisite legal standard its decision to depart from the methodology set out in point 13 of the 2006 Guidelines and to base its calculation of the basic amount on a proxy value for the value of sales which was arrived at by multiplying the annualised notional amounts of each of the banks concerned by an adjustment factor calculated on the basis of the sample of 33 categories of SSA bond.

In that context, the Court rejects the applicants' arguments that the Commission should have adopted a methodology for calculating the adjustment factor based on their own transactions.

In that regard, the Court points out that a methodology based on the transaction data of the banks concerned would entail carrying out calculations of a much greater complexity than those already complex calculations carried out in the present case, even though the representative nature of the SSA bonds retained precisely guarantees that the data taken into consideration remain relevant for the calculation of the fine and make it possible to reflect the economic importance of the infringement at issue with the degree of precision required by the case-law. Such an alternative methodology would place a disproportionate administrative burden on the Commission.

In the second place, the Court rejects the applicants' arguments that the BGN data used by the Commission were inadequate for the purposes of calculating the proxy value in that they inflated the adjustment factor.

After pointing out that it was for the Commission to ensure that it took account of the best available data, the Court noted that, in the contested decision, the Commission had set aside, with reasons, the arguments relied on by the banks concerned during the administrative procedure to contest the use of the BGN data. It follows that the applicants cannot confine themselves to arguing before the Court that the data used by the Commission suffer from one or more shortcomings but, on the contrary,

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

must demonstrate that, within the framework of the methodology which that institution lawfully determined, there are in fact data better than those used by that institution and that those data are in fact available.

In finding that the applicants were unable to submit data better than those used by the Commission, the Court also rejects Credit Suisse's criticism that the method of compiling the BGN data was unknown. On that point, the Court emphasises that the BGN data constituted reference data among traders, which are compiled by a third party to the proceedings on the basis of the prices of several traders. Accordingly, it cannot validly be argued that, on the ground that the manner in which they are compiled is partly unknown, such reference data cannot be used by the Commission, particularly where Credit Suisse has in no way referred to market platforms providing more accurate or more relevant information than the Bloomberg platform.

According to the Court, the Commission could not be criticised for having used data which did not reflect Credit Suisse's situation in all respects, when Credit Suisse itself did not have accurate and sufficiently representative data and was therefore obliged to use a methodology based on alternative data which were necessarily less accurate, in order to reconstitute a proxy value.

In the third place, the Court rejects Credit Suisse's complaint that the Commission overestimated the proxy value of the value of sales by including transactions relating to the purchase of liquid assets in the notional amounts applied to Credit Suisse.

On that point, the Court states that, in the context of the 2006 Guidelines, the concept of 'proxy value', like that of 'value of sales', is intended to take as the starting point for calculating the fine imposed on an undertaking an amount which reflects the economic importance of the infringement at issue and the weight of that undertaking in it. It follows that the determination of the proxy value involves taking into account all of the transactions carried out on the market affected by the infringement, for each of the undertakings that took part in the infringement at issue.

While the methodology adopted by the Commission admittedly results in the notional amount exchanged on a given cash-purchase transaction being taken into account both for the seller of the SSA bond concerned and for its purchaser where they both took part in the infringement at issue, that twofold taking into account stems from the very principles governing the determination of fines under the 2006 Guidelines in the specific context of the present case. Moreover, to exclude from the calculation of the proxy value part of the transactions that indisputably fall within the scope of the alleged cartel would have the effect of artificially minimising the economic importance of the infringement at issue, thereby undermining the objective of effectively prosecuting and punishing infringements of Article 101 TFEU.

Having thus validated the proxy values adopted in respect of the applicants, the Court finally rejected their arguments challenging the gravity multiplier that the Commission had applied to those values in accordance with points 20 to 23 of the 2006 Guidelines.

In view of the fact that this gravity multiplier had been set at 16% for all of the banks concerned, Crédit agricole argued in particular that the Commission should have used a lower individualised multiplier for it.

Since Crédit agricole referred, in support of that argument, to judgments of the Court of Justice prior to the date of publication of the 2006 Guidelines, the General Court began by noting that those judgments could not require the Commission to take into consideration factors other than the intrinsic seriousness of the infringement at issue when determining the gravity multiplier under the 2006 Guidelines.

In addition, while the Commission cannot disregard the principle of equal treatment when calculating fines imposed on the basis of Article 101 TFEU, it is clear both from point 22 of the 2006 Guidelines and from the relevant case-law that the gravity multiplier reflects, in principle, the gravity of the infringement at issue and not the relative gravity of the participation in that infringement of each of the undertakings concerned. It is in that sense that points 19 to 22 of the 2006 Guidelines envisage the determination of the gravity multiplier for the infringement at issue and not for each undertaking that took part in it. Thus, the assessment of individual circumstances is, in principle, not carried out as part of the assessment of the gravity of the infringement, namely when setting the basic amount of

the fine, but as part of the adjustment of the basic amount according to attenuating and aggravating circumstances.

In noting, moreover, that a gravity multiplier of 16% for an infringement such as that found in the contested decision cannot be regarded as inappropriate or disproportionate, the Court dismisses the arguments put forward in that regard by Crédit agricole.

In the light of all of the foregoing, the Court dismisses Crédit Suisse's action in its entirety. By contrast, it annuls the contested decision in relation to Crédit agricole in so far as, first, it finds that Crédit agricole participated in the infringement from 10 January 2013 to 24 March 2015, and not from 11 January 2013 to 24 March 2015, and, secondly, it sets the amount of the fine imposed on Crédit agricole at EUR 3 993 000. However, in the exercise of its unlimited jurisdiction, the Court maintains the amount of the fine imposed on Crédit agricole.

Judgment of the General Court (Seventh Chamber), 27 November 2024, HSBC and Others v Commission, T-561/21

Link to the judgment as published in extract form

Competition – Agreements, decisions and concerted practices – Euro Interest Rate Derivatives sector – Decision establishing an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Failure to discharge the obligation to state reasons – Annulment in part of the decision by a judgment of the General Court – Amending decision – Fines – Limitation – Basic amount – Value of sales – Article 23(2) and (3) of Regulation (EC) No 1/2003 – Equal treatment – Proportionality – Unlimited jurisdiction

The General Court dismisses the application for annulment brought by the entities HSBC Holdings plc, HSBC Bank plc and HSBC Continental Europe (together 'HSBC') against the Commission's decision amending its decision to impose a fine of EUR 33 606 000 on HSBC in respect of an infringement of EU competition law. [17] Given that, when the 2021 Amending Decision was adopted, the Commission's initial decision was still the subject of pending proceedings before the Court of Justice, the General Court provides, in its judgment, details on the suspensive effect of those pending proceedings on the limitation period within which the Commission may impose a fine on HSBC.

In 2016, the Commission found that HSBC had infringed Article 101 TFEU and Article 53 of the European Economic Area (EEA) Agreement by participating, from 12 February to 27 March 2007, in a single and continuous infringement with the object of distorting the normal course of pricing on the Euro Interest Rate Derivative market. Accordingly, the Commission imposed on the three entities referred to above jointly and severally a fine of EUR 33 606 000. [18]

By judgment of 24 September 2019, the General Court found that the Commission had made errors as to the scope of the infringement it found HSBC had committed in the 2016 Decision, but also found that those errors had no effect on the lawfulness of Article 1(b) of the 2016 Decision, since the conclusion set out therein remained substantiated by other elements appearing in the 2016 Decision, but that those errors might be taken into account when assessing the proportionality of the fine. [19]

In addition, since it had found that the 2016 Decision was vitiated by an error of reasoning, the General Court annulled it in so far as it imposed a fine of EUR 33 606 000 on HSBC. Both the Commission and HSBC brought an appeal before the Court of Justice against that judgment.

17 Commission Decision C(2021) 4600 final of 28 June 2021 amending Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives) ('the 2021 Amending Decision').

18 Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives (EIRD)) ('the 2016 Decision').

19 Judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675).

However, by letter of 8 May 2020, the Member of the Commission responsible for competition notified HSBC of her intention to propose to the College of Commissioners that a new decision be adopted in order to remedy the situation resulting from the judgment of the General Court of 24 September 2019.

By the 2021 Amending Decision, the Commission reduced the fine imposed on HSBC by the 2016 Decision to EUR 31 739 000 and supplemented the reasoning set out in that decision, which the General Court had deemed to be inadequate. Approximately one month after the adoption of the 2021 Amending Decision, the Commission withdrew its appeal against the judgment of the General Court of 24 September 2019.

HSBC brought an action before the General Court for annulment of the 2021 Amending Decision and therefore of the fine imposed by the 2016 Decision, as amended. In the alternative, the applicants asked the Court to exercise its power of unlimited jurisdiction and to reduce substantially the fine imposed on them in the 2021 Amending Decision.

Findings of the General Court

In support of its action for annulment, HSBC complains that, inter alia, the Commission adopted the 2021 Amending Decision outside the maximum limitation period of ten years laid down in Article 25(5) of Regulation No 1/2003 [20] for imposing a fine in respect of the infringement found in the 2016 Decision.

On that point, HSBC submits, in essence, that the appeal brought by the Commission against the judgment of the General Court of 24 September 2019 did not have the effect of suspending that 10-year limitation period, since, already at the time when that appeal was brought, the Commission intended to adopt the 2021 Amending Decision without awaiting the outcome of those appeal proceedings. In addition, according to the applicants, even if the appeal brought by the Commission had suspended the limitation period, that suspension came to an end in any event when the Member of the Commission responsible for competition notified HSBC of her intention to propose to the College of Commissioners that a new decision to be addressed to HSBC be adopted, which it did because the Commission had lost its interest in the outcome of the appeal.

After stating that, on the date on which the Commission brought the appeal, the limitation period for imposing a fine on HSBC in respect of the infringement found in the 2016 Decision had not yet expired, the Court recalls that, under Article 25(6) of Regulation No 1/2003, the limitation period for the imposition of fines is to be suspended for as long as the Commission's decision finding the infringement and imposing a fine is the subject of proceedings pending before one of the EU Courts. Under paragraph 5 of that article, the maximum limitation period of 10 years is to be extended by the time during which limitation is suspended pursuant to paragraph 6.

Contrary to what is argued by HSBC, Article 25(6) of Regulation No 1/2003 does not make the suspensory effect of pending court proceedings subject to any subjective condition, such as an 'objective' pursued by the bringing of the action or the 'intention' of the party bringing it.

That provision protects the Commission against the effect of the limitation period in situation in which it is 'prevented' from acting in so far as it must await the decision of the EU Courts in proceedings beyond its control before it knows whether the contested measure is or is not unlawful. That notion of being 'prevented' is therefore an objective circumstance that relates to whether there are pending court proceedings as a result of which there is uncertainty as to the lawfulness of the Commission's decision.

In the light of that clarification, the General Court finds that, while the Commission's appeal proceedings were pending, there was uncertainty as to the lawfulness of the 2016 Decision in so far as it imposed a fine of EUR 33 606 000 on HSBC. It follows that the limitation period for imposing a new fine on HSBC for the infringement found in the 2016 Decision was suspended until the Court of Justice adopted a decision bringing those appeal proceedings to an end, irrespective of the steps taken by the Commission with a view to adopting the 2021 Amending Decision.

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

In that context, the General Court also rejects HSBC's argument that the Commission had no interest in bringing or maintaining its appeal against the judgment of the General Court of 24 September 2019.

In that regard, the General Court states that, while the absence of any interest in bringing proceedings at the time when the appeal was brought – assuming that it were established – could lead an appeal to be dismissed as inadmissible, and while, if the interest in bringing proceedings were to fall away in the course of the proceedings, this could lead the Court of Justice to rule that there was no need to give judgment, it is precisely the fact that an action is pending before the General Court or the Court of Justice that justifies the suspension of the limitation period and not the conclusions reached by those courts in their decision bringing the proceedings to an end.

In any event, the mere fact that the Commission took steps to adopt a new decision following the delivery of the judgment of 24 September 2019 does not show that it lost all interest in seeking a declaration that the 2016 Decision was lawful, since that interest continued until the Court of Justice adopted a decision bringing the proceedings to an end or, at the very least, until that new decision was adopted. The fact that, after the adoption of the 2021 Amending Decision, the Commission withdrew its appeal does not in any way alter that conclusion.

In the light of all of the above, the General Court finds that the Commission's exercise of its power to impose penalties in respect of the infringement found in the 2016 Decision was not time-barred on the day on which the 2021 Amending Decision was adopted. The General Court then goes on to dismiss all of the other pleas relied on by HSBC in support of its application for annulment of the 2021 Amending Decision, as well as HSBC's claim for a reduction of the fine imposed in that decision, and, consequently, dismisses the action in its entirety.

2. CONCENTRATIONS

Judgment of the General Court (Seventh Chamber, Extended Composition), 13 November 2024, NetCologne v Commission, T-58/20

Link to the judgment as published in extract form

Competition – Concentrations – German markets for TV services and telecommunications services – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Commitments – Assessment of the horizontal, vertical and conglomerate effects of the transaction on competition – Competitive relationship between the parties to the concentration – Merger-specific change – Manifest error of assessment

Judgment of the General Court (Seventh Chamber, Extended Composition), 13 November 2024, Deutsche Telekom v Commission, T-64/20

Link to the full text of the judgment

Judgment of the General Court (Seventh Chamber, Extended Composition), 13 November 2024, Tele Columbus v Commission, T-69/20

Link to the judgment as published in extract form

Competition – Concentrations – German markets for TV services and telecommunications services – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Commitments – Assessment of the horizontal and vertical effects of the transaction on competition – Competitive relationship between the parties to the concentration – Merger-specific change – Manifest error of assessment

By judgments delivered on the same day, the General Court dismisses three actions lodged for the purpose of seeking the annulment of the European Commission decision authorising, as compatible with the internal market, a concentration in the TV services and telecommunications services sector involving the acquisition by Vodafone Group plc of certain assets of Liberty Global plc. [21] In so doing, the Court ruled that the Commission cannot be criticised for having given priority, in its examination of the compatibility of that concentration with the internal market pursuant to Article 2(2) of Regulation No 139/2004, [22] to the significant impediment to effective competition test over the dominance test.

Vodafone and Liberty Group are two operators active in the TV and telecommunications services sector in a number of EU countries, including Germany. In that country, Liberty Group is present via its subsidiary Unitymedia GmbH.

In 2018, Vodafone notified to the Commission, pursuant to the EC Merger Regulation, a proposed concentration to enable it to acquire sole control of Liberty Global's telecommunications businesses in a number of Member States, including Germany. The transaction consisted of a sale and purchase agreement under which Vodafone envisaged acquiring 100% of the shares in Unitymedia ('the concentration at issue').

Taking the view that the transaction raised serious doubts as to its compatibility with the internal market, the Commission decided to initiate an in-depth investigation. Upon the conclusion of that investigation, the concentration was declared compatible with the internal market and with the Agreement on the European Economic Area (EEA), subject to Vodafone's compliance with certain commitments. [23]

In the contested decision, the Commission, first of all, assessed the horizontal, vertical and conglomerate effects of the concentration, particularly in Germany. Upon conclusion of its analysis, while it found that there was no significant impediment to effective competition ('SIEC') on the market for the retail supply of TV signal transmission services, the market for the retail supply of multiple play services and the market for the retail supply of TV services, it found that there was a SIEC on the market for fixed internet access and on the market for wholesale TV signal transmission.

Next, it examined whether the commitments proposed by Vodafone were capable of rendering the transaction compatible with the internal market, in particular having regard to the two markets in which competition concerns had been identified.

The applicants, Deutsche Telekom AG, Tele Columbus AG and NetCologne Gesellschaft für Telekommunikation mbH, are companies established in Germany which offer TV, internet and telephony services. They each brought an action before the Court for the annulment of the contested decision in so far as it concerned each of them.

By their respective actions, they submit, first, that the Commission made an error of assessment concerning the horizontal effects of the concentration at issue, in particular on the market for the retail supply of TV signal transmission services and on the market for wholesale TV signal transmission, and concerning the vertical effects on the intermediary market for TV signal transmission. Second, they challenge the sufficiency and appropriateness of the commitments made binding by the contested decision in order to render the concentration compatible with the internal market.

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21 Commission Decision C(2019) 5187 final of 18 July 2019 declaring the concentration involving the acquisition by Vodafone Group plc of certain assets of Liberty Global plc to be compatible with the internal market and the EEA Agreement (Case COMP/M.8864 – Vodafone/Certain Liberty Global Assets) ('the contested decision').

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

23 Those commitments include in particular: the WCBA ('Wholesale Cable Broadband Access') commitment which provided for open access to the merged entity's cable infrastructure by a third-party operator in order to enable that operator to offer, on a retail basis, fixed internet access services, as well as its own OTT (over the top) TV services or those of third parties; the OTT commitment, which prevented the merged entity from limiting the possibility for broadcasters which are carried on its platform of distributing their content via an OTT service and which guaranteed them, in order to do so, sufficient direct interconnection capacity; the HbbTV (Hybrid Broadcast Broadband TV) commitment, which required the merged entity to continue to transmit the HbbTV signal of free-to-air broadcasters; and the feed-in fees commitment, which prevented the merged entity from increasing the feed-in fees paid to it by free-to-air broadcasters.

Findings of the General Court

As a preliminary point, the Court recalls the applicable case-law principles, both as regards the standard of the judicial review incumbent on it and as regards proof that there is no significant impediment to effective competition which it is for the Commission to establish.

In that regard, it states that, in the field of merger control, the EC Merger Regulation confers on the Commission a certain discretion, especially with regard to assessments of an economic nature. In that context, while it is not for the Court to substitute its own economic assessment for that of the Commission, the Court must, inter alia, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data which must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.

As regards the standard of proof imposed on the Commission in order to demonstrate that a notified concentration would or would not significantly impede effective competition and must therefore be declared incompatible or compatible with the internal market, the Court emphasises that, in view of the prospective nature of the economic analysis required, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that that concentration would or would not significantly impede effective competition in the internal market or in a substantial part of it.

It is in the light of those considerations that the Court analyses, first of all, the effects of the concentration on the German market and, subsequently, the commitments made binding by the contested decision.

Analysis of the effects of the concentration

The horizontal non-coordinated effects of the concentration on the market for the retail supply of TV signal transmission services to customers living in multi-dwelling units

First of all, the Court examines the manifest errors of assessment and of law allegedly committed by the Commission in its analysis of the horizontal effects on the market for the retail supply of TV signal transmission services to customers living in multi-dwelling units ('the MDU market').

As regards the reciprocal competitive constraints exerted by the merging parties, the Court considers, in the first place, that, given the absence of any meaningful overlap between their activities, the Commission did not make a manifest error of assessment in finding that they were not direct competitors before the concentration, notwithstanding the exceptional overlap situations taken into account by the Commission, the negligible nature of which has not been challenged by evidence. It follows that the products marketed by the merging parties did not, in practice, compete.

In the second place, the Commission did not make a manifest error of assessment in concluding that there was no indirect competition between the parties to the concentration. In that regard, the Court recalls that undertakings are in indirect competition, in particular, where they are subject to similar competitive pressures from other undertakings with which each of them competes directly, or where other factors, such as requirements imposed by customers, comparably limit their ability to set their prices and commercial conditions.

In the present case, the Court finds that, as regards the fact that the parties to the concentration monitored their respective activities and compared their product offers, those instances of benchmarking did not exceed simple benchmarking aimed at monitoring and possibly imitating best practices in the industry. That form of comparison, which consists of an analysis of market performance or best practices in the industry, including in other Member States or in third countries, cannot be classified as an indirect competitive constraint. Furthermore, it is apparent from the contested decision that the contracts concluded with owners of MDUs ('MDU customers') are the result of negotiations, bids or formal tender procedures. Consequently, they are not standard contracts which could have been the subject of benchmarking simply based on observing industry practices.

In addition, as regards infrastructure competition between the parties to the concentration, the Commission found that the investment and network innovation activities implemented by each of the parties to the concentration had not had a direct competitive impact on the other party's network

investment and innovation strategy and that each party's monitoring of the other party's activities in that context was simple commercial benchmarking, which is not a type of indirect competitive constraint.

In the third place, the applicants also failed to demonstrate that there was potential competition between the merging parties, with the result that they cannot successfully criticise the Commission for having found that it was unlikely that, absent the concentration at issue, those parties would have expanded their activities into the cable footprint of the other party, so as to eliminate potential competition, thereby giving rise to a SIEC.

In the fourth place, as regards whether there was a collective dominant position prior to the concentration at issue resulting from tacit collusion between the parties to the concentration, explaining the absence of actual or potential competition between them on the MDU market, the Court notes that, if that argument is seeking to draw attention to a cartel, that complaint is ineffective, since that argument does not relate to the subject matter of the contested decision, but rather to practices which potentially fall within the scope of Article 101 or 102 TFEU. In any event, it is irrelevant, for the purposes of merger control, to investigate the causes of an absence of competition between the merging parties, relating, as appropriate, to an infringement of the EU competition rules.

On the other hand, although that argument seeks to draw attention to the existence of a collectively dominant position, those allegations were not confirmed by a review of the parties' internal documents and were contradicted by the reasons, which are potentially contrary to EU competition law, why the merging parties did not seek to compete with each other prior to the merger.

In the fifth place, as regards the complaint alleging that the Commission failed to take account of the increase in resources resulting from the concentration, which would enable the merging parties to foreclose their competitors by, inter alia, predatory pricing, the Court notes that such an increase, even if proven, is not in itself sufficient for that transaction to be declared incompatible with the internal market. The Commission may declare a concentration incompatible with the internal market only if it finds a SIEC which is the direct and immediate consequence of the concentration. Such a SIEC, which would stem from future decisions by the merged entity, may only be regarded as a direct and immediate consequence of the concentration if that future conduct is made possible and economically rational by the alteration of the characteristics and the structure of the market caused by the concentration. In the present case, the merging parties already had the power to behave, to an appreciable extent, independently of their competitors and their MDU customers, irrespective of any increase in resources resulting from the concentration.

For the same reasons, the Court rejects the argument that the concentration at issue would significantly reduce the competitive constraint exerted by competitors on the MDU market, which could give rise to a SIEC. More specifically, the financial strength of the merged entity in relation to its competitors enabled it to prevent those competitors from developing. While it is true that the reduction of the competitive constraint exerted by competitors as a result of a merger may give rise to a SIEC, the finding of an increase in the financial strength of the merged entity does not, consequently, in itself make it possible to find such an impediment. The Commission must take account of a number of factors when assessing the compatibility of a concentration with the internal market, such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand.

As regards the complaint alleging that the Commission failed to take into account the creation of Vodafone's dominant position on the MDU market, which would give rise to a SIEC, the Court recalls that, in accordance with the EC Merger Regulation, [24] when reviewing concentrations, the Commission must assess whether a concentration is such as to significantly impede effective competition in the internal market or in a substantial part of it, since the fact that a concentration would create or strengthen a dominant position is not, in itself, sufficient for that concentration to be regarded as incompatible with the internal market. Such a prospective analysis consists of an examination of how

24 Article 2(2) and (3) of the EC Merger Regulation.

a concentration might alter the factors determining the state of competition on a given market. Consequently, the Commission cannot be criticised for having carried out, in the present case, a prospective analysis relating in particular to the horizontal non-coordinated effects of the concentration on the MDU market. In the context of that analysis, since the Commission concluded that there was no SIEC, in that the concentration at issue would not eliminate competitive constraints between the parties and would not weaken further the competitive constraints exerted by the remaining competitors, it was not required to examine whether that transaction would create or strengthen a dominant position, in particular on account of the national coverage of the merging parties' combined cable networks post-transaction.

Furthermore, the extent of the merging parties' cable infrastructure cannot be regarded as a factor determining the state of competition on the MDU market, the alteration of which would give rise to a SIEC. It follows that the mere geographical extension of the merged entity's cable network, whether merger-specific or not, does not necessarily give rise to an alteration of a factor determining the state of competition on the MDU market and, therefore, to a SIEC.

The vertical effects of the concentration

Next, as regards the analysis of the vertical effects of the concentration at issue, which led the Commission to examine, in particular, the likelihood of foreclosure of retail providers of TV signal transmission services to MDU customers, the Court observes that, in assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, in accordance with the Guidelines on non-horizontal mergers, [25] first, whether the merged entity could, post-merger, have the ability to substantially foreclose access to inputs, second, whether it could have an incentive to do so and, third, whether a foreclosure strategy could have a significant detrimental effect on competition downstream. Those three conditions are cumulative, so that the absence of any of them is sufficient to rule out the likelihood of input foreclosure.

As regards, more specifically, the third condition, the Commission had concluded that any market foreclosure strategy put in place by the merged entity would not, in any event, have a significant detrimental effect on downstream competition, since the concentration at issue would not lead to any merger-specific change in the structure of the markets concerned, whether upstream or downstream. More specifically, the concentration at issue would not lead to any change in the parties' ability and incentive to foreclose retail providers of TV signal transmission services, in particular, Tele Columbus, to MDU customers in Germany. Since the applicants failed to demonstrate that the Commission's assessment is vitiated by a manifest error, the third condition not being satisfied is sufficient to rule out the likelihood of anticompetitive input foreclosure.

Horizontal non-coordinated effects on the market for wholesale TV signal transmission

Lastly, the Court considers that Tele Columbus is unsuccessful in its argument that, in its examination, the Commission manifestly erred in its assessment of the horizontal non-coordinated effects on the market for wholesale TV signal transmission, resulting from the merged entity concluding exclusivity agreements with broadcasters.

First, in so far as the Commission is criticised for not having carried out all the examinations which the applicant wished for or felt to be useful, such as certain technical functionalities and commercial aspects, the applicant provides no explanation whatsoever of how they could be affected by the concentration, and in particular why, and how, the merged entity would have the ability, and above all the incentive, to deteriorate those functionalities and commercial terms in its negotiations with broadcasters, and how, having regard in particular to their importance, that could have the effect of significantly impeding effective competition on the wholesale market for TV signal transmission and how such a likely deterioration of those functionalities and commercial terms would be merger-specific.

Second, as regards the allegation that the Commission failed to take account of the fact that the merged entity would have the ability and the incentive to implement partial exclusivity in order to

25 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6).

prohibit the broadcasting of content via some of its competitors, such as itself, the applicant fails to demonstrate that such a strategy would have a significant detrimental impact on downstream competition. In addition, it was unlikely that the merged entity would have an incentive to conclude total or partial exclusivity agreements with a broadcaster, given the potentially unlawful nature of the conduct in question, contrary to competition law.

Third, as regards the allegation that the merged entity could, on the MDU market, exploit the advantages it would have on the wholesale market for TV signal transmission, namely the collection of feed-in fees and the acquisition of content on more advantageous terms than the smaller cable operators, it should be noted, first, that if those advantages made it possible to offer more advantageous prices to MDU customers, that would be indicative of positive effects for consumers, since it was likely that such a price reduction would be reflected in the amount of the monthly rent paid by the tenants of the buildings concerned, rather than of a SIEC. Second, the applicant has failed to demonstrate that those advantages were merger-specific.

The commitments made binding by the contested decision

In the contested decision, since the Commission concluded that there was a SIEC on the market for fixed internet access and on the market for wholesale TV signal transmission, it examined the commitments proposed by Vodafone and concluded that the concentration at issue, as modified by those commitments, would not significantly impede effective competition on those markets.

The Court considers that the Commission's analysis on that point can in no way be criticised as regards the commitments relating to the market for wholesale TV signal transmission [26] allegedly being insufficient and inappropriate and the commitment relating to the fixed internet access market (the WCBA commitment) offered by Vodafone allegedly being ineffective.

In that regard, it rejects the complaint that those commitments are purely behavioural and, consequently, insufficient to remedy competition concerns of a horizontal nature. Although, in the Notice on remedies, the Commission has a preference for structural commitments, in particular on account of the simplicity of implementing them, the acceptance of the commitments is governed principally by whether the commitments are appropriate and sufficient to resolve the competition problem identified, as well as the certainty that those commitments will be able to be implemented.

As regards, more specifically, the commitments relating to the market for wholesale TV signal transmission, the allegation that the wording used by the Commission in the contested decision demonstrates that the Commission was not certain that those commitments would be sufficient and effective to remedy the SIEC identified on the market for wholesale TV signal transmission cannot succeed. While the Commission must be certain that the proposed commitments will be able to be implemented and that they will be sufficiently workable and lasting, it may declare a concentration to be compatible if it is sufficiently likely that those commitments will be sufficient and effective to eliminate the SIEC identified.

In addition, as regards the feed-in fees commitment having been submitted out of time, the Commission may accept commitments submitted out of time, first, where those commitments clearly and without the need for further investigation resolve the competition concerns previously identified and, second, where there is sufficient time to consult the Member States on those commitments. Given that those two cumulative conditions were satisfied in the present case, the Commission was entitled to take account of the feed-in fees commitment despite it having been submitted out of time.

As regards the WCBA commitment, the Court rejects the complaint alleging ineffectiveness based on the fact that that commitment did not compensate for the loss of competitive pressure from the infrastructures and innovations which Unitymedia exerted prior to the transaction.

The objective of that commitment, which provides for a third-party operator to enter the market, namely Telefónica, is to address the competition concern arising from the loss of an operator (Vodafone) in Unitymedia's cable footprint, and is not to compensate for the loss of competitive pressure from the infrastructures and innovations which Unitymedia exerted prior to the transaction.

26 Those commitments include the OTT commitment, the feed-in fees commitment and the HbbTV commitment.

Moreover, and in any event, it has not been demonstrated that the merged entity would cease to invest and innovate in Unitymedia's former cable footprint, with the result that the transaction would lead to the loss of the competitive pressure resulting from such investments and innovations.

As regards Telefónica's alleged inability to exert significant competitive pressure on the market for fixed internet access, it must be stated that that allegation follows from certain findings made by the Commission in the contested decision on Telefónica's situation in the absence of the commitment in question and that those findings do not, therefore, take account of all the obligations entered into by Vodafone in the context of that commitment. Therefore, those findings do not allow any conclusion to be drawn as to Telefónica's ability and incentive to operate as a viable and active competitive force following implementation of that commitment.

As regards the argument that the WCBA commitment would adversely affect the market and strengthen its oligopolistic structure by granting wholesale access on preferred terms to Telefónica, the Commission explained that that remedy would strengthen that operator, but that it would not give rise to competition concerns since Telefónica was not a strong competitor, in particular, on the markets for fixed internet access.

The Court also rejects the complaint alleging that the Commission's examination of the WCBA commitment was inadequate and that the statement of reasons in the contested decision with regard to that commitment was inadequate, since the Commission did indeed verify that that commitment would eliminate entirely the competition concerns identified and that it would not have negative effects, including on investments in fibre optics or on the retail market for multiple play. It also set out in detail the reasons why it concluded that that would not be the case.

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

3. STATE AID

Judgment of the General Court (Fifth Chamber), 6 November 2024, Millennium BCP and BCP África v Commission (Madeira Free Zone), T-462/22

State aid – Madeira Free Zone – Aid scheme implemented by Portugal – Decision finding that the scheme does not comply with Decisions C(2007) 3037 final and C(2013) 4043 final, declaring that scheme to be incompatible with the internal market and ordering recovery of aid paid under it – Obligation to state reasons – Concept of 'existing aid' within the meaning of Article 1(b)(ii) of Regulation (EU) 2015/1589 – No derogation from the condition relating to the creation or maintenance of jobs in the Autonomous Region of Madeira – Principle of sound administration – Principle of sincere cooperation – Legitimate expectations – Legal certainty

The General Court dismisses the action brought by two companies against the decision of the European Commission [27] declaring certain aid paid to undertakings established on the island of Madeira, under a previously authorised scheme, to be incompatible with the internal market and ordering its recovery.[28] In that context, the Court clarifies, in particular, the extent of the information which Member States must provide when notifying an aid measure to the Commission in order to enable it to carry out its examination with due diligence, having regard to the requirements inherent in the principle of sincere cooperation.

27 Commission Decision (EU) 2022/1414 of 4 December 2020 on aid scheme SA.21259 (2018/C) (ex 2018/NN) implemented by Portugal for Zona Franca da Madeira (ZFM) – Regime III (OJ 2022 L 217, p. 49).

28 The judgment to which this résumé relates follows the dismissal in its entirety, which is now final, of the action seeking the annulment of that decision brought by the Portuguese Republic (judgment of 21 September 2022, Portugal v Commission (Madeira Free Zone), T95/21, EU:T:2022:567, confirmed by the judgment of the Court of Justice of 4 July 2024, Portugal v Commission (Madeira Free Zone), C736/22 P, not published, EU:C:2024:579).

In order to promote regional development and diversification of the economic structure of the island of Madeira, the Portuguese Republic established an aid scheme for a defined area on that island, called the Madeira Free Zone (MFZ).

That scheme, first approved by the Commission in 1987 as compatible regional aid, was amended in 2002. In 2007, the Commission authorised a third scheme which was further amended in 2013 [29] ('Regime III').

Regime III, as approved by the Commission, took the form of a reduction in corporate income tax on profits resulting from activities effectively and materially performed in Madeira, an exemption from municipal and local taxes and an exemption from tax on the transfer of immovable property for the setting up of a business in the MFZ, up to maximum aid amounts based on ceilings set according to the number of jobs held by the beneficiary.

On completion of a monitoring exercise in respect of that scheme relating to 2012 and 2013, the Commission decided to initiate the formal investigation procedure under Article 108(3) TFEU.

On conclusion of that procedure, it found, by a decision of 4 December 2020, that Regime III, as implemented by Portugal, differed substantially from the scheme authorised by the 2007 and 2013 decisions. Classifying that scheme as 'new aid' which had been unlawfully implemented and was incompatible with the internal market, the Commission ordered recovery of the aid from the beneficiaries.

The applicants, Millennium BCP Participações, SGPS, Sociedade Unipessoal, Lda and BCP África, SGPS, Lda, are holding companies ('the SGPS companies') which benefited from Regime III. They brought an action for annulment against Decision 2022/1414 in so far as it concerns them.

Findings of the General Court

In support of their action, the applicants allege, in particular, that the Commission erred in law by including the SGPS companies in the beneficiaries covered by the recovery obligation in the event of non-compliance with the condition relating to the creation or maintenance of jobs in the Autonomous Region of Madeira ('the ARM'). They assert that, on the basis of a derogation which forms an integral part of Regime III, as notified to the Commission, the SGPS companies were not subject to that condition, with the result that aid paid to them was not 'new aid', but 'existing aid' corresponding to the aid authorised by the Commission by the 2007 and 2013 decisions.

As a preliminary point, the Court notes that the classification of Regime III, as implemented for the SGPS companies, as 'existing aid' or 'new aid' depends not only on the actual text of the authorisation decisions adopted by the Commission, but also on the content of the notification made by the Member State concerned and on the further information provided by it following requests for additional information. In this context, account must also be taken of the conduct of that Member State in connection with the notification of the scheme in the light of its duty to cooperate with the Commission.

In this case, it is clear from the notification of Regime III as a whole, particularly in 2006 ('the 2006 notification'), and from the subsequent correspondence between the Commission and the Portuguese authorities, that the derogation at issue was mentioned only in the legal bases annexed to the notification, in particular in a provision of the draft decree-law relating to the Tax Incentives Statute notified to the Commission. [30] However, there was no mention of that derogation in the notification form or in the accompanying explanatory memorandum.

In the light of the wording of the provision concerned and the explanatory statement for the notified draft decree-law, the Commission could reasonably take the view that, like all undertakings eligible for Regime III, the SGPS companies were subject to the condition of creating or maintaining jobs in the ARM. Furthermore, it is clear from the explanatory memorandum accompanying the 2006 notification and, in particular, from the explanatory statement for the notified draft decree-law that the

29 Commission Decisions of 27 June 2007 in Case N 421/2006 and of 2 July 2013 in Case SA.34160 (2011/N) ('the 2007 and 2013 decisions').

30 Article 34A(5) of the Tax Incentives Statute included in the notified draft decree-law.

Portuguese authorities' intention was to require any undertaking wishing to benefit from Regime III to create or maintain jobs in the ARM.

It follows from all the foregoing that the Portuguese authorities never drew the Commission's attention to the fact that the notified draft decree-law could be applied such that it would permit the SGPS companies to benefit from Regime III without being subject to the condition relating to the creation or maintenance of jobs in the ARM. Accordingly, by the 2006 notification and the subsequent exchanges, the Portuguese Republic did not provide the Commission with all information required to allow it, first, to establish the existence of a derogation from that condition for the SGPS companies, second, to examine whether such a derogation was compatible with the FEU Treaty and, third, to form an opinion in this regard, even though, in practice, the derogation applying to the SGPS companies resulted in such undertakings benefiting from State aid granted in much more advantageous conditions than those laid down by the general scheme applicable to other undertakings.

The Court also holds that the applicants claim unsuccessfully that the Commission infringed the right to sound administration by failing to conduct a diligent examination of the 2006 notification.

The Portuguese authorities did not put the Commission in a position to know that a derogation from the condition relating to the creation or maintenance of jobs in the ARM for the SGPS companies had been submitted to it for the purposes of its assessment. Nor did they explain how that derogation was proportionate to the objective pursued by the aid and compatible with the internal market, when the condition of creating or maintaining jobs was a condition to access Regime III, particularly in so far as it served to quantify the contribution to the objective of regional development and the level and proportionality of the advantages conferred.

Thus, if it was the Portuguese authorities' intention to submit that derogation for assessment by the Commission, the principle of sincere cooperation to which they were subject should have led them to draw the Commission's attention more fully to the existence of such a derogation, which raises doubts as to its compatibility with the internal market, and, consequently, to provide explanations regarding that compatibility.

In these circumstances, the Commission cannot be criticised for having infringed the principle of sound administration or for having failed in its duty to act with diligence by not realising that a provision on which the Portuguese authorities had not provided explanations could be interpreted as permitting a derogation from the condition relating to the creation or maintenance of jobs in the ARM.

Therefore, in the absence of having been validly notified, a derogation from the condition relating to the creation or maintenance of jobs in the ARM cannot be considered to have been authorised by the 2007 decision.

Nor can such authorisation be derived from the 2013 decision, especially since it mentions an undertaking given by the Portuguese Republic to 'eliminate any preferential treatment of entities such as [the SGPS companies] if it is confirmed that their treatment in the MFZ actually confers an advantage compared with the Portuguese general scheme applicable to the SGPS companies'.

As the other pleas raised, alleging an infringement of the Commission's obligation to state reasons and a breach of the principles of protection of legitimate expectations and legal certainty, also proved to be unfounded, the Court dismisses the action in its entirety.

Judgment of the General Court (Fifth Chamber), 6 November 2024, Portumo – Madeira and Others v Commission (Madeira Free Zone), T-713/22 and T-720/22

Link to the full text of the judgment

State aid – Madeira Free Zone – Aid scheme implemented by Portugal – Decision finding that the scheme does not comply with Decisions C(2007) 3037 final and C(2013) 4043 final, declaring that scheme to be incompatible with the internal market and ordering recovery of aid paid under it – Concept of 'existing aid' within the meaning of Article 1(b)(ii) of Regulation (EU) 2015/1589 – Recovery – Legitimate expectations –

Legal certainty – Freedom to provide services – Freedom of establishment – Freedom of movement for workers

The General Court dismisses the actions for annulment brought by several companies against the decision of the European Commission declaring certain aid paid to undertakings established on the island of Madeira, under a previously authorised scheme, to be incompatible with the internal market and ordering its recovery. In that context, the Court provides further clarification as to the relationship between the fundamental freedoms enshrined by the TFEU and the rules of that Treaty relating to State aid.

In order to promote regional development and diversification of the economic structure of the island of Madeira, the Portuguese Republic established an aid scheme for a defined area on that island, called the Madeira Free Zone (MFZ).

First approved by the European Commission in 1987 as compatible regional aid, that scheme was amended in 2002. In 2007, the Commission authorised a third scheme which was further amended in 2013 [31] ('Regime III').

Regime III, as approved by the Commission, took the form of a reduction in corporate income tax on profits resulting from activities effectively and materially performed in Madeira, an exemption from municipal and local taxes and an exemption from tax on the transfer of immovable property for the setting up of a business in the MFZ, up to maximum aid amounts based on ceilings set according to the number of jobs held by the beneficiary.

On completion of a monitoring exercise in respect of that scheme relating to 2012 and 2013, the Commission decided to initiate the formal investigation procedure under Article 108(3) TFEU. On conclusion of that procedure, the Commission found, by a decision of 4 December 2020, [32] that Regime III, as implemented by Portugal, differed substantially from the scheme authorised by the 2007 and 2013 decisions. Classifying that scheme as 'new aid' which had been unlawfully implemented and was incompatible with the internal market, the Commission ordered recovery of the aid from the beneficiaries.

By their actions, four companies which benefited from aid paid under Regime III, as implemented, seek annulment of that decision by the General Court.

Findings of the General Court

In support of their actions, the applicants submitted, inter alia, that the interpretation used by the Commission, in the contested decision, of the conditions for accessing Regime III infringed the principles of free movement of citizens and of workers, freedom of establishment and freedom to provide services, by making it more difficult or more costly for undertakings that have benefited from Regime III or their employees to exercise those freedoms.

In that regard, it should be noted that, as in the judgments in Cases T-95/21 [33] and T-131/21, [34] the Court finds that the Commission did not err when it interpreted the conditions for accessing Regime III and found that that scheme, as implemented by Portugal, differed substantially from the regime authorised by the 2007 and 2013 decisions and was, accordingly, a new aid scheme.

Next, the Court states that the applicants' arguments alleging infringement of the principles of free movement of citizens and of workers, freedom of establishment and freedom to provide services are seeking, in essence, to question the finding, in recital 198 of the contested decision, made by the Commission on the basis of Article 107(3)(a) TFEU, that Regime III, as implemented, is incompatible with the internal market.

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31 Commission Decisions of 27 June 2007 in Case N 421/2006 and of 2 July 2013 in Case SA.34160 (2011/N) ('the 2007 and 2013 authorisation decisions').

32 Commission Decision (EU) 2022/1414 of 4 December 2020 on aid scheme SA.21259 (2018/C) (ex 2018/NN) implemented by Portugal for Zona Franca da Madeira (ZFM) – Regime III (OJ 2022 L 217, p. 49) ('the contested decision').

33 Judgment of 21 September 2022, Portugal v Commission (Madeira Free Zone) (T-95/21, EU:T:2022:567).

34 Judgment of 21 June 2023, Região Autónoma da Madeira v Commission (T-131/21, not published, EU:T:2023:348).

To the extent that those arguments are seeking to dispute the finding that Regime III, as implemented, is incompatible, the Court notes that it is admittedly apparent from the case-law that, when the Commission intends to declare aid to be compatible with the internal market, it must satisfy itself that the declaration of compatibility in question, which authorises the Member State to pay the aid concerned, will not entail an infringement of other provisions of EU law including, in particular, of the principles of free movement.

However, that case-law cannot require that the Commission, where it intends to declare aid to be incompatible, declare it to be compatible and therefore authorise its payment, on the ground that any incompatibility decision would have restrictive effects on the undertakings benefiting from that aid, whether by preventing its payment or by requiring its recovery.

Otherwise, the prohibition on incompatible State aid would be frustrated by the principles of free movement of citizens and of workers, freedom of establishment and freedom to provide services, even though the TFEU rules on competition, in particular those on State aid, are fundamental in nature and are the expression of one of the essential tasks with which the European Union is entrusted.

Accordingly, the Court concludes that the applicants could not effectively invoke the principles of free movement of citizens and of workers, freedom of establishment and freedom to provide services against the contested decision in so far as it finds, on the basis of Article 107(3)(a) TFEU, that Regime III, as implemented, is incompatible, and orders recovery thereunder.

The court adds that, even assuming that those principles can be relied on by the applicants and that – in so far as it interprets the conditions for accessing Regime III in such a way that the scheme, as implemented, is incompatible, and orders recovery of the aid paid under that scheme – the contested decision has restrictive effects on the freedoms invoked, those effects are, in any event, justified by the legitimate objective pursued by Regime III, which aims at promoting regional development and diversification of the economic structure of Madeira, as an outermost region, and are proportionate to that objective. In that regard, the Court notes that neither the finding that Regime III, as implemented, is incompatible with the internal market nor the recovery of the aid unlawfully paid under that scheme prevents companies registered in the MFZ from being established or from providing services outside the Autonomous Region of Madeira, or even from recruiting workers who reside or perform their activity outside that region. Finally, the Court finds that the Commission was not obliged to make a decision on an alternative aid scheme proposed by the applicants. On that point, the Court observes that, according to the case-law, the Commission is not required to make a decision in the abstract on every alternative measure conceivable, since, although the Member State concerned must set out in detail the reasons for adopting the aid scheme at issue, in particular in relation to the eligibility criteria used, it is not required to prove, positively, that no other conceivable measure, which by definition would be hypothetical, could better achieve the intended objective. If that Member State is not under any such obligation, the applicants are not entitled to ask the Court to require the Commission to take the place of the national authorities in that task of normative prospecting in order to examine every alternative measure possible.

In the light of the foregoing, the Court rejects the applicants' arguments as unfounded. It also rejects all the other pleas in law relied on and, consequently, dismisses the actions in their entirety.

Judgment of the General Court (Eighth Chamber, Extended Composition), 13 November 2024, Merlin and Others v Parliament, T-141/23

Link to the full text of the judgment

Action for failure to act – State aid – Common fisheries policy – Funding for shipowners fishing with beam trawl using electrical pulse current – Complaint – Admissibility – Definition of a position by the Commission – Clear and definitive nature of the position adopted – Competence of the Commission – Obligation to act

By its judgment, the General Court upholds in part the action for failure to act brought by 36 French, Dutch and United Kingdom fishermen and the association of small European fishermen Low Impact Fishers of Europe (LIFE), seeking a declaration that the European Commission unlawfully failed to adopt a position on their complaints concerning alleged unlawful State aid granted by the Kingdom of the Netherlands to shipowners engaged in electrical pulse fishing. Delivered by a Chamber sitting in extended composition, the judgment clarifies the conditions governing the admissibility of an action for failure to act, in particular those relating to the failure of the institution that had previously been called upon to act to define a clear and definitive position, and, as regards the substance, the extent of the obligations on the Commission once it has received complaints informing it of the existence of alleged unlawful aid or the alleged misuse of such aid.

In March 2021, the applicants submitted several complaints to the Commission. In those complaints, and in their subsequent exchanges with the Commission's Directorate-General for Competition, the applicants challenged, first, the funding granted by the Kingdom of the Netherlands to Dutch beam trawlers engaged in electrical pulse fishing in breach of EU law provisions relating to the conservation of fishing resources and the rules applicable to financing under the European Fisheries Fund ('EFF') and the European Maritime and Fisheries Fund ('EMFF'). According to the applicants, that funding therefore had to be classified as unlawful State aid incompatible with the internal market.

Second, the applicants complained of the existence of various aid measures granted by the Kingdom of the Netherlands to trawlers of the same type that greatly exceeded the applicable de minimis thresholds and therefore should be classified as State aid.

In the course of the exchanges with the applicants, the Commission's Directorate-General for Competition informed the applicants that, on the basis of all the information submitted, it saw no element constituting potentially unlawful State aid and requiring further examination. In those circumstances, by letter of 8 November 2022, the applicants called upon the Commission, in accordance with the second paragraph of Article 265 TFEU and Regulation 2015/1589, [35] in particular Articles 4, 12 and 15 thereof, to adopt a decision under Article 4 of that regulation. [36]

In response to that call to act, the Commission informed the applicants, by letter of 14 February 2023, that it did not envisage proposing the initiation of 'infringement proceedings' for failure by the Kingdom of the Netherlands to comply with EU law, that it had concluded that there had been no infringement of the rules applicable to the EFF and the EMFF by the Kingdom of the Netherlands, and that it intended to close the file, unless the applicants submitted to it, within four weeks, new information likely to be relevant to the re-examination of the file.

The applicants brought an action before the General Court seeking, inter alia, a declaration that the Commission had unlawfully failed to adopt a decision under Regulation 2015/1589. In support of their action, the applicants claim that the Commission, in accordance with the second subparagraph of Article 12(1), and Article 15(1) of Regulation 2015/1589, should have examined the information provided in the complaints and in their later exchanges, in which the applicants criticised the existence of various aid measures, and adopted a final decision on the basis of Article 4(2), (3) or (4) of that regulation, setting out clearly its position in that regard.

Findings of the General Court

First, the General Court examines the admissibility of the action, which the Commission contests on the ground in particular that it had defined its position, clearly and definitively, on the call to act.

According to the case-law, the conditions governing the admissibility of an action for failure to act, laid down in Article 265 TFEU, are not satisfied where the institution called upon to act defined its position on that request before the action was brought. Therefore, the institution in question has not failed to act, not only when it adopts a measure vindicating the applicant, but also when it refuses to adopt such a measure but answers the request made to it by stating the reasons why it considers that that

35 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

36 Under Article 4(2), (3) and (4) of Regulation 2015/1589, to which Article 15(1) of that regulation refers, the purpose of such a decision is to find one of the following: that the measure at issue does not constitute aid, that the measure is compatible with the internal market, or, on the contrary, that it is necessary to initiate the formal investigation procedure, in view of the doubts raised by it.

measure should not be adopted or that it does not have the power to do so. The fact that the position adopted by the institution has not satisfied the applicants is of no relevance in this respect because Article 265 TFEU refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned.

In addition, the definition of a position, within the meaning of the second paragraph of Article 265 TFEU, must set out clearly and definitively the position of the institution concerned on the applicant's call to act.

In the light of the principles thus recalled, the Court notes that the applicants challenged, in separate sections of the complaints, on the one hand, the existence of funding granted in breach of the rules applicable in the context of the EFF and the EMFF and, on the other hand, the existence of national subsidies constituting State aid. Accordingly, it is necessary to examine whether the Commission defined its position, clearly and definitively, before the action was brought, on both categories of measures challenged in the complaints.

As regards, in the first place, the contested EFF and EMFF funding, the Court concludes that, in its letter of 14 February 2023, read in the light of the exchanges which preceded it, the Commission clearly and definitively defined its position on the invitation to act, in so far as that letter related to that funding.

In that regard, the Court notes that the Commission stated, in its exchanges with the applicants, that it considered that it was not competent to adopt a decision relating to the funding in question, since the examination of its conformity had to be carried out in accordance with the specific procedures laid down in Regulations No 1198/2006 [37] and No 508/2014.[38] It also set out the reasons why, in its view, the contested EFF and EMFF funding did not infringe the rules relating to those funds.

It is true that, in its letter of 14 February 2023, considered in isolation, the Commission did not expressly refuse to adopt a decision under Regulation 2015/1589 in respect of the contested EFF and EMFF funding, nor did it state that it was not competent to adopt such a decision. However, the Court finds that the letter of 14 February 2023 must be read in the light of the previous exchanges. Indeed, the case-law allows the exchanges between the applicants and the Commission which preceded the adoption of a position to be taken into account for the purpose of ascertaining whether a clear and definitive position has been adopted. In the circumstances of the present case, it must be held that the Commission, in its letter of 14 February 2023, essentially confirmed its previously clearly expressed position and that, on that basis, it had decided to conclude its examination of the complaints. It follows that the Commission defined a position, within the meaning of Article 265 TFEU, on the contested EFF and EMFF funding, and that that position had been defined before the action was brought.

The Court also rejects the applicants' arguments seeking to show that the position defined was not clear and definitive. In that regard, it should be noted that the applicants had indeed understood the Commission's position regarding its lack of competence to examine the contested EFF and EMFF funding, given that they communicated to the Commission during their exchanges the reasons why they disagreed on that matter. In addition, as is apparent from the case-law, the mere fact that the Commission gave the applicants a final opportunity to submit new information that might be relevant for the 're-examination' of their file is not liable to call into question the clear and definitive nature of its position, since the Commission clearly stated, in its letter of 14 February 2023, that it had completed its examination of the complaints and set out its definitive analysis of the contested EFF and EMFF funding.

As regards, in the second place, the contested national aid, the Court considers, by contrast, that the Commission had not defined a clear and definitive position, within the meaning of Article 265 TFEU, before the action was brought.

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37 Council Regulation (EC) No 1198/2006 of 27 July 2006 on the [EFF] (OJ 2006 L 223, p. 1).

38 Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the [EMFF] and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council (OJ 2014 L 149, p. 1).

In that regard, the Court considers that, by interpreting, by its own admission, the applicants' complaints as relating only to the contested EFF and EMFF funding, the Commission had undertaken an incomplete reading of the complaints, which led it to fail to express its views on the contested national aid. Thus, although the Commission stated that it had examined in detail the additional information provided by the applicants challenging, inter alia, the existence of a programme of investment aid financed entirely by the Netherlands State that was intended to equip five trawlers with electric beam trawl, it failed to express its opinion on that aid.

The Court notes that the letter of 14 February 2023 cannot be regarded as a pre-closure letter sent to the applicants on the basis of the second subparagraph of Article 24(2) of Regulation 2015/1589, contrary to the Commission's contention. Not only did the Commission not rely on that article in its letter of 14 February 2023, but it declared in the course of its exchanges with the applicants that it lacked competence to adopt a decision under Regulation 2015/1589.

Thus declaring the action for failure to act admissible only in so far as it concerns the contested national aid, the Court, next, gives a ruling on the substance.

Called upon, thus, to ascertain whether at the time the Commission was called upon by the applicants to act it was under an obligation to act, the Court recalls that, in the field of State aid, the situations in which the Commission is required to act in respect of aid that is unlawful or incompatible with the internal market are governed by Regulation 2015/1589. In particular, the second subparagraph of Article 12(1) of that regulation requires the Commission to examine without undue delay any complaint submitted by any interested party, in accordance with Article 24(2) of that regulation. That provision, relating to the rights of interested parties, provides inter alia that, if the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful State aid or misuse of aid, the Commission is to inform the interested party thereof and call upon it to submit comments within a prescribed period which is not normally to exceed one month. If the interested party fails to make known its views within the prescribed period, the complaint is to be deemed to have been withdrawn. Moreover, pursuant to the first sentence of Article 15(1) of that regulation, the examination of possible unlawful aid is to result in a formal decision. In the present case, it should be noted that the Commission did not take any action or, a fortiori, adopt a formal decision even though it had duly received complaints informing it of the existence of alleged unlawful aid or of the alleged misuse of such aid. It had, therefore, at the end of the period of two months following the call to act, failed to act, with the result that the applicants' complaints that the Commission had failed to fulfil its obligation to act under Regulation 2015/1589 are well founded in so far as concerns the contested national aid.

V. APPROXIMATION OF LAWS

1. COPYRIGHT

Judgment of the Court of Justice (First Chamber), 14 November 2024, Reprobel, C-230/23

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2 – Reproduction right – Article 5(2)(a) and (b) – Exceptions and limitations – Fair compensation – Direct effect – Entity entrusted by the State with collecting and distributing fair compensation – Special powers

Hearing a reference for a preliminary ruling from the ondernemingsrechtbank Gent, afdeling Gent (Ghent Business Court, Ghent Division, Belgium), the Court of Justice clarifies its case-law on one of the fundamental issues of EU law, namely the direct effect of the provisions of directives and whether they can be relied on in vertical relationships, in the context of a dispute between an individual and a Member State.

Copaco Belgium NV, a public limited company governed by Belgian law, is a distributor of IT products and of reproduction devices, such as photocopiers and scanners, for businesses and consumers. Until the end of 2016, it was, for that reason, obliged to pay flat-rate remuneration for the reproduction of works protected by copyright or related rights ('remuneration by way of fair compensation'). That remuneration had to be collected by Reprobel CV, a copyright collecting society entrusted by the Belgian State with collecting and distributing the remuneration by way of fair compensation to which authors and publishers are entitled for reprography activities.

Claiming that, by its judgment in Hewlett-Packard Belgium, [39] the Court had held that Article 5(2)(a) and (b) of Directive 2001/29 [40] precluded the 'flat-rate' portion of the remuneration system laid down by the Belgian legislation on remuneration by way of fair compensation, Copaco suspended payment of the invoices issued by Reprobel relating to that remuneration for the period from November 2015 to January 2017, invoking the direct effect of that provision. It also stated that the suspension would continue until the provisions of that legislation were aligned with those of Directive 2001/29. In March 2017, a new regime for remuneration by way of fair compensation entered into force.

Reprobel then brought proceedings against Copaco before the ondernemingsrechtbank Gent, afdeling Dendermonde (Ghent Business Court, Dendermonde Division, Belgium), which, for reasons of territorial jurisdiction, referred the case to the Ghent Business Court, Ghent Division, which is the referring court. That court, being uncertain, inter alia, as to the direct effect of Article 5(2)(a) and (b) of Directive 2001/29, decided to refer questions to the Court for a preliminary ruling on the interpretation of that provision.

Specifically, the referring court seeks to determine, first, whether an individual may rely, before a national court, against an entity entrusted by a Member State with collecting and distributing the fair compensation established under Article 5(2)(a) and (b) of Directive 2001/29, on the fact that the national legislation laying down that compensation contravenes EU law. Second, it asks whether that provision must be interpreted as having direct effect, meaning that, in the absence of a correct transposition of that provision, an individual may rely on it for the purposes of disapplying national rules under which that individual is obliged to pay remuneration by way of fair compensation in contravention of that provision.

Findings of the Court

As a preliminary matter, the Court notes that Reprobel takes the legal form of a cooperative governed by private law and that the Belgian State is not represented on its bodies. In the present case, therefore, Reprobel is not an organisation governed by public law and nor is it controlled by the Belgian State. At the outset, the Court recalls its settled case-law according to which individuals may rely directly on provisions of a directive that are unconditional and sufficiently precise, not only against Member States and their organs in the strict sense, but also, in particular, against organisations which are subject to the authority or control of a public body, perform a task in the public interest and possess special powers beyond those which result from the normal rules applicable in relations between individuals. It therefore examines in turn whether Reprobel performs a task in the public interest and whether, in order to perform that task, it has special powers.

In the first place, the Court states that the Member States are entitled, under Article 5(2)(a) and (b) of Directive 2001/29, to establish in their respective legal systems exceptions to the reproduction right laid down in that provision and that they are also required, for that purpose, to establish fair compensation and a system of financing that compensation. In addition, it notes that the form, detailed arrangements and level of the fair compensation must be linked to the harm resulting for the rightholder from the making of copies for private use.

Furthermore, the Court states that it has already ruled on the detailed arrangements for the collection and distribution of the remuneration by way of fair compensation provided for by the Belgian legislation. It has held, first, that the fair compensation established in Article 5(2)(b) of

39 Judgment of 12 November 2015, Hewlett-Packard Belgium (C-572/13, EU:C:2015:750).

40 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001, L 167, p. 10).

Directive 2001/29 concerned reproductions on any medium made by means of any kind of technique, that is to say, such compensation is borne by all the users of reproduction devices, since those users are entitled to benefit from the exceptions provided for in that article. Second, fair compensation is, in principle, intended to compensate for the harm suffered as a result of the copies actually produced and it is, in principle, for the persons who have made the reproductions to make good the harm related to them by financing the compensation to be paid to the rightholder.

In that context, it would be very difficult for the holder of a reproduction right to assert that right with respect to acts performed by users in the private sphere. Inclusion of the exceptions to that right laid down in Article 5(2) of Directive 2001/29 therefore ensures that rightholders can benefit from revenue which would be very difficult to obtain directly from users. Accordingly, the collection of remuneration, such as that established by the Belgian legislation, and the payment of fair compensation to the holders of copyright and related rights fall within the scope of a task in the public interest, performed, in the circumstances of the present case, by Reprobel.

In the second place, as regards the assessment of the powers of an organisation such as Reprobel, the Court notes that that organisation is the only entity entrusted, pursuant to a royal decree, [41] with collecting and distributing the remuneration by way of fair compensation. Therefore, when performing its task, Reprobel may, automatically, claim payment of the remuneration by way of fair compensation from any person forming part of the group of persons liable to pay it. In addition, Reprobel has a series of specific powers, in particular in respect of requesting information, to enable it to perform the task in the public interest entrusted to it. First, that entity is entitled to require both the persons liable to pay that remuneration and other operators active on the market for copying equipment, on pain of criminal penalties, to provide all the information necessary to identify the persons liable and to determine the amounts payable by them. Second, Reprobel is authorised to request the information necessary to perform its task from the customs, tax and social security authorities.

The powers given to Reprobel, including the power to claim remuneration by way of fair compensation from the manufacturers and distributors of copying devices and media, must therefore be considered to be special powers beyond those which result from the normal rules applicable in relations between individuals.

The Court therefore holds that Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as meaning that an individual may rely, before a national court, against an entity entrusted by a Member State with collecting and distributing the fair compensation, on the fact that the national legislation laying down that compensation contravenes provisions of EU law which have direct effect, provided that such an entity has, in order to perform that task in the public interest, special powers beyond those which result from the normal rules applicable in relations between individuals.

In the third and last place, as regards whether Article 5(2)(a) and (b) of Directive 2001/29 has direct effect, after recalling the conditions necessary for the provisions of a directive to have such direct effect, the Court states that the assessment to be carried out in order to determine whether Article 5(2)(a) and (b) of Directive 2001/29 is unconditional and sufficiently precise concerns, in particular, three points: the identity of the persons entitled to the protection provided in that provision, the content of that protection and the identity of the person liable to provide the protection.

In that regard, the Court points out that it has already held that Article 5(2)(a) and (b) of Directive 2001/29 imposes specific obligations on Member States which choose to apply exceptions or limitations in respect of the reproduction right, in order to ensure that fair compensation is provided for the rightholders. Although it is true that the Member States are not bound to include those exceptions in their national law, if they do so they must, however, provide also for the payment of fair compensation to the authors harmed, and take into account the requirements relating to the structure and level of that compensation which flow from the interpretation of that provision.

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41 Koninklijk besluit tot het belasten van een vennootschap met de inning en de verdeling van de vergoeding voor het kopiëren van werken die op grafische of soortgelijke wijze zijn vastgelegd (Royal Decree of 15 October 1997 entrusting a society to collect and distribute the remuneration for the copying of works fixed on a graphic or similar medium) (Belgisch Staatsblad of 7 November 1997, p. 29873).

Those requirements include those relating to the detailed arrangements for calculating the remuneration by way of fair compensation, as established by the Court in its judgment in Hewlett-Packard Belgium.

As regards the content of the rights arising from the provisions of Directive 2001/29 which are capable of having direct effect, individuals are entitled not to bear the financial burden of remuneration by way of fair compensation if that remuneration is collected in contravention of Article 5(2)(a) and (b) of Directive 2001/29. Accordingly, the Court has expressly noted the need to establish mechanisms, in the fair compensation system, including for the reimbursement of remuneration that has been wrongly collected, designed to correct any situation where overcompensation occurs, which would be incompatible with the requirement that a fair balance be safeguarded between the rightholders and the users of protected subject matter. [42]

In the present case, since the national legislation at issue in the main proceedings is incompatible with Article 5(2)(a) and (b) of Directive 2001/29, as is apparent in essence from the judgment in Hewlett-Packard Belgium, the referring court, hearing a dispute relating to the suspension of payment, by an individual, of the remuneration by way of fair compensation required by that legislation, must guarantee the full effectiveness of that provision by disapplying that national legislation for the purposes of resolving the dispute pending before it.

The Court therefore holds that Article 5(2)(a) and (b) of Directive 2001/29 must be interpreted as having direct effect, and that therefore, in the absence of a correct transposition of that provision, an individual may rely on it for the purposes of disapplying national rules under which that individual is obliged to pay remuneration by way of fair compensation imposed in contravention of that provision.

2. EU TRADE MARK

Judgment of the General Court (Third Chamber), 13 November 2024, Administration of the State Border Guard Service of Ukraine v EUIPO (RUSSIAN WARSHIP, GO FK YOURSELF), T-82/24**

Link to the full text of the judgment

EU trade mark – Application for EU figurative mark RUSSIAN WARSHIP, GO F**K YOURSELF – Absolute ground for refusal – No distinctive character – Article 7(1)(b) of Regulation (EU) 2017/1001 – Political slogan – Equal treatment – Principle of sound administration – Article 71(1) of Regulation 2017/1001

By its judgment, the General Court addresses, for the first time, the question of the possibility of registering a 'political slogan' as a trade mark.

A Ukrainian border guard, the predecessor-in-title to the applicant, Administration of the State Border Guard Service of Ukraine, filed with the European Union Intellectual Property Office (EUIPO) an application for registration of the figurative sign 'RUSSIAN WARSHIP, GO F**K YOURSELF' as an EU trade mark for various goods and services.[43] The examiner rejected that application for registration in its entirety on the basis of Article 7(1)(f) of Regulation 2017/1001, [44] according to which trade marks which are contrary to public policy or to accepted principles of morality must not be registered. The applicant filed a notice of appeal with EUIPO against the examiner's decision. By the contested decision, [45] the Board of Appeal dismissed the appeal on the ground that the mark applied for was

42 That requirement is referred to in recital 31 of Directive 2001/29.

43 More specifically, the mark applied for covers the goods and services in Classes 9, 14, 16, 18, 25, 28 and 41 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

44 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).

devoid of any distinctive character in respect of the goods and services at issue and therefore had to be refused registration pursuant to Article 7(1)(b) of Regulation 2017/1001.

Findings of the General Court

The Court notes that the applicant submits unsuccessfully that the Board of Appeal erred in classifying the mark applied for as a 'political slogan'.

The phrase in the mark applied for had been widely used, immediately after its first use, in order to rally support for Ukraine and had thus become, very quickly, a symbol of Ukraine's fight against the aggression of the Russian Federation. Thus, that sentence was used in a political context, repetitively and with the aim of expressing and promoting support to Ukraine. That situation corresponds perfectly to the definition of the expression 'political slogan' put forward by the applicant itself in its application, namely, an expression, used in a political or social context, repetitive of an idea or purpose, with the goal of persuading the public or a target group within it.

The phrase in the mark applied for has been used very intensively in a non-commercial context and will necessarily be associated very closely with that context by the relevant public. The phrase used in the mark applied for very quickly became one of the symbols of Ukraine's fight against Russian aggression, associated with a soldier of the Ukrainian army and, thus, with Ukraine. Given the extent of the media coverage of that event, that phrase will be associated with that recent historical moment, well known to the average EU consumer.

In that regard, the Court considers that the Board of Appeal did not err in law in finding that the general principle that the relevant public is not very attentive with regard to a sign which does not immediately indicate the origin of the goods and services concerned, given that they would not perceive it or mentally register it as a trade mark, also applied to signs whose main message was of a political nature.

In view of the essential function of a trade mark, namely that of identifying the origin of the goods or services covered by it, a sign is incapable of fulfilling that function if the average consumer does not perceive, in its presence, the indication of the origin of the goods or services, but only a political message.

As regards the obligation to state reasons, the Court points out that, where the same ground for refusal is given for a category or group of goods or services, the competent authority may use only general reasoning for all of the goods or services concerned. The case-law has indeed made clear that such a power extends only to goods and services which are interlinked in a sufficiently direct and specific way, to the point where they form a sufficiently homogeneous category or group of goods or services. Nevertheless, it has stated that it is necessary to take into account, in order to determine whether the goods and services are interlinked in a sufficiently direct and specific way and can be placed in sufficiently homogenous categories and groups, the fact that the objective of that exercise is to enable and facilitate the assessment in concreto of the question whether or not the mark concerned by the application for registration comes under one of the absolute grounds for refusal. In addition, the placement of the goods and services at issue in one or more groups or categories must be carried out in particular on the basis of the characteristics which are common to them and which are relevant for the analysis of whether or not a specific absolute ground for refusal may apply to the mark applied for in respect of those goods and services. It follows that such an assessment must be carried out in concreto for the examination of each application for registration and, as the case may be, for each of the different absolute grounds for refusal which may apply.

In the present case, the Board of Appeal found, in the contested decision, that the mark applied for would not be perceived by the relevant public as indicating a commercial origin. Furthermore, it stated that the phrase in the mark applied for would first and foremost be interpreted as a political message and that that perception would be identical for all the goods or services covered by that mark. It follows that the Board of Appeal found that the goods and services covered by the mark applied for form a sufficiently homogeneous group, having regard to the absolute ground for refusal which, in its view, has caught registration of that mark.

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45 Decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 1 December 2023 (Case R 438/2023-1).

Given that the Board of Appeal was right in finding that the mark applied for would not be perceived by the relevant public as indicating a commercial origin, but as a political message promoting support for Ukraine's fight against the military aggression of the Russian Federation, it could validly group all the goods and services covered by the mark applied for in a single category, despite having different inherent characteristics.

Therefore, in view of the specific nature of the mark applied for and its identical perception by the relevant public with regard to all the goods and services covered by the application for registration, the Court held that it was without committing an error of assessment that the Board of Appeal found that those goods and services form part of a single group to which the ground for refusal, which it upheld, applies in the same way and that it was right to find that the mark applied for is devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation 2017/1001.

3. FOODSTUFFS

Judgment of the General Court (Sixth Chamber, Extended Composition), 13 November 2024, Aloe Vera of Europe v Commission, T-189/21

Link to the full text of the judgment

Consumer protection – Substances prohibited, restricted or under EU scrutiny – Article 8(1) and (2) of, and Annex III to, Regulation (EC) No 1925/2006 – Prohibition of preparations from the leaf of Aloe species containing hydroxyanthracene derivatives – Third entry in Article 1(1) of Regulation (EU) 2021/468

Judgment of the General Court (Sixth Chamber, Extended Composition), 13 November 2024, Aboca and Others v Commission, T-302/21

Link to the full text of the judgment

Consumer protection – Substances prohibited, restricted or under EU scrutiny – Article 8(1) and (2) of, and Annex III to, Regulation (EC) No 1925/2006 – Prohibition and placing under control of certain substances and preparations containing hydroxyanthracene derivatives – First, second and third entries in Article 1(1), and Article 1(2), of Regulation (EU) 2021/468 – Concepts of 'substance', 'ingredient' and 'preparations' – Error of law

Hearing two actions for annulment, which it upholds, the General Court annuls the first, second and third entries in Article 1(1), and Article 1(2), of Regulation 2021/468. [46] In these judgments, it rules for the first time on one of the conditions under which the Commission may have recourse to Article 8(2)(a)(i) of Regulation No 1925/2006 [47] in order to include substances and ingredients on the list in Part A of Annex III, with a view to prohibiting them or placing them under EU scrutiny. In addition, in Case T-302/21, the Court also finds that the meaning of the term 'preparations' is broader than that of 'substance' or 'ingredients'.

The applicants are companies specialising in the manufacture and marketing of products containing hydroxyanthracene derivatives ('HADs'), some of which contain the juice or jelly from certain species of Aloe.

46 Commission Regulation (EU) 2021/468 of 18 March 2021 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards botanical species containing hydroxyanthracene derivatives (OJ 2021 L 96, p. 6; 'the contested regulation').

47 Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods (OJ 2006 L 404, p. 26).

On 29 June 2016, the Commission asked the European Food Safety Authority (EFSA) to evaluate the available information on the safety of the use of HADs from all sources in foods. It also asked EFSA to recommend a daily intake of HADs that does not give rise to concerns about possible harmful effects on health for the general population and, as appropriate, for vulnerable subgroups of the population. On 22 November 2017, EFSA issued a scientific opinion in which it found, in essence, that the substances in question should be regarded as genotoxic and carcinogenic. The Panel did not however advise on a daily intake of HADs that would not give rise to concerns about harmful effects to health, for the general population or for vulnerable subgroups of the population. On 18 March 2021, the Commission adopted the contested regulation, by which, by the first, second and fourth entries in Article 1(1), it added aloe-emodin, emodin, danthron and all preparations in which those substances are present, as well as, by the third entry, preparations from the leaf of Aloe species containing HADs, to Part A of Annex III to Regulation No 1925/2006, which prohibited any use of those substances and preparations. It also added, by Article 1(2) of the contested regulation, certain preparations containing HADs to Part C of that annex, placing them under EU scrutiny.

Findings of the General Court

In the first place, as regards the use of the term 'preparations' in the contested regulation (plea raised in Case T-302/21), the Court finds, first, that that regulation refers in particular to, on the one hand, the specific HADs, namely aloe-emodin and emodin, and, on the other hand, preparations in which those substances are present, preparations from the leaf of Aloe species containing HADs, and, in essence, preparations from parts of certain species of Rheum, Cassia and Rhamnus, which contain HADs. It is apparent that the HADs aloe-emodin and emodin must be regarded as 'substances' within the meaning of Regulation No 1925/2006 [48] and are also classified as such in the contested regulation by the use of the expression 'all preparations in which this substance is present'. Therefore, the Court finds that the Commission did not err in law in relying on Regulation No 1925/2006 in order to include those HADs in the list of substances whose addition to foods or use in the manufacture of foods is prohibited.

Second, the Court examined whether Regulation No 1925/2006 permitted the adoption of the provisions of the contested regulation in so far as they refer to various 'preparations' containing HADs. In that regard, it finds that the concepts of 'substance', 'ingredient containing a substance', 'substance and/or … ingredient containing the substance' and 'preparations' in the contested regulation are not expressly defined in either Regulation No 1925/2006 or in the contested regulation. However, the Court notes that, in any event, in the light of the wording of the provisions of the contested regulation, which refer to certain HADs as substances as well as preparations in which those substances are present, the concept of 'preparation' is broader than that of 'substance', which is defined by Regulation No 1925/2006, and cannot therefore be substituted for it. Moreover, at the hearing, the Commission accepted that the meaning of the concept of 'preparations' differed from that of 'ingredient'. In addition, it points out that there is nothing to suggest that the term 'preparations' in the provisions of the contested regulation is not capable of covering, inter alia, final products resulting from a manufacturing process.

Therefore, without it being necessary to establish a precise definition of those various concepts, the Court takes the view that the concept of 'preparations' in the contested provisions has a broader scope and meaning than the concepts of 'substances' and 'ingredients', within the meaning of Article 8 of Regulation No 1925/2006, and cannot be substituted for them. Regulation No 1925/2006 permits the inclusion in Part A of Annex III only of a 'substance' or an 'ingredient containing [that] substance'. The same applies for inclusion in Part C of that annex, which is only permitted for a 'substance'. Accordingly, the Court takes the view that the Commission could not rely on Regulation No 1925/2006 in order to adopt Article 1(1) and (2) of the contested regulation, since those provisions do not permit the inclusion of 'preparations' on the lists in Part A or C of Annex III. It concludes from this that those provisions of the contested regulation were adopted in infringement of Regulation No 1925/2006 and it annuls them.

48 More specifically, within the meaning of Article 8(1) and (2)(a)(i) of that regulation.

In the second place, as regards the absence of a risk threshold for the use of the products in question, the Court recalls that, in accordance with the case-law, the Commission has broad discretion where it is called upon to undertake complex technical or scientific assessments. In such a situation, judicial review by the EU Courts is confined to determining whether the relevant procedural rules have been complied with, whether the facts established by the Commission are correct and whether there has been a manifest error of appraisal of those facts or a misuse of powers. However, as regards the Commission's conclusions which do not involve complex technical or scientific assessments, the Court has full jurisdiction to review them.

First of all, the Court notes that the procedure established by Regulation No 1925/2006 [49] is characterised by the essential role assigned to a scientific assessment by EFSA of the effect of the addition of a substance, or an ingredient containing that substance, to foods or of its use in the manufacture of foods, in order for the Commission to determine, in full knowledge of the facts, the appropriate measures to ensure a high level of public health protection. Thus, the Commission may decide to prohibit or authorise under specified conditions the addition to foods or the use in the manufacture of foods of a substance other than vitamins or minerals, or of an ingredient containing that substance, or even to place a substance under EU scrutiny. [50] More specifically, the Court notes that Regulation No 1925/2006 lays down two conditions for imposing such a prohibition: first, the addition or use results in the 'ingestion of amounts of [the substance in question] greatly exceeding those reasonably expected to be ingested under normal conditions of consumption of a balanced and varied diet and/or would otherwise represent a potential risk to consumers' and, second, a 'harmful effect on health has been identified'.

In the present case, the Commission relied on the 2017 scientific opinion, in order to include, inter alia, in Part A of Annex III to Regulation No 1925/2006, aloe-emodin and emodin and 'all preparations in which [those] substance[s] [are] present', as well as 'preparations from the leaf of Aloe species containing [HADs]', with the result that their addition to foods or their use in the manufacture of foods is prohibited.

Next, as regards the first condition, the Court notes that, by the contested provisions, all the substances and preparations in question are prohibited, irrespective of the amount of HADs which they contain. In that regard, the Commission noted that EFSA was unable to provide advice on a daily intake of HADs that does not give rise to concerns for human health. Therefore, the Commission thus appears to have taken the view that the insufficiency of data relating to a daily intake that does not give rise to concern for health allowed it to assume that there was no level for safe use of HADs, with the result that it could prohibit them entirely. The Court is of the view that that absence of a threshold is contrary to Regulation No 1925/2006, [51] inasmuch as the prohibition procedure presupposes that a harmful effect on health has been identified where substances other than vitamins or minerals, or ingredients containing them, are added to foods or used in their manufacture.

Moreover, the Court observes that it is not apparent from the 2017 scientific opinion or from any material in the case file that the provisions of the contested regulation were adopted because the substances and preparations in question otherwise represented a potential risk to consumers.

In addition, in order to include a substance in Annex III to Regulation No 1925/2006, the Commission must satisfy the conditions laid down in Article 8(1) of that regulation. However, the general prohibition on the addition to foods or the use in the manufacture of foods of substances and preparations containing certain substances, irrespective of the amount of those substances present, does not comply with the conditions laid down in Regulation No 1925/2006.

Lastly, the Court notes that although food business operators assume the burden of proof in relation to the safety of their products, [52] that burden of proof lies with them only where such an addition may result in intakes which are significantly higher than those that could be ingested through eating an adequate and varied diet. In the absence of data on the amount of the substance that can be ingested

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49 In Article 8 thereof.

50 According to Article 8(2) of Regulation No 1925/2006, read in conjunction with Article 8(1) thereof.

51 In particular, Article 8(2)(a)(i) of Regulation No 1925/2006, read in conjunction with Article 8(1) thereof.

52 According to recital 20 of Regulation No 1925/2006.

through such a diet or which are 'reasonably expected to be ingested under normal conditions of consumption of a balanced and varied diet', [53] a food business operator is not in a position to make an appropriate comparison between, on the one hand, the amounts of a substance under normal conditions of consumption and, on the other hand, the amounts of that same substance under the conditions of use and addition as concentrates.

Consequently, the first, second and third entries in Article 1(1) of the contested regulation infringe the provisions of Regulation No 1925/2006, in so far as they prohibit the HADs aloe-emodin and emodin, and preparations in which those substances are present, as well as preparations from the leaf of Aloe species containing HADs, from being added to foods or used in the manufacture of foods, irrespective of the amount of HADs concerned.

Judgment of the General Court (Sixth Chamber, Extended Composition), 13 November 2024, Ortis v Commission, T-271/21

Link to the full text of the judgment

Consumer protection – Substances prohibited, restricted or under EU scrutiny – Article 8(1) and (2) of, and Annex III to, Regulation (EC) No 1925/2006 – Prohibition and placing under scrutiny of certain substances and preparations containing hydroxyanthracene derivatives – First and second entries in Article 1(1), and first and second entries in Article 1(2), of Regulation (EU) 2021/468 – Definition of 'substance', 'ingredient' and 'preparations' – Error of law

Sitting in extended composition of five judges, the General Court upholds the action brought by Ortis for annulment of Regulation 2021/468, [54] and in particular Article 1 thereof, by which the European Commission included certain hydroxyanthracene derivatives ('HADs') and certain preparations containing HADs in the lists in Parts A and C of Annex III to Regulation No 1925/2006. [55] The Court thus clarifies the scope of the concept of 'preparations' laid down in Regulation 2021/468 and rules, for the first time, on the conditions in which the Commission may have recourse to Article 8(2)(a)(i) of Regulation No 1925/2006 [56] in order to include substances or ingredients in Part A of Annex III to that regulation.

The applicant is a company which manufactures and markets food supplements made of senna [57] and rhubarb, [58] which contain HADs, including emodin and aloe-emodin. HADs are chemical substances naturally occurring in different botanical species, such as certain fruits and vegetables, and are widely used in food supplements and herbal medicinal products for their laxative effect.

On 29 June 2016, the Commission asked the European Food Safety Authority (EFSA) to evaluate the available information on the safety in use of HADs [59] and to recommend a daily intake of HADs that does not give rise to concerns about possible harmful effects on health for the general population.

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53 Within the meaning of Article 8(1) of Regulation No 1925/2006.

54 Commission Regulation (EU) 2021/468 of 18 March 2021 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards botanical species containing hydroxyanthracene derivatives (OJ 2021 L 96, p. 6), and more specifically the first, second and third entries in Article 1(1), and the first and second entries in Article 1(2), of that regulation.

55 Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods (OJ 2006 L 404, p. 26).

56 Under that provision, the Commission may decide to include, if necessary, a substance other than vitamins or minerals, or an ingredient containing a substance other than vitamins or minerals, in Part A of Annex III to that regulation, where the substance or the ingredient in question has a harmful effect on health. As a result of that inclusion, the addition of the substance or ingredient to foods or its use in the manufacture of foods will be prohibited.

57 Cassia angustifolia Vahl.

58 In particular, Rheum palmatum L. or Rheum officinale Baillon.

59 On the basis of Article 8(1) and (2) of Regulation No 1925/2006.

On 22 November 2017, EFSA adopted a scientific opinion in which it concluded that the HADs, namely emodin and aloe-emodin, have been shown to be genotoxic in vitro. According to that same opinion, aloe-emodin was also shown to be genotoxic in mice. It therefore considered that HADs should be regarded as genotoxic, in the absence of specific data to the contrary, and that there was a safety concern for extracts containing HADs although uncertainty persisted. EFSA did not provide advice on a daily intake of HADs that does not give rise to concerns about harmful effects on health for the general population.

On 18 March 2021, the Commission adopted Regulation 2021/468, by which it took the view that aloe-emodin and emodin, as well as all preparations in which those substances are present, should be prohibited, on account of the serious harmful effects on health associated with their use in food. Accordingly, those substances and preparations were included in Part A of Annex III to Regulation No 1925/2006. [60] In addition, with regard to Rheum, Cassia and Rhamnus, as well as their preparations containing HADs, the Commission decided to place those substances under EU scrutiny, in so far as their use and that of their preparations in food could have harmful effects on health, but that scientific uncertainty persisted regarding whether such preparations contained the substances listed in Part A of Annex III to Regulation No 1925/2006. Those substances were therefore included in Part C of Annex III to Regulation No 1925/2006. [61]

Findings of the General Court

In the first place, the Court rules on whether Article 8(2) of Regulation No 1925/2006 allows 'preparations' to be included in the list in Part C of Annex III to that regulation.

In that context, the Court examines whether the term 'preparations' laid down in Regulation 2021/468 [62] may correspond to the definition of 'substance other than vitamins or minerals' or to that of 'ingredient containing a substance other than vitamins or minerals', both laid down in Regulation No 1925/2006. [63] In the context of that examination, it finds first of all that those terms are not expressly defined in those regulations.

First, with regard to 'substance other than vitamins or minerals', the Court observes that it constitutes the concrete expression of the term 'other substance' laid down in Regulation No 1925/2006. [64] It notes that the latter is defined in a residual manner, that is to say, by excluding vitamins or minerals, which are the subject of specific provisions in that regulation, and by stating merely that it has a nutritional or physiological effect.

Second, as regards to the term 'ingredient', laid down in Regulation No 1925/2006, the Court states that that term is included by reference to the 'substance' which it contains, which means that it is the harmful effect of the substance that renders the ingredient containing it unsafe and, therefore, results in the possible prohibition of its addition to foods or its use in the manufacture of foods, in accordance with Article 8 [65] of that regulation.

Third, as for 'preparations', the Court finds that that term is defined in an EFSA guidance document, but that that definition is not binding on the EU judicature. It is thus for the EU judicature to provide a binding interpretation of that definition. The Court also points out that the circular definition of 'preparations' provided in the 2009 EFSA Guidance document does not allow for a precise interpretation of that term.

In the light of the foregoing, the Court states that the term 'preparations' in Regulation 2021/468 has a broader scope and meaning than 'substance' and 'ingredient' laid down in Regulation No 1925/2006, since a preparation may contain a 'substance' or an 'ingredient'. In the present case, the definition of 'preparations' cannot be substituted for the definitions of 'substance' and 'ingredient', since the former can encompass all types of processed food products. Since those definitions evoke different

60 First, second and fourth entries in Article 1(1) of Regulation 2021/468.

61 First, second and third entries in Article 1(2) of Regulation 2021/468.

62 And more specifically, first and second entries in Article 1(2) of Regulation 2021/468.

63 And more specifically, Article 8(1) and (2)(a)(i) and (b) of Regulation No 1925/2006.

64 Defined more specifically in Article 2(2) of Regulation No 1925/2006.

65 Article 8(2)(a)(i) of Regulation No 1925/2006.

notions, the scope of a placement under EU scrutiny of 'preparations' cannot be the same as that of substances or, as the case may be, ingredients.

The Court therefore annuls the first and second entries in Article 1(2) of Regulation 2021/468, by which the Commission placed under EU scrutiny preparations from Rheum and Cassia containing HADs. With a view to adopting that provision, the Commission could not rely on Article 8(2)(b) of Regulation No 1925/2006, which only allows a 'substance' to be included in Part C of Annex III to that regulation.

In the second place, the Court rules on the conditions in which the Commission may have recourse to Article 8(2)(a)(i) of Regulation No 1925/2006 in order to include a substance other than vitamins or minerals, or an ingredient containing a substance other than vitamins or minerals, in Part A of Annex III to that regulation.

As a preliminary point, the Court observes that, according to the case-law, the Commission has a broad discretion when undertaking complex technical or scientific assessments, which restricts judicial review to determining whether the relevant procedural rules have been complied with, whether the facts established by the Commission are correct and whether there has been a manifest error of appraisal of those facts or a misuse of powers. However, as regards the Commission's conclusions which do not involve complex technical or scientific assessments, the Court has full jurisdiction to review them.

In that context, the Court notes the essential role assigned to a scientific assessment by EFSA of the effect of the addition of a substance, or an ingredient containing that substance, to foods or of its use in the manufacture of foods. The aim of the mandatory consultation of EFSA is to provide the Commission with the evidence of scientific assessment which is essential for it to be able to determine, in full knowledge of the facts, the appropriate measures to ensure a high level of public health protection.

The Court specifies the conditions in which, under inter alia Article 8(2)(a)(i) of Regulation No 1925/2006, the Commission may decide to prohibit the addition to foods or the use in the manufacture of foods of a substance other than vitamins or minerals or an ingredient containing that substance. Those conditions relate, first, to the ingestion of amounts of the substance in question greatly exceeding those expected to be ingested under conditions of a balanced and varied diet and, second, the identification of a harmful effect on health.

With regard to the first of those conditions, the Court observes that EFSA was not in a position to recommend a daily intake of HADs that does not give rise to concerns for human health. However, Regulation 2021/468 prohibits aloe-emodin, emodin and all preparations in which those substances are present, irrespective of the amount of HADs which they contain. In that context, the Commission appears to have taken the view that the insufficiency of data relating to a daily intake that does not give rise to concerns for health allowed it to assume that there was no level for safe use of HADs, with the result that it could prohibit them entirely. That absence of a threshold is contrary to Article 8(2)(a)(i) of Regulation No 1925/2006. That provision states that the prohibition procedure presupposes that a harmful effect on health has been identified where substances other than vitamins or minerals, or ingredients containing them, are added to foods or used in their manufacture, resulting in ingestion of amounts of those substances greatly exceeding those expected to be ingested under conditions of a balanced and varied diet.

Therefore, the Court considers that the general prohibition on the addition to foods or the use in the manufacture of foods of all the substances and preparations in question, irrespective of the amount of HADs which they contain, does not comply with the conditions laid down in Article 8(2)(a)(i) of Regulation No 1925/2006. In the absence of data on the amounts of substance that can 'be ingested through eating an adequate and varied diet' or on those amounts which are 'reasonably expected to be ingested under normal conditions of consumption of a balanced and varied diet', within the meaning of Regulation No 1925/2006, [66] food business operators, who are responsible for the safety of the foods they place on the market, are not in a position to make an appropriate comparison

66 Within the meaning of recital 20 and Article 8(1) of Regulation No 1925/2006.

between, on the one hand, the amounts of a substance under normal conditions of consumption and, on the other hand, the amounts of that same substance under the conditions of use and addition as concentrates.

In the light of the foregoing, the Court annuls the first and second entries in Article 1(1) of Regulation 2021/468. It takes the view that that provision infringes Article 8(2)(a)(i) of Regulation No 1925/2006, in so far as it prohibits the HADs aloe-emodin and emodin, as well as preparations in which those substances are present, from being added to foods or used in the manufacture of foods, irrespective of the amount of HADs concerned.

Judgment of the General Court (Sixth Chamber, Extended Composition), 13 November 2024, Synadiet and Others v Commission, T-274/21

Consumer protection – Substances prohibited, restricted or under EU scrutiny – Article 8(1) and (2) of, and Annex III to, Regulation (EC) No 1925/2006 – Prohibition and placing under control of certain substances and preparations containing hydroxyanthracene derivatives – First, second and third entries in Article 1(1), and Article 1(2), of Regulation (EU) 2021/468 – Concepts of 'substance', 'ingredient' and 'preparations' – Error of law

Ruling in extended composition with five judges, the General Court upholds the action brought by the Syndicat national des compléments alimentaires (Synadiet) and Others for the annulment of Regulation 2021/468, [67] and in particular Article 1 thereof, by which the European Commission included certain hydroxyanthracene derivatives ('HADs') and certain preparations containing HADs in the list in Parts A and C of Annex III to Regulation No 1925/2006. [68] The Court thus clarifies the scope of the concept of 'preparations' laid down in Regulation 2021/468 and rules, for the first time, on the conditions in which the Commission may have recourse to Article 8(2)(a)(i) of Regulation No 1925/2006 [69] in order to include substances or ingredients in Part A of Annex III to that regulation.

The applicants are trade unions and associations of undertakings whose purpose is, inter alia, to defend the interests of companies that manufacture and market products, food supplements or ingredients composed of various species of Aloe, senna, [70] rhubarb, [71] and cascara [72] containing HADs, including emodin and aloe-emodin. HADs are chemical substances that are naturally occurring in different botanical species, such as certain species of Aloe as well as certain fruits and vegetables. They are widely used in food supplements and herbal medicinal products for their laxative effect.

On 29 June 2016, the Commission asked the European Food Safety Authority (EFSA) to evaluate the available information on the safety in use of HADs [73] and to recommend a daily intake of HADs that does not give rise to concerns about possible harmful effects on health for the general population.

On 22 November 2017, EFSA adopted a scientific opinion in which it concluded that emodin, aloe-emodin and aloe extracts have been shown to be genotoxic in vitro. According to the same opinion, whole leaf aloe extract was carcinogenic to rats. Given that aloe-emodin and emodin could be present

67 Commission Regulation (EU) 2021/468 of 18 March 2021 amending Annex III to Regulation (EC) No 1925/2006 of the European Parliament and of the Council as regards botanical species containing hydroxyanthracene derivatives (OJ 2021 L 96, p. 6), and more specifically the first, second and third entries in Article 1(1), and the first and second entries in Article 1(2), of that regulation.

68 Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods (OJ 2006 L 404, p. 26).

69 Under that provision, the Commission may decide to include, if necessary, a substance other than vitamins or minerals, or an ingredient containing a substance other than vitamins or minerals, in Part A of Annex III to that regulation, where the substance or the ingredient in question has a harmful effect on health. As a result of that inclusion, the addition of the substance or ingredient to foods or its use in the manufacture of foods will be prohibited.

70 Cassia angustifolia Vahl.

71 In particular, Rheum palmatum L. or Rheum officinale Baillon.

72 Including Rhamnus frangula L. and Rhamnus purshiana.

73 On the basis of Article 8(1) and (2) of Regulation No 1925/2006.

in those extracts, it was concluded that HADs should be regarded as genotoxic and carcinogenic, in the absence of specific data to the contrary, and that there was a safety concern for extracts containing HADs, although uncertainty persisted. EFSA did not provide advice on a daily intake of HADs that does not give rise to concerns about harmful effects on health for the general population.

On 18 March 2021, the Commission adopted Regulation 2021/468, by which it considered that, considering the severe harmful effects on health associated with the use of aloe-emodin, emodin and aloe extracts containing HADs in food, those substances and all preparations in which they are present should be prohibited and included in Part A of Annex III to Regulation No 1925/2006. [74] Furthermore, as there was a possibility of harmful effects on health associated with the use of Rheum, Cassia and Rhamnus and their preparations containing HADs in food, but scientific uncertainty persisted regarding whether such preparations contained the substances listed in Part A of Annex III to Regulation No 1925/2006, the Commission decided that such substances had to be placed under EU scrutiny and therefore included them in Part C of Annex III to Regulation No 1925/2006. [75]

Findings of the General Court

In the first place, the Court rules on whether Article 8(2) of Regulation No 1925/2006 allows 'preparations' to be included in the list in Part C of Annex III to that regulation.

In that context, the Court examines whether the term 'preparations' laid down in Regulation 2021/468 [76] may correspond to the definition of 'substance other than vitamins or minerals' or to that of 'ingredient containing a substance other than vitamins or minerals', both laid down in Regulation No 1925/2006. [77] In the context of that examination, it finds first of all that those terms are not expressly defined in those regulations.

First, with regard to 'substance other than vitamins or minerals', the Court observes that it constitutes the concrete expression of the term 'other substance' laid down in Regulation No 1925/2006. [78] It notes that the latter is defined in a residual manner, that is to say, by excluding vitamins or minerals, which are the subject of specific provisions in that regulation, and by stating merely that it has a nutritional or physiological effect.

Second, as regards to the term 'ingredient', laid down in Regulation No 1925/2006, the Court states that that term is included by reference to the 'substance' which it contains, which means that it is the harmful effect of the substance that renders the ingredient containing it unsafe and, therefore, results in the possible prohibition of its addition to foods or its use in the manufacture of foods, in accordance with Article 8 [79] of that regulation.

Third, as for 'preparations', the Court finds that that term is defined in an EFSA guidance document, but that that definition is not binding on the EU judicature. It is thus for the EU judicature to provide a binding interpretation of that definition. The Court also points out that the circular definition of 'preparations' provided in the 2009 EFSA Guidance document does not allow for a precise interpretation of that term.

In the light of the foregoing, the Court states that the term 'preparations' in Regulation 2021/468 has a broader scope and meaning than 'substance' and 'ingredient' laid down in Regulation No 1925/2006, since a preparation may contain a 'substance' or an 'ingredient'. In the present case, the definition of 'preparations' cannot be substituted for the definitions of 'substance' and 'ingredient', since the former can encompass all types of processed food products. Since those definitions evoke different notions, the scope of a placement under EU scrutiny of 'preparations' cannot be the same as that of substances or, as the case may be, ingredients.

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74 First, second and fourth entries in Article 1(1) of Regulation 2021/468.

75 First, second and third entries in Article 1(2) of Regulation 2021/468.

76 And more specifically, first and second entries in Article 1(2) of Regulation 2021/468.

77 And more specifically, Article 8(1) and (2)(a)(i) and (b) of Regulation No 1925/2006.

78 Defined more specifically in Article 2(2) of Regulation No 1925/2006.

79 Article 8(2)(a)(i) of Regulation No 1925/2006.

Accordingly, the Court annuls Article 1(2) of Regulation 2021/468, by which the Commission placed preparations from Rheum, Cassia and Rhamnus containing HADs under EU scrutiny. With a view to adopting that provision, the Commission could not rely on Article 8(2)(b) of Regulation No 1925/2006, which only allows a 'substance' to be included in Part C of Annex III to that regulation.

In the second place, the Court rules on the conditions in which the Commission may have recourse to Article 8(2)(a)(i) of Regulation No 1925/2006 in order to include a substance other than vitamins or minerals, or an ingredient containing a substance other than vitamins or minerals, in Part A of Annex III to that regulation.

As a preliminary point, the Court observes that, according to the case-law, the Commission has a broad discretion when undertaking complex technical or scientific assessments, which restricts judicial review to determining whether the relevant procedural rules have been complied with, whether the facts established by the Commission are correct and whether there has been a manifest error of appraisal of those facts or a misuse of powers. However, as regards the Commission's conclusions which do not involve complex technical or scientific assessments, the Court has full jurisdiction to review them.

In that context, the Court notes the essential role assigned to a scientific assessment by EFSA of the effect of the addition of a substance, or an ingredient containing that substance, to foods or of its use in the manufacture of foods. The aim of the mandatory consultation of EFSA is to provide the Commission with the evidence of scientific assessment which is essential for it to be able to determine, in full knowledge of the facts, the appropriate measures to ensure a high level of public health protection.

The Court sets out the conditions in which, under Article 8(2)(a)(i) of Regulation No 1925/2006, the Commission may decide to prohibit the addition to foods or the use in the manufacture of foods of a substance other than vitamins or minerals, or of an ingredient containing that substance. Those conditions concern, on the one hand, the ingestion of amounts of the substance in question greatly exceeding those expected to be ingested under normal conditions of a balanced and varied diet, and on the other hand, the identification of a harmful effect on health.

With regard to the first of those conditions, the Court observes that EFSA was not in a position to recommend a daily intake of HADs that does not give rise to concerns for human health. However, Regulation 2021/468 prohibits aloe-emodin, emodin and any preparations in which those substances are present, and preparations from the leaf of Aloe species containing HADs. In that context, the Commission therefore appears to have taken the view that the insufficiency of data relating to a daily intake that does not give rise to concern for health allowed it to assume that there was no level for safe use of HADs, with the result that it could prohibit them entirely. That absence of a threshold is contrary to Article 8(2)(a)(i) of Regulation No 1925/2006. That provision states that the prohibition procedure presupposes that a harmful effect on health has been identified where substances other than vitamins or minerals, or ingredients containing them, are added to foods or used in their manufacture, resulting in ingestion of amounts of those substances greatly exceeding those expected to be ingested under conditions of a balanced and varied diet.

Therefore, the Court considers that the general prohibition on the addition to foods or the use in the manufacture of foods of all the substances and preparations in question, irrespective of the amount of HADs which they contain, does not comply with the conditions laid down in Article 8(2)(a)(i) of Regulation No 1925/2006. In the absence of data on the amount of the substance that can 'be ingested through eating an adequate and varied diet' or on the amounts that are 'reasonably expected to be ingested under normal conditions of consumption of a balanced and varied diet' within the meaning of Regulation No 1925/2006, [80] food business operators, who are responsible for the safety of the foods they place on the market and assume the burden of proof in relation to their safety, are not in a position to make an appropriate comparison between, on the one hand, the amounts of a substance under normal conditions of consumption and, on the other hand, the amounts of that same substance under the conditions of use and addition as concentrates.

80 Within the meaning of recital 20 and Article 8(1) of Regulation No 1925/2006.

In the light of the foregoing, the General Court annuls the first, second and third entries in Article 1(1) of Regulation 2021/468. It considers that that provision infringes Article 8(2)(a)(i) of Regulation No 1925/2006, in so far as it prohibits the HADs aloe-emodin and emodin, and preparations in which those substances are present, as well as preparations from the leaves of Aloe species containing HADs, from being added to foods or used in the manufacture of foods, irrespective of the amount of HADs concerned.

4. CHEMICALS

Judgment of the General Court (Sixth Chamber), 27 November 2024, Evonik Operations v Commission, T-449/22

Link to the full text of the judgment

Environment and protection of human health – Regulation (EC) No 1272/2008 – Classification, labelling and packaging of certain substances and mixtures – Delegated Regulation (EU) 2022/692 – Harmonised classification and labelling of the substance silanamine, 1,1,1-trimethyl-N-(trimethylsilyl)-, hydrolysis products with silica; pyrogenic, synthetic amorphous, nano, surface treated silicon dioxide – Criteria for classification of a substance in the hazard class 'Specific target organ toxicity – repeated exposure' – Appropriateness of the classification – Absence of public consultation on the opinion of ECHA's Committee for Risk Assessment – Interinstitutional Agreement on Better Law-Making – Absence of impact assessment

By its judgment, the General Court first of all clarifies the application of the criteria for classification of a substance in the hazard class 'Specific target organ toxicity – repeated exposure – (STOT RE)' which are laid down in Regulation No 1272/2008. [81] It then clarifies the scope of public consultations during the harmonised classification and labelling procedure under that regulation. Lastly, it clarifies the scope of the European Commission's obligations under the Interinstitutional Agreement on Better Law-Making [82] when adopting delegated regulations under that regulation.

The applicant, Evonik Operations, is a company incorporated under German law which manufactures silanamine. That substance is used in various products, such as medicinal and pharmaceutical products, food and cosmetics, and also in a variety of industrial applications.

In December 2018, the French competent authority [83] submitted to the European Chemicals Agency (ECHA) a proposal for the classification of silanamine in the hazard class 'Specific target organ toxicity – repeated exposure' ('the hazard class STOT RE') of Category 2. [84] Between March and May 2019, several of the parties concerned submitted their comments on the classification proposal. [85]

In December 2019, ECHA's Committee for Risk Assessment ('the RAC') adopted an opinion, by which it proposed the classification of silanamine in the hazard class STOT RE Category 2, with hazard statement code 'H373' (lungs, inhalation), as well as in the hazard class acute toxicity of Category 2 via the inhalation route (H330).

81 Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008, L 353, p. 1).

82 Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the Commission on Better Law-Making (OJ 2016 L 123, p. 1; 'the Interinstitutional Agreement on Better Law-Making').

83 Namely, the Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail (National Agency for Food, Environmental and Occupational Health and Safety, ANSES, France).

84 Proposal for harmonised classification and labelling in accordance with Article 37(1) of Regulation No 1272/2008.

85 In accordance with Article 37(4) of Regulation No 1272/2008.

In February 2022, on the basis of the RAC Opinion, the Commission adopted Delegated Regulation 2022/692, [86] by which silanamine was added to Table 3 of Part 3 of Annex VI to Regulation No 1272/2008, with harmonised classification and labelling in the hazard class STOT RE Category 2, hazard statement code 'H373' (lungs, inhalation) and pictogram hazard code 'GHS 08Wng' ('the contested classification').

The applicant then brought an action before the General Court seeking annulment of Delegated Regulation 2022/692, as regards the harmonised classification and labelling of silanamine.

Findings of the General Court

As a preliminary point, as regards the intensity of its review relating to the classification of a substance under Regulation No 1272/2008, the Court recalls that, if the Commission is to be able to carry out that classification, account being taken of the complex scientific and technical assessments which it must undertake, it must be recognised as enjoying a broad discretion. However, the exercise of that discretion is not excluded from review by the Court. In the context of such a review the Courts of the European Union must verify whether the relevant procedural rules have been complied with, whether the facts accepted by the Commission have been accurately stated and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. In addition, the limits to review by the Courts of the European Union do not affect their duty to establish whether the evidence relied on is factually accurate, reliable and consistent and also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

Furthermore, as regards the evaluation of scientific studies, the Court holds that the Commission must be allowed a broad discretion with regard to that assessment, as well as the choice of studies which must take precedence over others, irrespective of their chronology. Thus, it is not sufficient for the applicant to rely on the age of a scientific study to call into question its reliability, but it is also necessary for the applicant to provide sufficiently precise and objective evidence to argue that any recent scientific developments would call into question the soundness of the conclusions of such a study. The Court adds that, in order to establish that the administration committed a manifest error in assessing complex facts such as to justify the annulment of the contested act, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the act implausible. Subject to that review of plausibility, it is not the Court's role to substitute its assessment of complex facts for that made by the institution which adopted the act.

In the first place, the Court rejects as unfounded the applicant's pleas alleging (i) manifest errors of assessment and breach of the criteria for classification of a substance in the hazard class STOT RE Category 2 and (ii) breach of the Commission's obligation to examine the appropriateness of the contested classification.

As regards the hazard class STOT RE, the Court notes that it is provided for in Section 3.9 of Part 3 of Annex I to Regulation No 1272/2008. In particular, under Section 3.9.1.1 of Annex I to that regulation, that hazard class means specific toxic effects on target organs occurring after repeated exposure to a substance or mixture; in addition, all significant health effects that can impair function, reversible and irreversible, immediate and/or delayed are included. With regard to the hazard categories, it follows from Section 3.9.2.1 and Table 3.9.1 of Annex I to Regulation No 1272/2008 that the classification for the hazard class STOT RE is divided into two categories, depending upon the nature and severity of the effect(s) observed, namely Category 1 and Category 2. More specifically, Category 2 covers substances that on the basis of evidence from studies in experimental animals can be presumed to have the potential to be harmful to human health following repeated exposure. Substances are classified in that category on the basis of observations from appropriate studies in experimental animals in which significant toxic effects, of relevance to human health, were produced at generally moderate exposure concentrations.

86 Commission Delegated Regulation (EU) 2022/692 of 16 February 2022 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures (OJ 2022 L 129, p. 1; 'the contested regulation').

In the present case, the Court finds that none of the arguments put forward by the applicant is such as to establish that the RAC Opinion is based on conclusions which do not meet the criteria set out in Section 3.9 of Annex I to Regulation No 1272/2008. The applicant has not demonstrated that the effects identified in the RAC Opinion could not justify the contested classification in that they were not provided for in that section or that they resulted from the deposition of a large number of inhaled particles in the context of the relevant studies and not from the intrinsic qualities of the substance. In addition, the RAC took into account, for the purposes of the contested classification, the dose/concentration and duration of exposure in relation to which the effects were observed and, without committing any error, took into account the guidance values provided for by Regulation No 1272/2008 when making the contested classification. Thus, the Court finds that the applicant does not establish that the RAC and, consequently, the Commission committed a manifest error of assessment in that regard. In the absence of evidence to render implausible the factual assessments used in the RAC Opinion and accepted by the Commission in the contested regulation in that regard, it is not the Court's role to substitute its assessment of complex facts for that made by the RAC and accepted by the Commission.

As regards the Commission's alleged obligation to examine the appropriateness of the contested classification, the Court observes that, as is clear from the wording of Article 37(5) of Regulation No 1272/2008, the Commission is to adopt delegated acts for the purposes of the inclusion of a substance in Annex VI to Regulation No 1272/2008 if 'it finds that the harmonisation of the classification and labelling of the substance concerned is appropriate'. However, neither that article nor any other provision of Regulation No 1272/2008 sets out the criteria which must be taken into account by the Commission in order to find that the harmonisation of the classification and labelling of a substance is 'appropriate'. The Commission must be recognised as enjoying a broad discretion, in the light of the complex scientific and technical assessments which it must undertake if it is to be able to classify a substance. It follows that the Commission has a broad discretion in determining the appropriateness of a proposal for harmonised classification and labelling pursuant to Article 37(5) of that regulation.

In the second place, the Court rejects as unfounded the plea alleging breach of the harmonised classification and labelling procedure and, in particular, the absence of public consultation on the RAC Opinion.

In that regard, the Court observes that, in the case of acts of general application, neither the process of drafting them nor those acts themselves require, in accordance with the general principles of EU law, such as the right to be heard, consulted or informed, the participation of the persons affected. That is not the case if an express provision of the legal context governing the adoption of that act confers such a procedural right on a person affected.

In the present case, the Court states that the contested regulation lays down measures of general application, including the contested classification. Against that background, the procedural rights which the applicant enjoys in the procedure for harmonised classification and labelling are those expressly provided for in Regulation No 1272/2008.

In that regard, the Court recalls that Article 37(4) of Regulation No 1272/2008 must be interpreted in the light of the procedure for harmonisation of classification and labelling of substances, referred to in Article 37 of that regulation. That procedure takes place in several stages, namely, first of all, the submission of a classification proposal; next, the adoption of an opinion by the RAC 'giving the parties concerned the opportunity to comment'; subsequently, the forwarding by ECHA of that opinion and all comments to the Commission; and, lastly, the adoption by the Commission of a delegated act, where it considers that harmonisation of the classification and labelling of the substance concerned is appropriate. It follows that the public consultation provided for in Article 37(4) of Regulation No 1272/2008 is intended to allow interested parties to comment on the classification proposal and thus possibly to contribute elements not mentioned in that proposal, so as to allow the RAC to take account, in its opinion, of the comments and elements presented by the interested parties during that phase.

Accordingly, the Court notes that, although Article 37(4) of Regulation No 1272/2008 provides for the possibility of submitting comments on the proposal for harmonised classification and labelling, that regulation does not, however, provide for the possibility for the parties concerned to submit

observations on the RAC Opinion. Accordingly, in the present case, the applicant had the right to comment on the proposal for harmonised classification and labelling and to be heard in that regard before the RAC, and availed itself of that right. Between March and May 2019, a public consultation on the proposal for harmonised classification and labelling of silanamine was organised. Moreover, as is apparent from the content of the RAC Opinion itself, the RAC took into consideration the comments submitted by the parties concerned. In those circumstances, the Court concludes that the applicant did not have a right to be heard or consulted on the RAC Opinion.

In the third and last place, the Court rejects as unfounded the plea alleging the absence of an impact assessment by the Commission in the context of the procedure for the harmonisation of classification and labelling of substances governed by Regulation No 1272/2008.

To that end, the Court notes that the Interinstitutional Agreement on Better Law-Making, which establishes a series of initiatives and procedures with a view to improving the way in which the European Union legislates, makes provision for impact assessments, in points 12 to 18 thereof, as one of the 'tools for better law-making'.

As regards the legislative process, the General Court observes that the Court of Justice has already held that an obligation to carry out an impact assessment in every circumstance does not follow from the wording of points 12 to 15 of the Interinstitutional Agreement on Better Law-Making. It follows on the other hand that the preparation of impact assessments is a step in the legislative process that, as a rule, must take place if a legislative initiative is liable to have such implication.

In the present case, the General Court notes that it does not follow from point 13 of the Interinstitutional Agreement on Better Law-Making [87] that the Commission is required, in all circumstances, to carry out an impact assessment of its delegated acts. Moreover, such an obligation does not follow from Article 37 of Regulation No 1272/2008 either, governing the procedure for harmonised classification and labelling, which does not provide for such an assessment at any of the stages of that procedure. By contrast, it follows from the provisions of Article 76(1)(c) and (d) of Regulation No 1907/2006 that, in the context of the procedure for the harmonisation of classification and labelling of substances governed by Regulation No 1272/2008, it is the RAC which is to be responsible for preparing the opinions of ECHA and that the Committee for Socio-economic Analysis is not involved. In the absence of any express provision for the involvement of the latter, it can be deduced that the legislature did not wish to include the socioeconomic impact in that procedure.

The Court concludes that, in the context of the procedure for harmonisation of classification and labelling which led to the adoption of the contested regulation, the Commission was under no obligation to carry out an impact assessment of that regulation under point 13 of the Interinstitutional Agreement on Better Law-Making.

87 Point 13 of that interinstitutional agreement provides as follows: 'The Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts. The initiatives included in the Commission Work Programme or in the joint declaration will, as a general rule, be accompanied by an impact assessment. In its own impact assessment process, the Commission will consult as widely as possible. The Commission's Regulatory Scrutiny Board will carry out an objective quality check of its impact assessments. The final results of the impact assessments will be made available to the European Parliament, the Council and national Parliaments, and will be made public along with the opinion(s) of the Regulatory Scrutiny Board at the time of adoption of the Commission initiative.'

5. MEDICINAL PRODUCTS FOR HUMAN USE

Judgment of the General Court (Tenth Chamber, Extended Composition), 13 November 2024, Orion v Commission, T-223/20

Link to the full text of the judgment

Medicinal products for human use – Generic medicinal products – Decision granting marketing authorisation for the medicinal product for human use Dexmedetomidine Accord – dexmedetomidine – Eligibility of a medicinal product as a reference medicinal product – Article 10(1) and (2) of Directive 2001/83/EC

By its judgment, the General Court addresses the novel issue relating to the competence and obligation of the European Commission to examine, when analysing an application for marketing authorisation for a generic medicinal product, the eligibility as a reference medicinal product of the medicinal product for which the marketing authorisation was granted by a national authority, where information provided to the Commission by the holder of the latter medicinal product may call into question its eligibility as a reference medicinal product.

Orion Oyj is a pharmaceutical company which developed the active substance called 'dexmedetomidine hydrochloride'. In 1994, it granted Abbott Laboratories Inc. ('Abbott') an exclusive licence to manufacture and market dexmedetomidine hydrochloride in 'all countries and territories of the world except Finland, Sweden, Norway, Denmark and Iceland'. In 1998, Abbott submitted to the European Medicines Agency (EMA) [88] an application for marketing authorisation for that substance, under the trade name Precedex. However, the EMA's Committee for Medicinal Products for Human Use ('the CHMP') [89] raised serious concerns about the adequacy of certain clinical studies submitted by Abbott. The latter therefore withdrew that application on account of the cost of the additional clinical studies required by the CHMP and requested various marketing authorisations from several European countries, including the Czech Republic. According to Orion, the clinical data submitted in support of the application for marketing authorisation to the Státní ústav pro kontrolu léčiv (SUKL, State Institute for Drug Control, Czech Republic) were identical to the data enclosed with the application made to the EMA, since Abbott had not carried out any additional study. Subsequently, on 23 October 2002, Abbott obtained a marketing authorisation from the SUKL for Precedex.

In 2002, Abbott returned to the applicant part of its exclusive licence, namely the part relating to the manufacture and marketing of Precedex in States which, on that date, were Members of the European Union.

In 2004, following the Czech Republic's accession to the European Union, Abbott assigned the remainder of the exclusive licence to Hospira Inc., which, in 2008, returned it to Orion. The latter then requested the withdrawal of the Czech marketing authorisation for Precedex, which became effective as from 30 July 2010.

In 2005, Orion also applied for marketing authorisation for a medicinal product called Dexdor of which the active substance was dexmedetomidine hydrochloride. That marketing authorisation was granted by the Commission in 2011.

In 2018, Accord Healthcare submitted to the EMA an application for marketing authorisation for Dexmedetomidine Accord – dexmedetomidine, a generic medicinal product of the reference medicinal products Precedex, for which the marketing authorisation had been granted by the SUKL in 2002, and Dexdor, for which the marketing authorisation had been granted by the Commission in

88 That agency, at the time of the facts, was called the European Agency for the Evaluation of Medicinal Products (EMEA).

89 That committee, at the time of the facts, was called the Committee for Proprietary Medicinal Products (CPMP).

2011. [90] After the Commission granted the marketing authorisation for that generic medicinal product in 2020, Orion sought its annulment. [91]

Findings of the General Court

The Court rules, in the first place, on the Commission's competence to examine the eligibility of Precedex as a reference medicinal product and its obligation in that regard. It recalls that no medicinal product may be placed on the market unless a marketing authorisation has been granted by the competent authority [92] and that an abridged procedure has been provided for with a view to granting authorisation for a generic medicinal product of a reference medicinal product. [93] That procedure exempts the party applying for marketing authorisation for the generic medicinal product from the obligation to provide the results of pharmaceutical and pre-clinical tests or of clinical trials with the aim of saving the time and expense needed to gather that data and to avoid the repetition of tests on humans or animals where not absolutely necessary. However, the abridged procedure does not provide for any relaxation of the requirements of safety and efficacy which must be met by medicinal products approved in the European Union. Accordingly, that procedure is only available where all the particulars and documents demonstrating the safety and efficacy of the reference medicinal product are and remain available to the competent authority before which the application for marketing authorisation for a generic medicinal product is brought.

Furthermore, the Commission and the competent authorities of the Member States, which are subject to the same harmonised rules, may consider that a marketing authorisation granted by one of them was preceded by a careful examination of the results of pharmaceutical and pre-clinical tests and of clinical trials, thus ensuring a reliable assessment of the benefit/risk balance of the medicinal product, in accordance with the substantive requirements stemming from EU law. Therefore, the Commission was able, in principle, to rely on the confirmation which it had requested from the SUKL that the Czech marketing authorisation for Precedex had indeed been granted.

However, the authority before which an application for marketing authorisation for a generic medicinal product is brought – the Commission in the present case – may request that the authority which authorised the reference medicinal product transmit to it not only a confirmation that the reference medicinal product is or has been authorised, but also all other relevant documentation. The Commission may therefore request more information from the competent authority which authorised the marketing authorisation for the reference medicinal product, and even request that that authority give it access to the dossier relating to that marketing authorisation, where it possesses evidence which calls into question the fact that that marketing authorisation is based on a dossier demonstrating the safety and efficacy of that medicinal product.

Accordingly, the Court concludes, both on the basis of Article 10(1) and (2) of Directive 2001/83, [94] and of the principle of sound administration, laid down in Article 41(1) of the Charter of Fundamental Rights of the European Union, that the Commission was competent to examine the eligibility of Precedex as a reference medicinal product and was required to do so where the information provided by the holder of the reference medicinal product before the decision granting marketing authorisation for the generic medicinal product was adopted may have called into question the eligibility of that product as a reference medicinal product.

In the second place, the Court addresses the evidence calling into question the eligibility of Precedex as a reference medicinal product. In that regard, it notes that, while it is common practice that the authority before which the application for marketing authorisation for the reference medicinal product is brought is the first to assess the clinical studies and the competent authority before which

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90 The application was submitted under Article 10(2) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).

91 Annulment under Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

92 Article 3(1) of Regulation No 726/2004, and Article 6(1) of the same regulation and Article 6(1) of Directive 2001/83.

93 Article 10 of Directive 2001/83.

94 Directive 2001/83 is applied to the centralised procedure on the basis of Article 6(1) of Regulation No 726/2004.

the application for marketing authorisation for the generic medicinal product is brought then reproduces that assessment, in the present case, the order of events is reversed. In particular, the CHMP, tasked in 2018 with examining the application for marketing authorisation for the generic medicinal product, Dexmedetomidine Accord, had already, in 2001, examined the clinical studies relating to the application for marketing authorisation for the reference medicinal product, Precedex, and raised serious concerns about them, before they were submitted to the SUKL.

Accordingly, the possible lack of additional clinical studies in the dossier relating to the Czech marketing authorisation for Precedex was evidence which the Commission possessed and which called into question the fact that that marketing authorisation was based on clinical data enabling a well-founded and scientifically valid opinion to be formed on the benefit/risk balance of that medicinal product. [95]

VI. ENERGY

Judgment of the General Court (Fifth Chamber, Extended Composition), 27 November 2024, Nord Stream 2 v Parliament and Council, T-526/19 RENV

Link to the full text of the judgment

Energy – Internal market in natural gas – Directive (EU) 2019/692 – Amendments to Directive 2009/73/EC – Legal certainty – Equal treatment – Proportionality – Misuse of powers – Procedural irregularities

Hearing a case referred back to it, the General Court dismisses in its entirety the action brought by Nord Stream 2 AG against Directive (EU) 2019/692 [96] amending Directive 2009/73 concerning common rules for the internal market in natural gas. In so doing, it rejects the central argument advanced by Nord Stream 2 that, in essence, the contested directive was directed specifically against it, in breach inter alia of the principles of legal certainty, equal treatment and proportionality.

Nord Stream 2 is a company incorporated under Swiss law whose sole shareholder is the Russian public joint stock company Gazprom. It is responsible for the planning, construction and operation of the offshore gas pipeline Nord Stream 2, which is intended to ensure the flow of gas between Ust-Luga (Russia) and Lubmin (Germany).

On 17 April 2019, the European Parliament and the Council of the European Union adopted the contested directive, which entered into force on 23 May 2019. That directive is aimed at ensuring that the rules laid down by Directive 2009/73 for gas transmission lines connecting two or more Member States are also applicable, within the European Union, to gas transmission lines to and from third countries, such as the Nord Stream 2 gas pipeline.

In that context, Article 49a(1) of Directive 2009/73, as amended ('Article 49a'), nevertheless provides that gas pipelines between a Member State and a third country completed before 23 May 2019 may be granted a derogation from the obligations provided for by that directive ('the derogation at issue'). In addition, Article 36, as amended, provides that new gas infrastructure may benefit from an exemption on certain conditions ('the exemption at issue'). However, the Nord Stream 2 pipeline could not benefit either from that derogation or from that exemption.

By order of 20 May 2020, [97] the General Court rejected as inadmissible the action seeking the annulment of the contested directive brought by Nord Stream 2. Hearing an appeal brought against

95 Article 8(3) of Directive 2001/83, read in conjunction with Annex I to that directive.

96 Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1; 'the contested directive').

97 Order of 20 May 2020, Nord Stream 2 v Parliament and Council (T526/19, EU:T:2020:210).

that order, the Court of Justice set aside the order of the General Court, [98] declared that the action was partially admissible and referred the case back to the General Court for it to rule on the substance.

In the light of the claims advanced by Nord Stream 2, as clarified at the hearing, the General Court found that the action was admissible in so far as it sought the annulment of Article 1(9) of the contested directive, which inserted an Article 49a into Directive 2009/73.

Findings of the General Court

In the first place, the Court holds that the fact that Nord Stream 2 could not benefit either from the exemption at issue or from the derogation at issue at the date of adoption of the contested directive is not capable of demonstrating that the EU legislature infringed the principle of legal certainty and its corollary, the principle of protection of legitimate expectation.

In that regard, the Court recalls that whether those principles have been complied with must be examined in the light of the knowledge that a prudent and alert economic operator could reasonably have had as to the development of the legal framework and the consequences which it needed to draw from it in order to determine its conduct. That compliance must also be examined in the light of the circumstances surrounding that development and, in particular, of the conduct of the competent institutions.

As regards the impossibility of benefiting from the exemption at issue, the Court finds that Nord Stream 2 decided to invest in a context which for a long time had been characterised by the firm and repeated intention, inter alia of several Member States, the Parliament and the European Commission, to make gas pipelines between a Member State and a third country, in general, and the Nord Stream 2 pipeline in particular, subject to the obligations laid down by Directive 2009/73.

Furthermore, Nord Stream 2 continued to make its investments without interruption after that intention materialised in the form of proposals submitted by the Commission and despite the fact that it could therefore reasonably foresee such an application of Directive 2009/73. Moreover, it has not shown that it was unable to make changes in order to be able to benefit from the exemption at issue when the contested directive entered into force.

Consequently, the fact that Nord Stream 2 could not benefit from that exemption did not oblige the EU legislature to adapt the scope of Article 49a to its particular situation so that it could benefit from the derogation at issue.

As to the fact that Nord Stream 2 could not benefit from the derogation at issue since the construction of its pipeline was not completed until after 23 May 2019, the Court notes, first of all, that the criterion of completion of the pipeline before the date of entry into force of the contested directive was already included in the proposal for a directive and that Nord Stream 2 was in a position to foresee that its pipeline would not be completed before that date.

The Court adds that that criterion complies with the principle of legal certainty and the principle of the protection of legitimate expectations, to the extent that it is clear, precise and objective and that it reflects the principle that a new rule of law applies with effect from the entry into force of the act introducing it. That objective criterion shows, in addition, that the legislature took account of the particular situation of completed pipelines.

Furthermore, Nord Stream 2 had an additional period of time within which to amend the proposed arrangements for the operation of its pipeline, given that the deadline for transposition of the contested directive had been set for 10 months after its adoption. Moreover, the impossibility of benefiting from the derogation at issue did not prevent it from operating its pipeline under economic conditions.

In the second place, the Court rejects the plea advanced by Nord Stream 2 alleging an infringement of the principle of equal treatment in that Article 49a entailed an unjustified difference in treatment of comparable situations.

98 Judgment of 12 July 2022, Nord Stream 2 v Parliament and Council (C348/20 P, EU:C:2022:548).

In that regard, it finds that pipelines completed before 23 May 2019, on the one hand, and pipelines not completed before that date, including those whose construction was ongoing, such as Nord Stream 2, on the other hand, are not in a comparable situation. A gas pipeline which is in service at that date necessarily entailed a prior investment which can no longer be abandoned and which would have commenced operation under a legal regime which did not provide for the application, to its situation, of the obligations laid down by Directive 2009/73.

By contrast, an investor in a pipeline which was not completed by the date of entry into force of the contested directive may have incurred a lower level of expenditure or have greater opportunities to make changes to its investment. In addition, even if the gas pipeline in question has entailed significant investments and construction work, they could have been made with full knowledge of the facts and in a context in which an amendment to the legislation applicable was foreseeable, as was the case for Nord Stream 2. Finally, an investor in such a pipeline has the time to adapt to the legislative changes provided for by the contested directive, given that it was informed about it many months in advance and that the Member States have a period of time within which to transpose it.

The Court states that the situation of the two categories of pipelines referred to above is different in the light not only of the subject matter of Article 49a but also of the objectives of the contested directive and the principles and objectives of EU policy on energy.

Indeed, the impact of a pipeline already completed on the functioning of the internal market can be assessed ex post, on the basis of experience acquired during the operation of the pipeline in question. In addition, the application of the obligations laid down by Directive 2009/73 to such pipelines risks disrupting the capacity and flow of supply, which justifies a rapid examination of their situation having regard to the conditions laid down in Article 49a.

However, in the case of a pipeline which was not completed before the date of entry into force of the contested directive, the assessment of its impact on the internal market and security of supply can only be prospective and requires more in-depth and complex assessments. In addition, since such a gas pipeline is not capable of being operated, the application of the contested directive to it does not present a risk of disruption to the flow of supply.

In the light of the foregoing, Article 49a leads to different situations being treated differently.

The Court adds that, even if Article 49a were to lead to comparable situations being treated differently, that difference would be justified. In that regard, it finds, first, that the criterion of completion before the date of entry into force of the contested directive, provided for by that article, is objective and reasonable. Secondly, any difference in treatment resulting from the application of that criterion is appropriate for achieving the objective pursued by that article of taking account of the lack of rules applicable to pipelines between a Member State and a third country before the date of entry into force of the contested directive. It allows pipeline owners and Member States easily to assess whether or not a gas pipeline falls within the scope of Article 49a. Thirdly, any difference in treatment resulting from that criterion does not exceed the limits of what is necessary to achieve the objective pursued by that article, since the importance of that objective justifies the constraints borne by investors, such as Nord Stream 2, due to the application of the obligations laid down by Directive 2009/73 to a pipeline which was not completed before 23 May 2019.

In the third place, the Court considers that Nord Stream 2 has not established that the extension of the scope of the obligations laid down by Directive 2009/73 to cover pipelines between a Member State and a third country infringes the principle of proportionality.

The Court notes, first of all, that the contested directive is appropriate for attaining the objective of legal certainty and the consistency of the legal framework which it essentially pursues, in that it extends the scope of Directive 2009/73 and therefore of the obligations that it lays down. The fact that Nord Stream 2 is the only one not to be able to benefit from either the exemption at issue or the derogation at issue has no bearing on that finding.

Next, the Court finds that the application of the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country in general, and to Nord Stream 2 in particular, is also appropriate for achieving the objective of completing the internal market in natural gas by avoiding distortions of competition and negative impacts on security of supply. Directive 2009/73 lays down inter alia an unbundling obligation to separate the transmission system and the transmission

system operator, an obligation to provide third-party access to the system and other obligations relating, inter alia, to tariff and non-tariff transparency. Taking into account the purpose of those obligations, the fact that they apply only to a section of gas pipelines between a Member State and a third country in no way affects their appropriateness to achieve the abovementioned objective.

Likewise, the fact that the directive applies only to part of the import capacity from third countries, namely the capacity of the Nord Stream 2 pipeline, does not call that appropriateness into question. The Nord Stream 2 pipeline project was launched in a particular context in which numerous Member States had faced shortages of gas owing to disputes involving the Russian Federation. Furthermore, the contested directive applies to all existing and future, on-shore and offshore pipelines. Finally, it was adopted in a context in which numerous pipelines completed between a Member State and a third country were already subject to the obligations laid down by Directive 2009/73, with the result that it increases the import capacity from third countries covered by the obligations laid down by it, even if the Nord Stream 2 pipeline is the only pipeline which could not benefit from an exemption or a derogation.

Finally, the Court holds that the contested directive does not exceed the limits of what is necessary for the achievement of its objectives.

Nord Stream 2 has not shown either that the contested directive imposes upon it obligations that are unnecessary as regards the objective of the completion of the internal market or that the constraints upon it, or upon the European Union and its Member States, resulting from the application of the obligations laid down by Directive 2009/73, are manifestly disproportionate compared with the importance of the objectives pursued and the advantages drawn by the European Union from those obligations. The fact that Nord Stream 2 cannot operate its pipeline as it had initially envisaged does not demonstrate that the contested directive imposes disproportionate constraints upon it. In addition, it has not demonstrated the financial consequences related to the application of the obligations laid down by Directive 2009/73 to its pipeline, which it could continue to operate under economic conditions.

In the fourth place, the Court rejects the plea advanced by Nord Stream 2 alleging a misuse of powers. It recalls, first of all, that the legal basis of the contested directive, which is not disputed, is Article 194 TFEU. The mere fact that the contested directive adversely affects the Nord Stream 2 pipeline does not suffice to demonstrate that the legislature intended to pursue an objective different from those referred to in Article 194(1) TFEU.

In addition, Nord Stream 2 has not demonstrated that the contested directive was adopted in order to pursue objectives other than those referred to in that directive, which seek to address wider problems than those related to its pipeline project, namely, inter alia, obstacles to the completion of the internal market in natural gas.

Furthermore, Nord Stream 2 is also not correct to submit that the objective of the contested directive was to circumvent the legal difficulties posed by the request for a mandate sent by the Commission to the Council with a view to negotiating an international agreement with the Russian Federation on the subject of the Nord Stream 2 pipeline. The contested directive and the negotiation of such an agreement are complementary and not substitutable instruments.

Since the latter plea by Nord Stream 2, alleging the infringement of an essential procedural requirement, was also not upheld, the Court dismisses the action in its entirety.

VII. JUDGMENTS PREVIOUSLY DELIVERED

1. INSTITUTIONAL PROVISIONS: RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the General Court (Second Chamber, Extended Composition), 2 October 2024, TotalEnergies Marketing Nederland v Commission, T-332/22

Link to the full text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Documents relating to a proceeding under Article 101 TFEU – Refusal of access – Exception relating to the protection of the purpose of inspections, investigations and audits – Exception relating to the protection of the commercial interests of a third party – General presumption of confidentiality – Obligation to identify the documents covered by the presumption and to provide a list of them

Ruling in extended composition, the General Court dismisses the action for annulment brought by the applicant, TotalEnergies Marketing Nederland NV, against the decision of the European Commission [99] rejecting, pursuant to Regulation No 1049/2001, [100] its confirmatory application for access to documents. By its judgment, the Court explains its case-law in the area of access to documents [101] by clarifying the obligations incumbent on the Commission when that institution relies on a general presumption of confidentiality against an application for access to documents in a file relating to a proceeding under Article 101 TFEU.

On 13 September 2006, the Commission adopted a decision relating to a proceeding under Article 101 TFEU [102] in which it found that various undertakings, including the applicant, had participated in an infringement of Article 101 TFEU ('the Bitumen case'). In June 2021, the applicant submitted five applications for access to documents relating to the Bitumen case.

In its decision of 4 July 2021, the Commission relied on a general presumption of confidentiality concerning the documents in the administrative file relating to a proceeding under Article 101 TFEU to dismiss four of the five applications, on the ground that the requested documents were covered by the exceptions provided for in Regulation No 1049/2001. [103]

Following the dismissal by the Commission of the confirmatory application submitted by the applicant in August 2021, by which it had asked the Commission to reconsider its decision of 4 July 2021, the applicant brought an action before the Court for annulment of the contested decision.

Findings of the Court

As a preliminary point, the Court points out that it is apparent from the system of exceptions established by Regulation No 1049/2001 [104] that the right of access to documents of European Union institutions is subject to certain limits based on reasons of public or private interest. As such exceptions depart from the principle of the widest possible public access to documents, they must be interpreted and applied strictly.

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99 Decision C(2022) 1949 final of the European Commission of 23 March 2022 ('the contested decision').

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

101 Judgment of 28 May 2020, Campbell v Commission (T701/18, EU:T:2020:224).

102 Case COMP/F/38.456 – Bitumen – Netherlands.

103 Article 4(2), third indent, and (3) of Regulation No 1049/2001.

104 Article 4 of Regulation No 1049/2001.

In that regard, the Court recalls that, where an EU institution, body, office or agency that has received a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that exception, and the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical. The Court of Justice has acknowledged, however, that it is open to that institution, body, office or agency to base its decisions in that regard on general presumptions which apply to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature.

The objective of such general presumptions is the possibility, for the EU institution, body, office or agency concerned, to consider that the disclosure of certain categories of documents undermines, in principle, the interest protected by the exception which it is invoking, by relying on such general considerations, without being required to examine specifically and individually each of the documents requested. The existence of a general presumption of confidentiality does not exclude the possibility of demonstrating that a given document, disclosure of which has been requested, is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001.

The Court of Justice has recognised the existence of general presumptions of confidentiality for five categories of documents, including the documents in a file relating to a proceeding under Article 101 TFEU. The Court has held that the Commission is entitled to presume, [105] without carrying out a specific, individual examination of each of those documents, that disclosure of them would, in principle, undermine the protection of the commercial interests of the undertakings involved in such a proceeding and the protection of the purpose of the investigations relating to the proceeding.

In the first place, as regards the applicability of the general presumption of confidentiality relied on by the Commission, the Court notes that it is apparent from Regulation No 1/2003 [106] that, in the context of a Commission investigation relating to the application of the rules relating to the application of Article 101 TFEU, correspondence between the Commission and the competition authorities of the Member States belongs to the internal documents contained in the Commission's file. Moreover, it is apparent from the Commission notice on the matter [107] that the correspondence maintained between the Commission and other public authorities during an investigation counts among the inaccessible internal documents belonging to the Commission's file. The communications between the Commission and the national authorities relating to the Bitumen case, to which the applicant had requested access, were thus in a file relating to a proceeding under Article 101 TFEU.

The Court infers from this that the Commission was entitled to assert the existence of a general presumption of confidentiality, pursuant to Regulation No 1049/2001, [108] according to which the disclosure of the documents from the administrative file in the Bitumen case would undermine, in principle, on the one hand, the protection of the purpose of inspections, investigations and audits and, on the other hand, the protection of commercial interests.

In the second place, with regard to the rules for applying the general presumption of confidentiality relied on by the Commission, the Court recalls that it follows from the judgment in Campbell v Commission that, where an institution considers that a general presumption of confidentiality is applicable, it is able to reply in a global manner to a request for access, in the sense that that presumption relieves it from providing explanations as to how access to a document covered by that request specifically undermines the interest protected. However, the application of a presumption of confidentiality cannot be interpreted as permitting the institution to reply, in a global manner, that all

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105 For the purposes of the application of the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001.

106 Article 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

107 Paragraphs 1 and 15 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7).

108 Under the first and third indents of Article 4(2) of Regulation No 1049/2001.

the documents covered by the application for access are part of a file covered by a general presumption of confidentiality, without having to identify those documents or draw up a list of them. In that judgment, after all, the Court held that it is only once the institution has identified which documents were covered by the request for access that it can classify them into categories according to their common characteristics, their same nature or their belonging to the same file and that it can then apply a general presumption of confidentiality to them. In the absence of such identification, the general presumption of confidentiality would be irrebuttable.

First, the General Court notes that, in the case giving rise to the judgment in Campbell v Commission, the request for access had been worded in an abstract and general manner, in that it covered all the documents held by the Commission. Unlike that case, in the case at hand the applicant requested access to documents of a specific type relating to a precisely identified proceeding under Article 101 TFEU. Second, it holds that, unlike the aforementioned case, the Commission identified, in the contested decision, the documents covered by the applications jointly, specifying in its assessment that they were exchanges with the Netherlands authorities in the context of the Bitumen case, and that those documents belonged to the file in that case and were covered by the general presumption of confidentiality. The Commission also set out the parameters of that general presumption of confidentiality and its application to the case at hand.

In that regard, the Court specifies that the institution, body, office or agency responding to an application for access to documents, when it applies a general presumption of confidentiality, is not in every case required to provide the applicant with a list of the documents covered by that presumption. On the contrary, the provision of such a list is but one of the possible ways of identifying the documents requested, in order for the applicant to have the possibility of rebutting the application of that presumption. In particular, the provision of such a list of documents is not necessary where the documents referred to, or at least their type, are already clear from the request for access and the applicant, in principle, has the opportunity of arguing that a document is not covered by the general presumption of confidentiality.

Consequently, the Court finds that the fact that the documents disclosure of which was requested were identified both as regards their nature and as regards their belonging to the administrative file relating to a proceeding under Article 101 TFEU was sufficient to justify the application of the general presumption of confidentiality without the Commission being required to provide the applicant with a list of those documents.

2. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Grand Chamber), 4 October 2024, Lindenapotheke, C-21/23

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Chapter VIII – Remedies – Medicinal products marketed by a pharmacist on an online platform – Action brought before the national civil courts by a competitor of that pharmacist on the basis of the prohibition of unfair commercial practices for infringement by the pharmacist of the obligations laid down by that regulation – Standing to bring proceedings – Article 4(15) and Article 9(1) and (2) – Directive 95/46/EC – Article 8(1) and (2) – Concept of 'data concerning health' – Conditions for the processing of those data

Hearing a request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany), the Grand Chamber of the Court of Justice rules on the nature and scope of the system of remedies with regard to data protection [109] and on the concept of 'data concerning health'. [110]

ND and DR, two natural persons, each operates a pharmacy in Germany. Since 2017, ND has been marketing pharmacy-only medicinal products on the online platform 'Amazon-Marketplace'. When they order online, ND's customers must enter information, such as their name, the delivery address and details required for individualising those medicinal products.

Relying on German law on unfair competition, [111] DR brought an application for injunctive relief against ND before the national civil courts. DR claimed that the marketing of the medicinal products by ND was unfair, on account of the failure to comply with the legal requirement to obtain the customer's prior consent to the processing of his or her data concerning health.

After the lower courts upheld that action, ND brought an appeal on a point of law before the referring court, which, in turn, considered it necessary to make a reference to the Court for a preliminary ruling.

In its judgment, the Court concludes that the system of legal remedies established by the GDPR is non-exhaustive, recognising that that regulation does not preclude Member States from providing, in national law, for the possibility for competitors of the person allegedly responsible for an infringement of the substantive provisions of that regulation to challenge that infringement before the courts as an unfair commercial practice. In addition, it provides clarification on the scope of the concept of 'data concerning health'.

Findings of the Court

In the first place, the Court notes that, although Chapter VIII of the GDPR does not specifically provide for an opening clause which would expressly allow Member States to make such a remedy available to competitors, it nevertheless follows from the wording and context of the provisions of Chapter VIII that the EU legislature did not intend to rule out that possibility. That interpretation is confirmed by the objectives pursued by the GDPR.

On the one hand, an application for injunctive relief brought by a competitor against an undertaking on the basis of the prohibition of unfair commercial practices, on account of the alleged infringement of the substantive provisions of the GDPR in no way undermines the system of remedies provided for in that regulation or the objective of ensuring a consistent level of protection for natural persons throughout the European Union and of preventing divergences hampering the free movement of personal data within the internal market.

In that regard, the Court states that it is true that such an application may be based, albeit incidentally, on an infringement of the same provisions of the GDPR as those on which a complaint or action brought by the data subjects or by a body, organisation or association representing those data subjects may be based. [112] However, unlike those remedies provided for by the GDPR, an application for injunctive relief brought by a competitor does not, as such, pursue an objective of protection of the fundamental rights and freedoms of data subjects with regard to the processing of their personal data, but seeks to ensure fair competition, in the interests, inter alia, of that competitor.

In addition, the possibility for a competitor to bring such an action before the civil courts on the basis of the prohibition of unfair commercial practices is in addition to the remedies established by the GDPR, which remain in full and can still be pursued by data subjects and, where appropriate, by

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109 Chapter VIII 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').

110 Referred to, respectively, in Article 8(1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31) and in Article 9(1) of the GDPR.

111 Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) of 3 July 2004 (BGBl. 2004 I, p. 1414), in the version applicable to the main proceedings.

112 Articles 77 to 80 of the GDPR.

associations representing data subjects. In particular, the coexistence of remedies under data protection law and competition law does not create a risk for the uniform application of that regulation.

Moreover, the fact that the substantive provisions of the GDPR may be relied on more widely, by persons other than just data subjects and bodies, organisations and associations, does not undermine the attainment of the objective of ensuring a consistent level of protection of those persons throughout the European Union and of preventing divergences hampering the free movement of personal data within the internal market. Even if the Member States did not provide for such a possibility, this would not result in a fragmentation of the implementation of data protection in the European Union, as the substantive provisions of the GDPR are binding in the same way on all data controllers and compliance with those provisions is ensured by the remedies provided for in that regulation.

On the other hand, as regards the objective of ensuring effective protection of data subjects with regard to the processing of their personal data and the effectiveness of the substantive provisions of the GDPR, the Court notes that, although an application for injunctive relief brought by a competitor of the person allegedly responsible for an infringement of the laws protecting personal data pursues not that objective but that of ensuring fair competition, the fact remains that it undoubtedly contributes to compliance with those provisions and, therefore, to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection. Moreover, such an application for injunctive relief brought by a competitor may prove, like that brought by a consumer protection association, to be particularly effective in ensuring such protection, in so far as it is capable of preventing a large number of infringements of the rights of data subjects by the processing of their personal data. [113]

The Court finds that the provisions of the GDPR must be interpreted as not precluding national legislation which, alongside the powers of intervention of the supervisory authorities responsible for monitoring and enforcing that regulation and the remedies available to data subjects, confers on competitors of the person allegedly responsible for an infringement of the laws protecting personal data standing to bring proceedings against that person, by means of an action before the civil courts, for infringements of that regulation and on the basis of the prohibition of unfair commercial practices.

In the second place, as regards the concept of 'data concerning health', the Court finds that that concept covers data which a customer enters in an online platform when ordering pharmacy-only medicinal products. Those data are capable of revealing, by means of an intellectual operation involving collation or deduction, information on the health status of the data subject, [114] in so far as that order entails establishing a link between a medicinal product, its therapeutic indications or uses, and a natural person identified or identifiable by factors such as that person's name or the delivery address.

Furthermore, the Court holds that it is irrelevant in that regard that the sale of the medicinal products ordered does not require a prescription and that they might therefore be intended not for the customer making the order, but for third parties. Thus, where a user of an online platform communicates personal data when ordering pharmacy-only medicinal products the sale of which does not require a prescription, the processing of those data by the operator of a pharmacy which sells those medicinal products on that online platform must be regarded as processing of data concerning health, [115] given that the processing of those data is capable of revealing information on the health status of a natural person, irrespective of whether that information concerns that user or any other person for whom the user places the order. [116]

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113 See, to that effect, judgment of 28 April 2022, Meta Platforms Ireland (C319/20, EU:C:2022:322, paragraphs 74 and 75).

114 Article 4(1) of the GDPR.

115 Article 8(1) of Directive 95/46 and Article 9(1) of the GDPR.

116 See, to that effect, judgment of 4 July 2023, Meta Platforms and Others (General terms of use of a social network) (C252/21, EU:C:2023:537, paragraph 73).

An interpretation which would result in a distinction being made according to the type of medicinal product concerned and to whether or not the sale thereof requires a prescription would not be consistent with the objective of ensuring a high level of protection of the fundamental rights and freedoms of natural persons, in particular their private life, with respect to the processing of personal data concerning them. Such an interpretation would, moreover, run counter to the purpose of Article 8(1) of Directive 95/46 and Article 9(1) of the GDPR, namely to ensure enhanced protection as regards processing which, because of the particular sensitivity of the data processed, is liable to constitute a particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data.[117] Consequently, the information which customers enter when ordering online pharmacy-only medicinal products the sale of which is does not require a prescription constitutes data concerning health, even where it is only with a certain degree of probability, and not with absolute certainty, that those medicinal products are intended for those customers.

The Court adds that it is not inconceivable that, even if such medicinal products are intended for persons other than the customers, it may be possible to identify those persons and draw conclusions about their health status. That could be the case, for example, where the medicinal products in question are delivered not to the home of the customer who ordered them but to the home of another person, or where, irrespective of the delivery address, the customer referred, in the order or in any communication relating to the order, to another identifiable person, such as a family member.

Lastly, the Court notes that the fact that the information in question constitutes data concerning health does not preclude it from being processed, in particular in the context of the management of healthcare services and systems, if one of the conditions set out in that regard is met.[118] First, this may in particular be the case where the data subject gives explicit consent to one or more processing operations involving those personal data, the specific characteristics and purposes of which have been presented to him or her in an accurate, comprehensive and easily understandable manner. Second, such processing may be permissible where processing is necessary for the purposes of the provision of healthcare on the basis of EU or Member State law or pursuant to a contract with a health professional.

Judgment of the Court of Justice (First Chamber), 4 October 2024, Agentsia po vpisvaniyata, C-200/23

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 – Publication in the commercial register of a company's constitutive instrument containing personal data – Directive (EU) 2017/1132 – Non-compulsory personal data – Lack of consent of the data subject – Right to erasure – Non-material damage

Following a reference for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), the Court of Justice rules on a series of questions concerning, in essence, the relationship between the provisions of EU law on disclosure of company documents [119] and the GDPR. [120]

OL is a member of 'Praven Shtit Konsulting' OOD, a limited liability company governed by Bulgarian law entered in the commercial register following the submission of a company's constitutive

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117 See judgment of 1 August 2022, Vyriausioji tarnybinės etikos komisija (C184/20, EU:C:2022:601, paragraph 126 and the case-law cited).

118 Conditions set out in Article 8(2) of Directive 95/46 and Article 9(2) of the GDPR.

119 Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46).

120 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) ('the GDPR').

instrument. That instrument, made public by the Agentsia po vpisvaniyata (Registration Agency, Bulgaria) ('the Agency') as submitted, contains several items of personal data of its members, including their surnames, forenames, identity card numbers, addresses and signatures.

In 2021, OL made a request to the Agency that it erase her personal data contained in that instrument. That agency's refusal to grant that request was the subject of two actions brought by OL before the Administrativen sad Dobrich (Administrative Court, Dobrich, Bulgaria). By judgment of 5 May 2022, that court ordered the Agency to pay compensation to OL in respect of non-material damage, pursuant to the GDPR. [121] The Agency, which disagreed with that judgment, brought an appeal on a point of law before the referring court.

Uncertain as to the balancing exercise which must be carried out between the legislation on the right to protection of personal data and that guaranteeing disclosure and access to certain company documents, the national court referred questions to the Court for a preliminary ruling.

Findings of the Court

In the first place, as regards the scope of voluntary disclosure of information, including personal data contained in company documents, the Court notes that the provision of Directive 2017/1132 on the voluntary disclosure of company documents and information [122] concerns only their translations, without however referring to their content. Therefore, it cannot be interpreted as imposing any obligation relating to the disclosure of data which are not required to be disclosed either by other provisions of EU law or by the law of the Member State concerned, but which appear in a document subject to compulsory disclosure under that directive. [123] Accordingly, that provision does not impose on a Member State an obligation to permit the disclosure, in the commercial register, of a company's constitutive instrument subject to compulsory disclosure under that directive and containing personal data, other than the minimum personal data required, disclosure of which is not prescribed by the law of that Member State.

In the second place, the Court notes that the authority responsible for maintaining the commercial register of a Member State which publishes therein the personal data contained in a company's constitutive instrument, which is subject to compulsory disclosure under Directive 2017/1132 and transmitted in the context of an application for registration of the company in that register, is both a 'recipient' of those data and, particularly in so far as it makes them available to the public, a 'controller' of those data, [124] even where that instrument contains personal data not required by that directive or by the law of that Member State.

In that context, the Court observes that, under Directive 2017/1132, it is for the Member States to determine, inter alia, which categories of information concerning the identity of the persons linked to the companies, in particular, which kind of personal data, are to be subject to compulsory disclosure, in accordance with EU law.

The Court also notes that, by transcribing and storing personal data received in connection with an application for registration of a company in the commercial register of a Member State, disclosing those data, where appropriate, on request to third parties and publishing them in the national gazette, or by an equally effective means, the authority responsible for maintaining that register carries out processing of personal data for which it is the 'controller'. Those kinds of processing of personal data are distinct from and subsequent to the disclosure of personal data carried out by the applicant for that registration and received by that authority. In addition, that authority carries them out alone, in accordance with the purposes and procedures laid down by Directive 2017/1132 and by the legislation of the Member State implementing that directive.

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121 Under Article 82 of the GDPR.

122 Article 21(2) of Directive 2017/1132.

123 Pursuant to Article 14 of Directive 2017/1132.

124 Within the meaning of Article 4(7) and Article 4(9) of the GDPR, respectively.

In the third place, as regards the right to erasure, which may be available to the subject data, the Court, [125] in the first instance, examines the grounds of lawfulness under which the processing of his or her personal data may fall.

First, as regards whether that processing is necessary for compliance with a legal obligation arising from EU law or Member State law to which the controller is subject, [126] the Court notes that Directive 2017/1132 does not require the systematic processing of all personal data contained in an act subject to compulsory disclosure under that directive. On the contrary, any processing of personal data carried out in the context of that directive must fully satisfy the requirements arising from the GDPR. Thus, it is for the Member States to ensure that the objectives of legal certainty and protection of the interests of third parties, pursued by Directive 2017/1132, are reconciled with the rights enshrined in the GDPR.

Therefore, it cannot be held that the making available to the public, online, in the commercial register, of personal data not required by Directive 2017/1132 or by the national legislation at issue in the main proceedings contained in a company's constitutive instrument subject to compulsory disclosure under that directive and transmitted to the Agency, is justified by the requirement to ensure disclosure of the documents referred to in that directive and, that, therefore, that making available is the result of a legal obligation laid down by EU law. In addition, the lawfulness of the processing concerned does not appear to be based, subject to verification by the referring court, on a legal obligation laid down by national law.

Second, as regards the necessity of the processing concerned for the purposes of performing a task carried out in the public interest, [127] the Court observes that that processing does indeed appear to occur when such a task is performed. However, it appears to go beyond what is necessary in order to achieve the objectives of general interest pursued.

In that regard, the Court notes that the requirement to preserve the integrity and reliability of company documents – subject to compulsory disclosure under Directive 2017/1132 – which requires the publication of those documents in the form in which they were sent to the authorities responsible for maintaining the commercial register, cannot systematically prevail over the right to protection of personal data, if it is not to render that protection purely illusory.

In particular, that requirement cannot impose that personal data not required by Directive 2017/1132 or by national law remain available to the public, online, in that register when the Agency could itself draw up a copy of the instrument of the company concerned – having redacted the data not required – provided for by that law, with a view to making it available.

In the second instance, the Court points out that, if the referring court were to conclude, following its assessment, that the processing in question is not lawful, it would be for the Agency, as controller, to erase the data concerned without undue delay.

However, if that court were to conclude that that processing is indeed necessary for the performance of a task carried out in the public interest, in particular in so far as the making available to the public, online, in the commercial register of data not required by Directive 2017/1132 or by national legislation was necessary in order to avoid delaying the registration of the company concerned, in the interest of the protection of third parties, it would be necessary to examine whether there were compelling legitimate grounds which may override the interests, rights and freedoms of the data subject and to refuse to grant the request for erasure. [128]

Thus, the Court observes that Directive 2017/1132 and the GDPR must be interpreted as precluding a Member State's legislation or practice which leads the authority responsible for maintaining the commercial register of that Member State to refuse any request for erasure of personal data not required by that directive or by the law of that Member State, contained in a company's constitutive

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125 Under Article 17 of the GDPR.

126 Ground for lawfulness laid down in point (c) of the first subparagraph of Article 6(1) of the GDPR.

127 Ground for lawfulness laid down in point (e) of the first subparagraph of Article 6(1) of the GDPR.

128 Under Article 17(1)(c) of the GDPR, read in conjunction with Article 21(1) of the GDPR.

instrument published in that register, where a copy of that instrument in which those data have been redacted has not been provided to that authority, contrary to the procedural rules laid down by that legislation.

Last, ruling on the liability regime under the GDPR and, more specifically, on the effect, in that context, of an opinion issued by the supervisory authority of a Member State, the Court points out that, under the GDPR, [129] the issuing of such an opinion falls within the scope of the advisory powers of the supervisory authority, and not within that of its authorisation powers. Moreover, the terms used indicate that that opinion is not, under EU law, legally binding. Thus, the opinion concerned cannot, in itself, demonstrate that that damage is not attributable to the controller and, therefore, is not sufficient to exempt it from liability under the GDPR. Consequently, such an opinion is not sufficient to exempt from liability the authority responsible for maintaining the commercial register of a Member State which has the status of controller.

3. AGRICULTURE AND FISHERIES

Judgment of the Court of Justice (First Chamber), 4 October 2024, AFAÏA, C-228/23

Link to the full text of the judgment

Reference for a preliminary ruling – Agriculture – Organic production and labelling of organic products – Regulation (EU) 2018/848 – Use of certain products and substances in organic production and their listing – Derogation – Implementing Regulation (EU) 2021/1165 – Annex II – Concepts of 'factory farming' and 'landless livestock production' – Consumer confidence – Animal welfare – Respect for the environment and the climate – Criteria

In a reference for a preliminary ruling from the Conseil d'État (Council of State, France), the Court of Justice clarifies the scope of the prohibition of the use, in organic farming, of fertilisers, soil conditioners and nutrients from factory farming, as laid down in Annex II to Implementing Regulation 2021/1165, [130] adopted for the purposes of implementing Regulation 2018/848. [131]

With regard to the fertilisation of soils used for organic production, those regulations authorise, by way of derogation and only to the extent necessary, the use of certain non-organic products and substances, provided that they do not come from 'factory farming'. [132]

In 2020, the Institut national de l'origine et de la qualité (INAO) (National Institute of Origin and Quality (INAO), France), a French public administrative institution, amended its reading guide to EU legislation on organic farming in order, inter alia, to interpret that prohibition of the use of fertilisers and soil conditioners of animal origin from 'factory farming' on organic land. It interpreted it broadly as excluding manure from livestock raised in integral slatted or grid systems and from livestock raised in cages, exceeding certain thresholds on the number of places for the animals concerned.

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129 Article 58(3)(b) of the GDPR.

130 Commission Implementing Regulation (EU) 2021/1165 of 15 July 2021 authorising certain products and substances for use in organic production and establishing their lists (OJ 2021 L 253, p. 13, and corrigendum OJ 2022 L 115, p. 230).

131 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ 2018 L 150, p. 1).

132 In accordance with point 1.9.3 of Part I of Regulation 2018/848, where soil management practices and the application of fertilisers from organic production do not cover the nutritional requirements of plants, only fertilisers and soil conditioners which are authorised for use in organic production in accordance with Article 24 of Regulation 2018/848 are to be used, and only to the extent necessary. Fertilisers, soil conditioners and nutrients authorised by the Commission under Article 24 are the subject of Annex II to Implementing Regulation 2021/1165, the third paragraph of which states that, in organic production, 'factory farming origin' is prohibited for products like farmyard manure, composted animal excrements and liquid animal excrements.

Before the referring court, the association AFAÏA, a trade association for the protection of the interests of organic fertiliser producers, sought annulment of the decision by which the INAO rejected its request for amendment of the reading guide. In its view, the criterion determining the prohibition at issue is linked to the use of land, with the result that the concept of 'factory farming' can correspond only to that of 'landless livestock production' and designate livestock-producing holdings without the management of agricultural land.

Faced with that question concerning the origin of fertilisers which may be used in organic farming, the referring court asks the Court of Justice about the concept of 'factory farming' and asks what the scope is for the derogation provided for in Annex II to Implementing Regulation 2021/1165.

Findings of the Court

In the first place, as regards the equivalence between the concepts of 'factory farming' and 'landless livestock production', the Court finds that, although they both refer to the mechanisation of the processes and mass production, they do not, however, have the same meaning.

According to their usual meaning, the terms 'factory' or 'intensive' refer to a form of large-scale production, which is intended to optimise the yield of that activity, in particular by increasing the density of animals on the holding or by shifting, to a greater or lesser degree, away from the surrounding environment through confinement. Factory farming generally requires high investment, and involves the use of enriched foods and preventative antibiotics. It may cause significant environmental pollution. Furthermore, specific protection of animal welfare is not generally one of its priorities.

On the other hand, according to its usual meaning, 'landless' livestock production corresponds to a type of 'factory' or 'intensive' farming in which the feed supply does not come, for the most part or entirely, from the agricultural holding where the animals are reared.

It follows that the concept of 'factory farming' is appreciably broader than that of 'landless livestock production' and that, therefore, those concepts must be regarded as being different.

As regards the concept to be used for the purposes of interpreting Annex II to Regulation 2021/1165 and, therefore, the scope of the prohibition at issue, the Court concludes that the prohibition covers all 'factory' farming and not only 'landless' livestock production.

In addressing the general scheme of that annex, it points out, first, that the authorisation by way of derogation provided for therein must be interpreted strictly, which means that the limits imposed on that authorisation, namely, in particular, the prohibition on using preparations from 'factory farming', must, on the contrary, be interpreted broadly.

An interpretation to the effect that the concept of 'factory farming' corresponds solely to the concept of 'landless livestock production' results in manure from all 'factory' farming other than 'landless' livestock production being authorised for use in organic farming. That interpretation therefore amounts to a broad interpretation of the scope of that derogation, contrary to the principle laid down.

Secondly, as regards the argument that the ground for the prohibition at issue is exclusively linked to land use, the Court states that, it is true that, in accordance with the overall approach which characterises organic farming, livestock production must be land-related. However, that means only that the 'landless' type of farming is not compatible with the principles of organic farming and, therefore, is purely and simply prohibited in that context.

Furthermore, organic farming is also based on the implementation of husbandry practices which enhance the immune system of animals, including regular exercise and access to open air areas. Furthermore, Regulation 2018/848 prohibits genetically modified organisms in feed and significantly limits the use of plant protection products.

It cannot therefore be asserted that organic farming is characterised solely by a certain method of land management and, therefore, that the ground for the prohibition at issue is exclusively linked to land use. That farming method consists of an overall system of farm management and food production that combines best environmental and climate action practices, a high level of biodiversity, the preservation of natural resources and the application of high animal welfare

standards and high production standards in line with the demand of a growing number of consumers for products produced using natural substances and processes. It is, in particular, linked to ethical production methods, and, in particular to livestock housing conditions, both in terms of freedom to move and access to outdoor spaces, and in terms of stocking density.

In the light of those requirements, it cannot be accepted that livestock manure from 'factory' or 'intensive' farming is authorised as organic manure.

That interpretation is supported by the objectives of Regulation 2018/848, such as the protection of the environment, animal welfare and consumer confidence. A derogation allowing, broadly, the use of products from intensive farming would clearly run counter to those objectives and would be contrary to the requirements of consistency and to ethical and environmental principles, which are the very foundations of organic farming.

Thus, consumers' legitimate expectations that products bearing the organic logo of the European Union have actually been obtained in observance of the highest standards, in particular with regard to respect for the environment and animal welfare, are guaranteed if the manure used in organic farming comes from organic sources or, where that is not sufficient, and only in that case, if non-organic manure is used, provided that the latter does not come from factory farming.

In the second place, the Court notes that, as EU law currently stands, the criteria to be taken into account in order to determine whether livestock farming must be categorised as 'factory farming' within the meaning of Annex II to Implementing Regulation 2021/1165 are not the subject of general harmonisation measures. It states, however, that EU law does not preclude national legislation under which the prohibition of the use, on organic land, of fertilisers and soil conditioners of animal origin which are of 'factory farming origin' also covers manure from livestock raised in integral slatted or grid systems and exceeding the thresholds defined in Annex I to the EIA Directive [133] and manure from livestock raised in cages and exceeding those same thresholds. However, for the purposes of that categorisation, it is necessary to rely on a set of indicia relating, at the very least, to the preservation of animal welfare, respect for biodiversity, and environmental and climate protection.

4. FREEDOM OF MOVEMENT

4.1. FREEDOM OF ESTABLISHMENT

Judgment of the Court of Justice (First Chamber), 4 October 2024, Staatssecretaris van Financiën (Interest in respect of an intra-group loan), C-585/22

Link to the full text of the judgment

Reference for a preliminary ruling – Freedom of establishment – Article 49 TFEU – Corporation tax – Intra-group cross-border loan for the purposes of financing the acquisition or the extension of an interest in a company not related to the group concerned that becomes, as a result of that transaction, related to that group – Deduction of interest paid on that loan – Loan contracted on an arm's length basis – Concept of 'wholly artificial arrangement' – Principle of proportionality

In a reference for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), the Court of Justice rules on the compatibility with freedom of establishment of national legislation limiting the deduction of interest paid in respect of an intra-group loan.

133 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 (OJ 2014 L 124, p. 1).

X is a company incorporated under Netherlands law which belongs to a multinational group of companies. That group includes, inter alia, companies A and C, both established in Belgium. A is the sole shareholder of X and the majority shareholder of C. In 2000, X acquired the majority of the shares in a company incorporated under Netherlands law, in which A acquired the remaining shares. X financed that acquisition by means of loans contracted with C, which used for that purpose own funds obtained through a capital contribution made by A.

In the corporation tax assessment notice addressed to X for 2007, the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) refused to deduct the interest paid by that company to C.

X challenged that refusal before the Netherlands courts, the last of which being the referring court. The referring court raises the question of the compatibility of the relevant Netherlands legislation with, inter alia, the freedom of establishment, since that legislation is liable to place cross-border situations at a disadvantage. In accordance with the law on corporation tax, [134] interest paid in respect of intra-group debts, which relate, as in the present case, to the acquisition or extension of an interest in an entity that becomes, after that transaction, an entity related to the taxpayer, may only be deducted if the taxpayer demonstrates either that the loan and the related legal transaction are based, to a decisive extent, on economic considerations, or that the tax ultimately levied on the interest results in taxation of at least 10% of the taxable profit determined in accordance with the criteria of Netherlands law. [135] According to the referring court, that second condition, laid down in Article 10a(3)(b) of that law, is generally satisfied by resident entities, but is less often satisfied by a non-resident entity.

Nevertheless, the referring court considers that such a restriction is justified by the need to combat tax fraud and avoidance. It asks, however, whether, in the light, in particular, of the judgment in Lexel, [136] it must be held that transactions contracted on an arm's length basis are not, for that reason alone, wholly artificial.

Findings of the Court

In the first place, the Court finds that, although it is applicable without distinction, the Law on Corporation Tax entails a difference in treatment which is liable to have a deterrent effects on the exercise of the freedom of establishment, guaranteed by Article 49 TFEU. If taxation at a rate lower than 10% were not practised under the Netherlands tax regime, which is for the referring court to ascertain, the inevitable and not uncertain consequence of Article 10a(3)(b) of that law would be that that condition would affect only cross-border situations. Only companies established in the Netherlands which pay interest to a related entity established in another Member State may not satisfy that condition where the latter Member State subjects that entity to a lower tax.

Such a difference in treatment is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest and is proportionate to that objective.

In that regard, in the second place, the Court considers that, with regard to legislation which seeks to confer the possibility of deducting, in the context of determining profit, interest on debts due to a related entity only where that loan interest is not generated artificially, a company is not in a different situation merely because the related entity, the recipient of the interest concerned, is established in another Member State, in which that interest is subject to a rate not exceeding 10% on a taxable profit determined according to the criteria of Netherlands law. In such a situation, the loan in respect of which that interest is paid and the related legal transaction may also be based on economic considerations. [137]

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134 Wet op de vennootschapsbelasting 1969 (Law on Corporation Tax of 1969), in the version in force in 2007 (Stb. 2006, n°631), ('the Law on Corporation Tax').

135 See Article 10a(3)(a) and (b) of the Law on Corporation Tax.

136 Judgment of 20 January 2021, Lexel (C484/19, EU:C:2021:34).

137 Within the meaning of Article 10(3)(a) of the Law on Corporation Tax.

In the third place, as regards the existence of an overriding reason in the public interest capable of justifying a restriction on the exercise of a freedom of movement guaranteed by the FEU Treaty, the Court notes that Article 10a(3)(b) of the Law on Corporation Tax pursues the objective of combating tax fraud and avoidance and seeks to prevent the group capital from being presented, in a contrived manner, as funds borrowed by a Netherlands entity of that group and the interest on that loan from being deducted from the taxable profit in the Netherlands. That objective also applies to cases where, as in the present case, an entity becomes an entity related to the same taxpayer only following the acquisition or extension of an interest.

In the fourth place, as regards the proportionality of the legislation at issue, the Court notes that it is appropriate for ensuring the attainment of the objective pursued and does not go beyond what is necessary to attain that objective.

First, the legislation at issue in the main proceedings establishes a presumption that interest paid in respect of intra-group loan debts, contracted according to criteria which it lays down as indicators, constitutes or forms part of wholly artificial arrangements. The possibility for the taxpayer to rebut that presumption by demonstrating that the conditions laid down in Article 10a(3)(a) and (b) of the Law on Corporation Tax are satisfied makes it possible to limit the refusal to deduct loan interest solely to situations where the loan is dictated by tax reasons to such an extent that that loan is not necessary for the attainment of economically justified objectives and where it would not have been contracted between entities which have no special relationship.

Second, as regards the question whether transactions established on an arm's length basis do not, by definition, constitute wholly artificial arrangements, the Court emphasises that the examination of compliance with arm's length conditions must relate not only to the terms of the loan agreement relating, in particular, to the amount or the interest rate, but also to the economic logic of the loan at issue and the related legal transactions, in order to ascertain the economic reality of the transactions, whose absence constitutes one of the decisive factors in classifying a transaction as a wholly artificial arrangement. In that regard, it cannot be inferred from the judgment in Lexel, which concerned Swedish legislation with different practical consequences, that, in the absence of any economic reason, the mere fact that the conditions of intra-group loan correspond to those which would have been agreed between independent undertakings means that that loan and the related transactions do not, by definition, constitute wholly artificial arrangements.

Third, the Court points out that the refusal of all deduction of interest paid on an intra-group loan would go beyond the objective of preventing wholly artificial arrangements. Where the artificial nature of a given transaction results from an exceptionally high rate of interest on such loan which also reflects economic reality, the principle of proportionality requires the deduction of the proportion of interest paid on that loan which exceeds the normal market rate. By contrast, where the loan at issue is, in itself, devoid of economic justification and, but for the relationship between the companies and the tax advantage sought, would never have been contracted, it is consistent with the principle of proportionality to refuse the deduction of the whole interest.

Fourth, the legislation at issue in the main proceedings does not appear to be contrary to the requirements arising from the principle of legal certainty either. The Court notes that it is inevitable that a provision prohibiting abusive practices uses abstract concepts in order to cover the greatest number of situations. However, the use of abstract concepts does not mean that the application of that legislation is left entirely to the discretion of the tax authorities, since that application is subject to criteria clearly established in that legislation, enabling the taxpayer to determine the scope of that legislation beforehand and with sufficient precision.

4.2. FREEDOM TO PROVIDE SERVICES

Judgment of the Court of Justice (First Chamber), 4 October 2024, Tecno*37, C-242/23

Link to the full text of the judgment

Reference for a preliminary ruling – Freedom to provide services – Directive 2006/123/EC – Article 25(1) – Restrictions on multidisciplinary activities – Regulated profession – National legislation providing for, as a general rule, the incompatibility of the joint exercise of the activity of property brokerage and that of property manager – Requirements of independence and impartiality – Proportionality of the restriction – Consequences of the closure of an infringement procedure brought by the European Commission against a Member State

In the context of a dispute concerning the general prohibition on the joint exercise by an undertaking of the activity of property brokerage and that of property management, the Court of Justice provides clarification relating to the conditions to be met by restrictions to the exercise of multidisciplinary activities by a regulated profession in order for them to be compatible with Directive 2006/123. [138]

Tecno*37 is a sole trader who pursues jointly the activities of property management and property brokerage, in the capacity of estate agent.

Considering that that joint exercise of the activity of property management and that of property brokerage amounted to a situation of incompatibility within the meaning of the national legislation, the Camera di Commercio Industria Artigianato e Agricoltura di Bologna (Chamber of Commerce, Industry, Crafts and Agriculture of Bologna, Italy) decided to prohibit Tecno*37 from pursuing the activity of property brokerage.

Tecno*37 challenged that decision before the courts, including the Consiglio di Stato (Council of State, Italy), the referring court, arguing in particular that the prohibition on the combined pursuit of the activities at issue infringed EU law. In particular, in its view, the national legislation at issue is applied in a general and abstract manner with the result that the activity of property brokerage is always found to be incompatible with that of property management and precludes any case-by-case assessment of the risk of conflict of interest.

The referring court, which has doubts as to whether the restrictions laid down by that legislation are consistent with EU law, queries, in particular, whether Article 25(1) of Directive 2006/123 precludes national legislation which provides, as a general rule, that the activity of property brokerage cannot be exercised jointly with that of property management.

The Court answers that question in the affirmative.

Findings of the Court

In reaching that conclusion, the Court finds, first of all, that, by imposing a general prohibition on the joint exercise of the activities of property brokerage and property management, the national legislation at issue makes the activity of property brokerage – which is a regulated profession in Italy – subject to requirements such as those laid down in the first subparagraph of Article 25(1) of Directive 2006/123.

Next, the Court observes that, in order to guarantee consumer protection, Member States may adopt measures to ensure the independence and impartiality of the regulated professions, in accordance with point (a) of the second subparagraph of Article 25(1) of Directive 2006/123.

In the present case, since a property broker must be a third party in relation to the parties to a property transaction, it is apparent that the prohibition on the joint exercise of the activities of

138 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

property brokerage and property management, in that it seeks to avert the risk of a conflict of interest, may, in principle, be regarded as appropriate for the purpose of ensuring the independence and impartiality of the regulated profession at issue.

However, it appears that such a general prohibition goes beyond what is necessary and proportionate to achieve that objective.

Although it cannot be ruled out that a conflict of interest may arise, in particular where the activities of property brokerage and property management are pursued in respect of the same or comparable properties, such a risk will not necessarily materialise in all circumstances, with the result that the existence of such a conflict of interest cannot be presumed. In addition, measures less restrictive of the freedom to provide services than a general prohibition on the joint exercise of the two activities, such as a prohibition on the joint exercise of activities restricted to the situation in which the same property is concerned, or specific obligations of transparency and information concerning that joint exercise, accompanied by an ex post review by the competent professional chambers, may make it possible to ensure the independence and impartiality of the regulated profession at issue.

Last, the Court states that the practical difficulties, relating to the impossibility of verifying that there is no conflict of interest in each transaction when the activity of property brokerage and that of property management are performed jointly in respect of the same property, are not insurmountable. Deeds of sale may indeed, for example, include express declarations stating that the estate agent, acting as property broker, does not at the same time perform the role of manager of the shared ownership property of which the building acquired forms part.

5. COMPETITION

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

Judgment of the General Court (Second Chamber, Extended Composition), 2 October 2024, Crown Holdings and Crown Cork & Seal Deutschland v Commission, T-587/22

Competition – Agreements, decisions and concerted practices – Metal packaging market – Decision finding an infringement of Article 101 TFEU – Cooperation between the Commission and the national competition authorities – Initiation of an investigation procedure by the Commission at the request of a national competition authority – Period for re-allocation – Obligation to state reasons – Legitimate expectations – Principle of subsidiarity – Rights of the defence – Proportionality – Principle of good administration – Counterclaim for re-evaluation of the amount of the fine following a settlement procedure

By its judgment, the General Court dismisses the action for annulment brought by Crown Holdings, Inc. and Crown Cork & Seal Deutschland Holdings GmbH against a decision of the European Commission imposing a fine on them for having infringed Article 101 TFEU [139], as well as the Commission's counterclaim seeking an increase in the amount of the fine imposed. In that regard, the Court clarifies the division of competences between the Commission and the national competition authorities in the context of the re-allocation of a case in favour of the Commission at the request of national competition authorities. It takes the opportunity to clarify that the Notice on cooperation within the Network of Competition Authorities [140] cannot give rise to a legitimate expectation on the part of the undertakings concerned that any re-allocation of a case must take place within two

[139] Commission Decision C(2022) 4761 final of 12 July 2022 relating to a proceeding under Article 101 TFEU (Case AT.40522 – Metal packaging) ('the contested decision').

[140] Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) ('the cooperation notice').

months. In addition, in the exercise of its unlimited jurisdiction, the Court gives a ruling on the Commission's counterclaim seeking the withdrawal of the reduction granted to the applicants for their cooperation in the settlement procedure on the ground that, by the present action, they called into question, for the first time before the Court, the Commission's competence to deal with the case in the place of a national competition authority.

In 2015, the Bundeskartellamt (Federal Cartel Office, Germany) opened an investigation into a number of companies in the metal packaging sector, including the applicants. In 2018, believing that the suspected anticompetitive behaviour may have extended to other markets outside the Federal Republic of Germany and that the German law applicable at the time did not allow it to impose penalties on the undertakings belonging to the applicants which had been dissolved or reorganised before its investigation concluded, the Federal Cartel Office requested to have its investigation re-allocated to the Commission, which initiated a proceeding under Article 101 TFEU in respect of the applicants.

At the end of that procedure, the Commission adopted the contested decision, by which it found that the applicants had participated in a single and continuous infringement of Article 101 TFEU in the metal packaging sector in Germany and imposed a fine on them of EUR 7 670 000. That amount took account of a 50% reduction in the fine granted to the applicants for their cooperation under the 2006 Leniency Notice [141] and of a 10% reduction for their cooperation under the settlement procedure. [142]

In that context, the applicants brought an action against the contested decision, not in order to challenge its content which they had already accepted in relation to the settlement procedure, but on the basis of a number of procedural irregularities which led to the case being re-allocated to the Commission and ultimately to the contested decision being adopted.

Findings of the Court

In the action for annulment, the applicants maintained, inter alia, that, since the case was re-allocated from the national competition authority to the Commission after the initial period laid down in the cooperation notice, the Commission infringed the principles set out in that notice and the applicants' legitimate expectations.

In that regard, the Court recalls that where the Commission adopts such rules of conduct and announces by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and must not depart from those rules on pain of being found, where appropriate, to be in breach of the fundamental principles of law, such as the protection of legitimate expectations.

That case-law also applies to the cooperation notice, the Court having previously held in Sped-Pro v Commission [143] that, in adopting that notice, which contains guidance for determining the competition authority which is best placed to examine a complaint, the Commission imposed a limit on the exercise of its discretion in dealing with complaints in competition matters.

Accordingly, the Commission's argument that that judgment is not applicable in so far as it relates to a case brought following a complaint whereas, in the present case, the Commission acted on its own initiative following a request from a national competition authority cannot succeed. The cooperation notice deals with both situations and makes no distinction, in particular as regards re-allocation, according to whether a case is an own initiative investigation or follows a complaint. Therefore, despite the fact that exchanges within the network are a matter between competition authorities acting in the public interest which do not in any way alter the rights or obligations of the undertakings involved, by adopting that notice the Commission did not restrict itself solely with regard to complainants, but also with regard to undertakings whose activities are the subject of an investigation.

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141 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p.11)

142 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

143 Judgment of 9 February 2022, Sped-Pro v Commission (T791/19, EU:T:2022:67).

That having been stated, the Court considers whether paragraphs 18 and 19 of the cooperation notice, which relate to matters of reallocation, could have given rise to a legitimate expectation on the part of the applicants that any re-allocation of the case would have to take place within the initial period of two months.

In that regard, it is apparent from settled case-law that, in order for an infringement of the principle of the protection of legitimate expectations by the Commission to be established, the Commission must have given the person concerned precise assurances which have led that person to entertain justified expectations. However, the cooperation notice provides no precise assurance that the period for re-allocation would not exceed a period of two months.

First, the re-allocation of cases, provided for in paragraph 18 of that notice, must 'normally' take place within a period of two months, with the result that that time limit is not mandatory. In any event, that time-period relates to cases where case re-allocation issues arise between competition authorities, which is not so in the present case, given that the Commission initiated investigation proceedings at the request of the Federal Cartel Office.

Second, as regards paragraph 19 of the cooperation notice, according to which re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the case change materially during the course of the proceedings, the Court clarifies that the expression 'facts known about the case' cannot be interpreted as covering only the facts which are relevant for assessing whether an infringement of the competition rules has taken place. It follows from the context in which that paragraph occurs [144] that, at the end of the initial allocation period of two months, the Commission may justify initiating investigation proceedings in various situations which go beyond the facts which are relevant for assessing whether an infringement has taken place. Consequently, that expression must be interpreted as covering any relevant fact which comes to light during the proceedings.

Continuing its analysis, the Court also rejects the plea alleging an infringement of the principle of subsidiarity. Thus, while Regulation No 1/2003 [145] establishes, in accordance with that principle, a wider association of national competition authorities, the Commission retains a leading role in investigating and taking action against infringements. Accordingly, Article 11(6) of Regulation No 1/2003 provides that, subject only to consultation of the national authority concerned, the Commission retains the option of initiating investigation proceedings, even where a national authority is already acting on the case. It follows that the Commission, which initiated investigation proceedings at the request of the German national competition authority itself, did indeed comply with the condition laid down by that provision and did not therefore undermine the prerogatives of the Member State concerned.

As regards the Commission's counterclaim, the Court begins by dismissing the plea of inadmissibility raised by the applicants, pointing out that although the exercise of its unlimited jurisdiction to cancel, reduce or increase the amount of a fine imposed by the Commission is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from applying to have that amount increased.

As regards the substance of that counterclaim, the Court notes, in the first place, that the Commission failed to demonstrate that during the settlement procedure the applicants had acknowledged its competence in place of the national competition authority's competence, or even that it could reasonably suppose that the applicants would not challenge that competence.

The Commission has not provided any evidence which would establish the alleged recognition of its competence by the applicants. It was only at the hearing that the Commission stated that it was prepared to provide, in the context of a measure of inquiry ordered by the Court, the settlement submission which contained indications that that competence was acknowledged. The Commission has provided no valid justification for its delay in taking its action, nor has it explained why such a

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144 See, to that effect, paragraph 54 of the cooperation notice.

145 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

measure of inquiry was necessary in the present case, confining itself to a general reference to alleged reasons of confidentiality or sensitivity, whereas the documents it offered to produce came from the applicants themselves.

Furthermore, it cannot be inferred from the information contained in the settlement submission, in particular the applicants' acknowledgement of their liability and the indication of the maximum amount of the fine that they would be prepared to accept, that they had acknowledged the Commission's competence to deal with the case, since the acknowledgement of that competence was not provided for in the settlement notice, unlike the factors mentioned above. In addition, the Court of Justice has previously held, in circumstances similar to those of the present case, [146] that the competence of the authority which adopted the measure is subject to review by the EU Courts, which are to assess whether anything unlawful occurred.

In the second place, the increase in the fine cannot be justified either by the alleged loss of procedural gains or by the alleged additional administrative burden caused by the present action having been brought. The procedural gains which the Commission derived from the settlement procedure remain vested, irrespective of the present action being brought. The mobilisation of Commission resources for the purposes of defending the contested decision before the Court is an integral feature of any judicial proceedings and does not undermine those gains.

5.2. STATE AID

Judgment of the General Court (Second Chamber, Extended Composition), 2 October 2024, European Food and Others v Commission, T-624/15 RENV, T-694/15 RENV and T-704/15 RENV

Link to the judgment as published in extract form

State aid – Articles 107 and 108 TFEU – Bilateral investment treaty – Arbitration clause – Romania – Accession to the European Union – Repeal of a tax incentives scheme prior to accession – Arbitral award granting payment of damages after accession – Decision declaring the aid incompatible with the internal market and ordering its recovery – First paragraph of Article 351 TFEU – Obligation to state reasons – Concept of 'State aid' – Advantage – Selective nature – Whether imputable to the State – Whether compatible with the internal market – Aid facilitating the economic development of disadvantaged regions – Recovery – Concept of 'economic unit' – Legitimate expectations – Right to be heard

The General Court, hearing the cases on referral back from the Court of Justice, dismisses the actions brought against the Commission decision [147] classifying as State aid that is incompatible with the internal market the payment by Romania of damages to Swedish investors pursuant to an arbitral award. In that context, it clarifies the scope of the first paragraph of Article 351 TFEU, according to which the rights and obligations arising from agreements concluded between a Member State before its accession to the European Union and one or more third countries are not affected by the provisions of the Treaties. The General Court also analyses the issue of identifying the beneficiaries of an aid measure in the case of a single economic unit.

On 29 May 2002, the Kingdom of Sweden and Romania concluded a Bilateral Investment Treaty on the Promotion and Reciprocal Protection of Investments ('the BIT'), providing for protections when the investors of one country invested in the other country, including for investments entered into prior to the entry into force of the BIT. The BIT provided also that any dispute between investors and the

146 Order of 29 January 2020, Silgan Closures and Silgan Holdings v Commission (C-418/19 P, EU:C:2020:43, paragraphs 63 and 64).

147 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (OJ 2015 L 232, p. 43; 'the contested decision').

signatory countries would be settled by an arbitral tribunal under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), in accordance with the ICSID Convention. [148]

In 2005, in the context of the negotiations for Romania's accession to the European Union, the Romanian Government repealed a national tax incentives scheme established in 1998 for the benefit of certain investors in disadvantaged regions ('the tax incentives scheme').

Several companies belonging to the European Food and Drinks Group (EFDG), whose majority shareholders are the Swedish citizens Mr Ioan Micula and Mr Viorel Micula, had previously made investments in a disadvantaged area covered by the tax incentives scheme. Claiming that, by repealing that scheme, Romania had breached its obligation to ensure fair and equitable treatment of their investments in accordance with the BIT, Mr Ioan Micula and Mr Viorel Micula as well as three of those companies (together, 'the arbitration applicants') requested the establishment of an arbitral tribunal, with a view to obtaining compensation for the damage caused. By an arbitral award of 11 December 2013, that tribunal ordered Romania to pay the arbitration applicants damages in the amount of approximately EUR 178 million.

On 1 October 2014, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU in respect of the partial execution of the arbitral award by Romania that took place in early 2014 as well as in respect of any further implementation or execution of that award.

By the contested decision, adopted on 30 March 2015, the Commission found that the abovementioned compensation had been paid for the benefit of the single economic unit comprising Mr Ioan Micula and Mr Viorel Micula and the group of companies owned by them. It classified that compensation as State aid incompatible with the internal market, prohibited its implementation and ordered the recovery of sums already paid.

Hearing several actions, the General Court annulled that decision [149] on the ground, in essence, that the Commission had retroactively exercised its powers in respect of facts predating Romania's accession to the European Union on 1 January 2007.

On appeal, the Court of Justice, sitting as the Grand Chamber, set aside that judgment and referred the case back to the General Court [150] for it to adjudicate on the pleas and arguments raised before it on which the Court of Justice had not given a ruling.

Findings of the Court

As regards the merits of the actions, the General Court rules, in the first place, that the contested decision did not infringe Article 351 TFEU, pursuant to which the rights and obligations arising from an agreement concluded between a Member State prior to its accession and third countries are not affected by the provisions of the Treaties.

Article 351 TFEU is not applicable to bilateral treaties concluded between Member States. In the present case, the General Court states that, since Romania's accession to the European Union, the BIT must be regarded as a treaty concerning two Member States. In those circumstances, on the date on which the aid was granted, namely the day of delivery of the arbitral award, the BIT cannot be regarded as an agreement giving rise, within the meaning of Article 351 TFEU, to rights in favour of third countries and obligations on the part of that Member State liable to be affected by the application, pursuant to the contested decision, of Articles 107 and 108 TFEU. The fact that the repeal of the tax incentives scheme or the facts giving rise to Romania's liability took place before its accession to the European Union does not call that interpretation into question, since the right to receive the compensation at issue was granted by the arbitral award, after Romania's accession to the European Union.

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148 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded on 18 March 1965.

149 Arrêt du 18 June 2019, European Food and Others v Commission (T-624/15, T-694/15 and T-704/15, EU:T:2019:423).

150 Judgment of 25 January 2022, Commission v European Food and Others (C638/19 P, EU:C:2022:50; 'the judgment on appeal').

The General Court states, furthermore, that the system of judicial remedies provided for by the EU and FEU Treaties replaced the arbitration procedure provided for by the BIT with effect from Romania's accession to the European Union on 1 January 2007. The arbitral tribunal in question in the present case does not form part of the EU judicial system, with the result that the arbitral award at issue, which it adopted after Romania's accession to the European Union, cannot therefore produce any effects or be executed with a view to paying the compensation granted by that award.

It follows that the ICSID Convention, which provides for the obligation of the parties to an award to abide by it and for the obligation of each Contracting State to recognise its binding force, created neither obligations on the part of Romania falling within the scope of Article 351 TFEU nor corresponding rights in favour of third counties.

The General Court adds that, in so far as the ICSID Convention is intended to govern bilateral relations between the contracting parties in an analogous way to a bilateral treaty, it cannot be interpreted as having created rights, within the meaning of the first paragraph of Article 351, in favour of third States signatory to that convention that correspond to obligations on the part of Romania to execute the arbitral award.

In the second place, the General Court rejects the plea in law alleging that the Commission infringed Article 107(1) TFEU by finding that the conditions for the existence of incompatible State aid were met.

As regards, first, the existence of an economic advantage, the General Court considers that the Commission did not err in identifying the aid measure at issue as consisting in the payment of the compensation of approximately EUR 178 million and not in the arbitral award granting that compensation. That finding is not called into question by the fact that, in the judgment on appeal, the Court of Justice observed that the right to compensation was granted to the arbitration applicants only by the arbitral award.

In so doing, the Court of Justice ruled only on the Commission's competence ratione temporis to adopt the contested decision under Article 108 TFEU and not on the classification as State aid within the meaning of Article 107(1) TFEU of the payment of the sums at issue.

After noting that the arbitral award compensated the arbitration applicants for the financial consequences of the repeal of the tax incentives scheme and not, as those applicants maintained, for a failure on the part of Romania to ensure fair and equitable treatment of their investments, in breach of the BIT, the General Court rejects also the argument that compensation for indirect consequences of the repeal of the tax incentives scheme cannot be classified as an advantage for the purposes of Article 107(1) TFEU.

The General Court considers that the case-law relied on by the applicants, according to which the recovery of unlawful aid with a view to re-establishing the status quo ante does not imply the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage procured by that aid, does not apply in the present case. The contested decision orders the recovery of the compensation granted pursuant to the arbitral award, and not the recovery of a hypothetical advantage resulting from the recipient exploiting it. Moreover, an action for damages cannot lead to circumvention of the effective application of the rules on State aid. Thus, damages paid on account of the repeal of an aid scheme cannot escape classification as State aid where those damages meet the definition of an economic advantage for the purposes of those rules.

Lastly, contrary to what the applicants have argued, the case-law arising from the judgment in Asteris, [151] according to which State aid is fundamentally different in its legal nature from damages, does not preclude the compensation obtained by the applicants in the present case from being classified as an advantage for the purposes of Article 107(1) TFEU. Since the arbitral award could not have produced effects vis-à-vis the applicants in the EU judicial system as from Romania's accession to the European Union, the Commission was entitled to analyse the existence of State aid irrespective of the legal classification adopted by the arbitral tribunal. It concluded, without being refuted by the applicants, that the measure at issue constituted an economic advantage conferred as compensation

[151] Judgment of 27 September 1988, Asteris and Others (106/87 to 120/87, EU:C:1988:457).

for the consequences of the repeal of the tax incentives scheme. Since the payment of the sums at issue did not have the effect of compensating for damage resulting from allegedly wrongful conduct on the part of Romania, the judgment in Asteris did not preclude that measure from being classified as State aid.

As regards, second, the imputability of the aid measure at issue, the General Court rejects the applicants' argument that that measure was not imputable to Romania on the ground that that State was under an obligation, vis-à-vis the other signatories of the ICSID Convention, to execute the arbitral award. On that point, the General Court reiterates that, since Romania is subject to the judicial system of the European Union with effect from its accession to the European Union, it was required to set aside the arbitral award and the applicants cannot rely on an alleged obligation on the part of Romania to execute that award.

In the third place, the General Court holds that the Commission was entitled to designate as the beneficiary of the aid measure the single economic unit comprising Mr Ioan Micula and Mr Viorel Micula and the group of companies owned by them.

In that regard, it recalls, first of all, that where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking, in particular where the beneficiary of State aid needs to be identified.

In that respect, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking, and must therefore itself, in that respect, be regarded as an undertaking within the meaning of Article 107(1) TFEU.

In the present case, the General Court observes that Mr Ioan Micula and Mr Viorel Micula were involved in the economic activities of the arbitration applicant undertakings, intervening directly or indirectly in their management. The fact that the arbitral tribunal granted collective compensation to the arbitration applicants also supports the finding that there was no functional and organisational autonomy on the part of those undertakings vis-à-vis Mr Ioan Micula and Mr Viorel Micula. Moreover, it is apparent from the arbitral award that those brothers were not compensated solely in their capacity as shareholders of the undertakings in question.

Furthermore, the fact that the Commission did not consider that Mr Ioan Micula and Mr Viorel Micula should each also be regarded as undertakings has no bearing on the classification of the beneficiaries of the aid measure at issue. The contested decision finds that they formed, together with all of the applicant undertakings, a single economic unit, which constituted the undertaking in question for the purposes of the application of the State aid rules.

The General Court finds that the Commission also did not err in designating certain undertakings which were not parties to the arbitration proceedings, and which had not therefore received any compensation, as beneficiaries of the aid measure, since those undertakings were controlled by Mr Ioan Micula and Mr Viorel Micula and all the undertakings controlled by those shareholders form a single group which constitutes a coherent whole, from both a financial and industrial point of view.

Moreover, in view of the functions relating to direction and financial support exercised by Mr Ioan Micula and Mr Viorel Micula, the sums paid to the arbitration applicants could benefit, directly or indirectly, undertakings which were not parties to the arbitration proceedings.

In the last place, the General Court considers that the Commission did not err in law in recovering the aid.

On that point, the applicants claimed, inter alia, that, in accordance with the case-law, [152] the sums at issue could not be recovered from the abovementioned single economic unit, but only from the undertakings which had actually benefited from those sums.

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[152] Judgments of 11 May 2005, Saxonia Edelmetalle and ZEMAG v Commission (T111/01 and T133/01, EU:T:2005:166, paragraph 113), and of 19 October 2005, Freistaat Thüringen v Commission (T318/00, EU:T:2005:363, paragraph 324).

The General Court finds, first, that the judgments cited by the applicants did not concern recovery in respect of an aid measure from undertakings forming part of a single economic unit, as in the present case. It recalls, second, that the decisive criterion for the application of EU competition law is the existence of unity in conduct on the market. By their functions relating to direction and financial support, Mr Ioan Micula and Mr Viorel Micula may extend the benefit of the aid measure at issue to all the undertakings in the EFDG. Recovery in respect of that aid measure from the abovementioned single economic unit thus enables the situation prior to the payment of the aid to be restored by eliminating the ensuing competitive advantage for that unit.

Having rejected all the applicants' pleas in law on the merits, the General Court dismisses the actions in their entirety.

6. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the Court of Justice (First Chamber), 4 October 2024, Aeris Invest v Commission and SRB, C-535/22 P

Appeal – Economic and monetary policy – Banking Union – Regulation (EU) No 806/2014 – Single Resolution Mechanism for credit institutions and certain investment firms – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption of a resolution scheme in respect of Banco Popular Español SA – Article 18(1) – Conditions for the adoption of a resolution scheme – Obligations of the Single Resolution Board (SRB) – Duty of diligence – Obligation to state reasons – Article 88 – Obligation of confidentiality – Article 14 – Resolution objectives – Sale of business of the entity concerned – Conditions of sale under which an offer may be accepted – Charter of Fundamental Rights of the European Union – Article 17 – Shareholders' right to property – Validity of Regulation No 806/2014

Hearing an appeal brought against the judgment in Aeris Invest v Commission and SRB, [153] by which the General Court dismissed an action for annulment of the decision of the Single Resolution Board (SRB) concerning the adoption of a resolution scheme in respect of Banco Popular Español, SA [154] ('Banco Popular') and of Decision 2017/1246 endorsing that scheme, [155] the Court of Justice, in dismissing the appeal, provides clarification on, inter alia, the obligation to state reasons as regards the right of access to the full versions of the resolution scheme at issue and the preparatory valuations, including the confidential information contained in those documents, on the validity of certain provisions of Regulation No 806/2014 [156] ('the SRM Regulation') in the light of the right to property of the shareholders and creditors of an institution under resolution, and on the irregularities allegedly vitiating the resolution tool (sale of business) applied by the SRB.

The appellant, Aeris Invest Sàrl, a legal person under Luxembourg law, was a shareholder in Banco Popular before a resolution scheme was adopted in respect of that institution.

Prior to the adoption of the resolution scheme, Banco Popular was valued. That valuation comprised two reports which are annexed to the resolution scheme: the first valuation ('valuation 1'), dated 5 June 2017 and prepared by the SRB, and the second valuation ('valuation 2'), dated 6 June 2017, prepared by an independent expert. The purpose of valuation 2 was, inter alia, to estimate the value of Banco Popular's assets and liabilities, to inform the decision to be taken on the shares and

153 Judgment of 1 June 2022, Aeris Invest v Commission and SRB (T628/17, EU:T:2022:315).

154 Decision SRB/EES/2017/08 of the Single Resolution Board (SRB) in its Executive Session of 7 June 2017 ('the resolution scheme at issue').

155 Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español SA (OJ 2017 L 178, p. 15).

156 Second subparagraph of Article 88(1) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

instruments of ownership to be transferred, and to enable the SRB to determine what constituted commercial terms for the purposes of the sale of business tool. Also on 6 June 2017, the European Central Bank (ECB), after consulting the SRB, carried out an assessment as to whether Banco Popular was failing or was likely to fail, in which it took the view that, given the liquidity problems which Banco Popular was facing, the latter would probably be unable, in the near future, to pay its debts or other liabilities as they fell due. On the same day, Banco Popular's Board of Directors informed the ECB that it had reached the conclusion that the institution was likely to fail.

At the same time, on 3 June 2017, the SRB adopted Decision SRB/EES/2017/06, addressed to the Fondo de Reestructuración Ordenada Bancaria (Fund for Orderly Bank Restructuring) ('the FROB'), concerning the marketing of Banco Popular, by which the SRB approved the immediate launching of the sale process for Banco Popular and set out the marketing requirements. In addition, it stated that the five potential purchasers in the private sale process had to be invited to submit an offer. Of the five potential purchasers, only two remained and, after signing a non-disclosure agreement, were given access to the virtual data room. On 6 June 2017, the FROB issued a letter containing information on the sale process and setting the deadline for the submission of bids at midnight on 6 June 2017. One of the two remaining potential purchasers of Banco Popular informed the FROB at that time that it would not be making a bid.

By letter of 7 June 2017, the FROB informed the SRB that Banco Santander SA had submitted a concrete bid of EUR 1 for shares in Banco Popular, and that it had selected Banco Santander as awardee of the competitive sale process of Banco Popular. It then proposed that the SRB designate Banco Santander as buyer in the SRB's decision on the adoption of a resolution scheme in respect of Banco Popular. In the resolution scheme for Banco Popular, the SRB considered that that institution satisfied the conditions for the adoption of a resolution action, that is to say that it was failing or was likely to fail, that there were no alternative measures that could prevent its failure within a reasonable time frame, and that a resolution action in the form of a sale of business tool was necessary in the public interest. The SRB exercised its power to write down and convert Banco Popular's capital instruments and ordered that the resulting new shares were to be transferred to Banco Santander for the price of EUR 1.

Findings of the Court

As a preliminary point, the Court recalls [157] that, unlike the European Commission endorsement decision at issue in the present case, the resolution scheme at issue does not constitute a challengeable act against which an action for annulment may be brought.[158] That said, in an action for annulment brought against that endorsement decision, it is open to the natural or legal persons concerned to plead the illegality of the resolution scheme, which is capable of guaranteeing them sufficient judicial protection. Moreover, by such an endorsement, which gives that scheme binding legal effects, the Commission is deemed to endorse the information and grounds contained in that scheme, with the result that it must, if necessary, answer to the EU judicature.

In the first place, as regards, in the light of the obligation to state reasons, the right of access to the full versions of the resolution scheme at issue and the preparatory valuations, including the confidential information contained in those documents, after citing its case-law on the obligation to state reasons and the importance of the statement of reasons required in order to carry out an effective judicial review, the Court recalls that, as regards, in particular, notifying reasons to persons other than the addressee of a measure, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the general principle of the right to the protection of business secrets, not to disclose to the competitors of a private operator confidential information which that operator has provided. Although such a measure may, in the light of the obligation to respect business secrecy, be sufficiently reasoned without including, inter alia, all the figures on which that reasoning is based, the statement of reasons must nevertheless disclose in a clear and unequivocal fashion that reasoning and the methodology used.

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157 Judgment of 18 June 2024, Commission v SRB (C551/22 P, EU:C:2024:000, paragraphs 102 and 103).

158 For the purposes of the fourth paragraph of Article 263 TFEU.

Under the SRM Regulation, first of all, compliance with the requirements of professional secrecy [159] prohibits the SRB from disclosing information which is subject to those requirements to another public or private entity, except where such disclosure is due for the purpose of legal proceedings. Furthermore, persons who are the subject of the SRB's decisions are entitled to have access to the SRB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The SRM Regulation expressly states that the right of access to the file does not extend to confidential information or internal preparatory documents of the SRB. Thus, the Court of Justice considers that the General Court was fully entitled to find that, since the appellant was not the addressee of the resolution scheme at issue addressed to the FROB, it could not, in any event, be given access to the entire resolution scheme.

Next, the Court of Justice notes that the General Court found that no argument had been put forward to show that the confidentiality claim in respect of the redacted information in the resolution scheme at issue was contrary to the principle of transparency. Thus, the Court of Justice takes the view that the General Court did not err in law in holding that the case-law referred to above, as regards notifying reasons to persons other than the addressee of a measure, applies by analogy to confidential information held by the SRB, [160] or in finding that a third party concerned by such a scheme is not always entitled to obtain the full version of that scheme.

Lastly, the Court adds that the confidentiality required under the SRM Regulation is intended not only to protect the specific interests of the undertakings directly concerned, but also to ensure that the SRB is able to carry out effectively its duties under that regulation, in particular the power to request credit institutions to provide it with all the information necessary for the performance of its tasks, without being bound by the requirements concerning the preservation of the professional secrecy of those institutions. The absence of confidence in maintaining the confidentiality of that information is liable to compromise the smooth transmission of that confidential information.

In the second place, as regards respect for the right to property of shareholders and creditors during a resolution procedure, first of all, the Court recalls that, in accordance with Article 52(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, [161] the meaning and scope of those rights are to be the same as those laid down by that convention. However, that provision does not prevent EU law from providing more extensive protection, and therefore, for the purposes of interpreting Article 17 of the Charter, the Court considers that the case-law of the European Court of Human Rights relating to Article 1 of Additional Protocol No 1 to the ECHR, which enshrines the protection of the right to property, must be taken into account as the minimum threshold of protection.

Next, the Court notes that Article 17(1) of the Charter contains three distinct rules, of which the first gives concrete expression to the principle of respect for the right to property, the second refers to a person being deprived of that right and subjects that deprivation to certain conditions, and the third recognises States' power, inter alia, to regulate the use of property in so far as is necessary for the general interest. As regards, more specifically, a deprivation of property, the Court recalls that, according to its case-law and that of the European Court of Human Rights, in order to establish whether there has been such a deprivation of property, it is necessary to examine not only whether there has been a formal dispossession or expropriation of property, but also whether the situation at issue amounted to de facto expropriation. In the present case, the resolution action in question [162] consists of the write-down and/or conversion of capital instruments, without, however, involving a formal dispossession or expropriation of the instruments concerned.

As regards the question whether a substantial or even total write-down of capital instruments constitutes a de facto expropriation, the Court recalls that the exercise of the power to write down

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159 Enshrined in Article 339 TFEU and clarified, inter alia, in the second subparagraph of Article 88(1) of the SRM Regulation.

160 In accordance with the second subparagraph of Article 88(1) of the SRM Regulation.

161 Signed in Rome on 4 November 1950.

162 Article 22(1) read in conjunction with Article 21 of the SRM Regulation.

and convert capital instruments [163] presupposes that the conditions for the adoption of a resolution scheme are satisfied, [164] namely, first, that the entity in question is failing or is likely to fail, secondly, that there is no reasonable prospect that any alternative private sector measures or supervisory action would prevent its failure within a reasonable timeframe and, thirdly, that adopting a resolution action is necessary in the public interest. Furthermore, the Court states that it follows from the SRM Regulation [165] that, where the first two conditions are met, the relevant entity is to be wound up in an orderly manner in accordance with the applicable national law if the resolution of that entity is not in the public interest. It is thus apparent that a resolution scheme should be adopted only in the event of an exceptionally serious liquidity crisis which threatens the very existence of the entity in question, and to which there is no solution other than resolution or liquidation under normal insolvency proceedings.

In those circumstances, the Court considers that the loss of value of capital instruments does not arise from the exercise of the power to write down and convert capital instruments, but from the fact that the credit institution is failing or is at risk of failing. Therefore, it follows that a resolution action adopted in accordance with the SRM Regulation does not constitute a deprivation of the right to property, [166] which must, inter alia, satisfy the conditions relating to the existence of a public interest and the payment of fair compensation in good time, but provides a basis for regulating the use of property, for the purposes of the third sentence of Article 17(1) of the Charter.

Lastly, the Court recalls that, in accordance with that provision, such use may be regulated by law in so far as is necessary for the general interest. Furthermore, according to the case-law of the Court, the right to property guaranteed by the Charter is not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union. Thus, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and the principle of proportionality. Limitations may be imposed on those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.[167] Indeed, the second subparagraph of Article 5(4) TEU specifically requires the institutions of the Union to apply the same principle of proportionality when exercising a power conferred on them.

However, the Court has recognised that, in the exercise of the powers conferred on it, the EU legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations. That is the case as regards the SRM Regulation.

As regards the complaint alleging infringement of the principle of proportionality, the appellant claimed, in essence, that the write-down or conversion of capital instruments does not resolve liquidity problems, that there are less restrictive measures for that purpose and that, in the absence of adequate compensation, such a measure is not proportionate. The Court holds that this complaint is based on a manifestly incorrect reading of the SRM Regulation.

As regards the appropriateness of such a measure, the Court recalls that the SRM Regulation [168] provides that the power to write down and convert capital instruments may be exercised not in an automatic manner and in all circumstances, but only where the resolution tool chosen by the SRB would otherwise result in losses being borne by creditors or their claims being converted, therefore allowing the circumstances of each case to be taken into account. In particular, that regulation [169]

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163 Article 22(2) read in conjunction with Article 18(6)(b) of the SRM Regulation.

164 Article 18(1)(a) to (c) of the SRM Regulation.

165 Article 18(5) and (8) of the SRM Regulation.

166 Within the meaning of the second sentence of Article 17(1) of the Charter.

167 In accordance with Article 52(1) of the Charter.

168 Article 22(1) of the SRM Regulation.

169 Article 22(1) of the SRM Regulation.

provides for a write-down and/or conversion of capital instruments, not to resolve the liquidity problems of the entity concerned, but to avoid, where possible, the application of the resolution tool chosen by the SRB resulting in losses being borne by the creditors of that entity or in a conversion. The write-down and conversion measures taken by the SRB are an application of the principle [170] that the shareholders are to bear first losses.

As regards the criterion of necessity, the Court recalls that, according to the SRM Regulation, [171] the adoption of a resolution scheme and, therefore, the exercise of the power to write down and convert capital instruments presuppose that there is no reasonable prospect that any alternative private sector measures or supervisory action would prevent the failure of the entity within a reasonable timeframe. In so far as that power to write down capital instruments can be exercised only in the absence of alternative measures, the alleged existence of such alternative measures does not call into question the need to write down and convert capital instruments.

As regards proportionality, the Court holds that, while the failure or likely failure of a credit institution may [172] be caused both by insolvency and by a liquidity crisis of the credit institution concerned, the resulting failure or likely failure of that institution poses the same risk to financial stability in the European Union.

In those circumstances, first of all, the General Court was right to rely on the case-law arising from the judgment in Kotnik and Others [173] in order to hold that, in the case of an entity which is the subject of a resolution action, the application of the principle that the shareholders are to bear first losses [174] and the exercise of the power to write down and convert capital instruments [175] are the consequence of the fact that the shareholders of an entity must bear the risks inherent in their investments and the economic consequences of the resolution of the entity that is failing or likely to fail.

That assessment is not called into question by the argument that a solvent bank exposed to liquidity problems is unlikely to face losses that will have to be borne by shareholders. The SRM Regulation provides that resolution tools are to be applied, in accordance with the principles governing resolution set out in that regulation, [176] in order to achieve the resolution objectives, [177] which do not include the objective of covering the losses of the credit institution concerned. Thus, the write-down and/or conversion of capital instruments, which contributes to the achievement of those objectives, is not intended to cover the losses incurred by the entity concerned, and therefore the application thereof does not presuppose the existence of such losses.

Next, as regards possible compensation for shareholders and creditors, [178] since the exercise of the power to write down and convert capital instruments does not constitute a deprivation of property, it is not subject to fair compensation being paid in good time, [179] even though the SRM Regulation provides that compensation may be paid to shareholders where appropriate. [180] According to the Court, such compensation may contribute to the proportionality of the write-down and/or conversion of capital instruments.

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170 Article 15(1)(a) of the SRM Regulation.

171 Article 22(1) of the SRM Regulation, read in conjunction with point (b) of the first subparagraph of Article 18(1) of that regulation.

172 As stated in points (b) and (c) of the first subparagraph of Article 18(4) of the SRM Regulation.

173 Judgment of 19 July 2016, Kotnik and Others (C526/14, EU:C:2016:570, paragraph 74).

174 Article 15(1)(a) of the SRM Regulation.

175 Article 22(1) of the SRM Regulation.

176 Article 15 of the SRM Regulation.

177 Article 14 of the SRM Regulation.

178 As provided for in Article 20(16) and Article 76(1)(e) of the SRM Regulation.

179 Second sentence of Article 17(1) of the Charter.

180 Article 20(16) and Article 76(1)(e) of the SRM Regulation.

Lastly, the Court of Justice holds that the General Court was right to consider that the application of the SRM Regulation [181] presupposes that the conditions for the adoption of a resolution action are met, without ruling that the interference with the right to property resulting from the write-down of capital instruments is justified provided that those conditions are met.

In the third place, as regards the alleged irregularities which vitiated the sale process in respect of Banco Popular, first of all, the Court points out that the aim of maximising the sale price, relied on by the appellant, is not among the resolution objectives set out in the SRM Regulation. [182] Indeed, when pursuing those objectives, the SRB and the Commission must seek to minimise the cost of resolution and avoid destruction of value, and they only seek to do so unless necessary to achieve the resolution objectives. The Court adds that, by providing that, in the context of the application of the sale of business tool, the proposed marketing is to aim at maximising, as far as possible, the sale price, Directive 2014/59 [183] merely identifies a principle which must specifically govern the application of the sale of business tool. Accordingly, the Court of Justice considers that the General Court was fully entitled to hold that maximising the sale price does not constitute, as such, a resolution objective within the meaning of the SRM Regulation.

Next, as regards the SRB's acceptance of Banco Santander's offer after the expiry of the time limit set in the letter of procedure, the Court recalls that, under the SRM Regulation, [184] the SRB is to apply the sale of business tool without complying with the marketing requirements when it determines that compliance with those requirements would be likely to undermine one or more of the resolution objectives. Thus, the fact that it needs to achieve those objectives can justify non-compliance with those marketing requirements, which include a time limit for the submission of bids.

That is the case, in particular, where the Board considers that there is a material threat to financial stability in the Member States arising from or aggravated by the failure or likely failure of the institution under resolution, or that compliance with those requirements would be likely to undermine the effectiveness of the sale of business tool of the institution concerned in addressing that threat or achieving the objective of avoiding significant adverse effects on that financial stability.

The fact that the achievement of those objectives requires non-compliance with the marketing requirements means it cannot be held that compliance with the marketing requirements is necessary in the light of the resolution objectives, since the SRB and the Commission must only seek to minimise the cost of resolution and avoid destruction of value unless necessary to achieve the resolution objectives. Furthermore, it is also apparent from Directive 2014/59 [185] that the marketing must aim at maximising the sale price only to the extent possible, which means that it is also necessary to take into account the other criteria for carrying out the marketing set out in that directive [186] and, in particular, the need to effect a rapid resolution action. In any event, the measures proposed to maximise the sale price must not run counter to the resolution objectives. [187]

Lastly, the Court adds that the SRB and the Commission have a certain margin of discretion because of the technical choices and the complex forecasts and appraisals to be made when adopting a resolution scheme. Thus, the judicial review of the validity of the reasons for a resolution scheme is intended solely to check that that decision is not based on materially incorrect facts or vitiated by a manifest error of assessment or misuse of powers. In the present case, first, the timetable for the sale process set out in the FROB's letter of 6 June 2017 was intended to enable all formalities to be

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181 Articles 15 and 22 of the SRM Regulation.

182 First and second subparagraphs of Article 14(2) of the SRM Regulation.

183 Point (f) of the first subparagraph of Article 39(2) of Directive 2014/59.

184 Article 24(3) of the SRM Regulation.

185 Point (f) of the first subparagraph of Article 39(2) of 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).

186 Article 39(2) of Directive 2014/59.

187 As listed in Article 31(2) of Directive 2014/59 and, in identical terms, in Article 14(2) of the SRM Regulation.

concluded before the markets opened, in order inter alia to avoid a break in Banco Popular's critical functions. Secondly, the FROB accepted Banco Santander's offer when it appeared certain that none of the other institutions invited to participate in the sale process would be making a bid. Thirdly, the SRB had considered that, in those circumstances, it was prudent to accept the conditions of the only institution to have made a bid and thus to prevent uncontrolled insolvency of Banco Popular which could, inter alia, have undermined its critical functions. The appellant does not claim that those findings were vitiated by a manifest error of assessment.

Therefore, the Court of Justice considers that the General Court did not err in law in holding that the SRB could accept Banco Santander's offer, even though it was submitted after the expiry of the time limit set in the FROB's letter of 6 June 2017.

7. CONSUMER PROTECTION: PROVISION OF FOOD INFORMATION TO CONSUMERS

Judgment of the Court of Justice (Second Chamber), 4 October 2024, Protéines France and Others, C-438/23

Link to the full text of the judgment

Reference for a preliminary ruling – Regulation (EU) No 1169/2011 – Provision of food information to consumers – Article 2(2)(n) to (p), and Articles 7, 9 and 17 – Fair practices concerning the names of foods – Legal names, customary names and descriptive names – Substitution of components or ingredients of a food – Article 38(1) – Matters specifically harmonised – National measures prohibiting the use of meat-related names to designate a product containing vegetable proteins

Ruling on a request for a preliminary ruling from the Conseil d'État (Council of State, France), the Court of Justice develops its case-law relating to the concept of 'specific harmonisation' for the purposes of Article 38(1) of Regulation No 1169/2011, [188] which, in principle, precludes Member States from adopting national measures.

Protéines France, which represents the interests of undertakings active in the French market for vegetable proteins, the Union végétarienne européenne (EVU), the Association végétarienne de France (AVF), which promote vegetarianism, and Beyond Meat, which manufactures and markets vegetable protein-based products, have brought actions before the Conseil d'État (Council of State) seeking the annulment of the decree ('the decree at issue') on the use of certain names to designate foods containing vegetable proteins. [189]

By their actions, they argued that the decree at issue, which prohibits the use of names such as 'steak' or 'sausage' for the purpose of designating processed products containing vegetable proteins, without or even with the inclusion of additional indications, infringed a number of provisions of Regulation No 1169/2011.

In the course of the proceedings before the Court, the French authorities adopted a new decree [190] which provides for the repeal of the decree at issue. Following a request for information addressed to

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188 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ 2011 L 304, p. 18).

189 Decree No 2022-947 of 29 June 2022 on the use of certain names to designate foods containing vegetable proteins (JORF of 30 June 2022, Text No 3).

190 Decree No 2024-144 of 26 February 2024 on the use of certain names to designate foods containing vegetable proteins (JORF of 27 February 2024, Text No 15).

it by the Court, the Conseil d'État (Council of State) confirmed that the answer to the questions which it referred for a preliminary ruling remained decisive for the outcome of the dispute pending before it.

Findings of the Court

As a preliminary point, in the light of the information provided by the referring court, according to which, inter alia, the scope of those two decrees is identical in part and a number of applicants in the main proceedings have demonstrated their intention to challenge the second decree as well, the Court declares admissible the request for a preliminary ruling, which has become neither devoid of purpose nor hypothetical.

As regards the substance, with respect to the first and second questions submitted by the referring court, in the first place, the Court reads the provisions of Article 7(1), (2) and (4), Article 9(1)(a), Article 17(1) and (5) and point 4 of Part A of Annex VI to Regulation No 1169/2011 together and summarises their content as follows. First, foods must bear a name. Second, that name must be a legal name or, in the absence of such a name, a customary name or, failing that, a descriptive name. Third, that name must be accurate, clear and easy to understand for the consumer. Fourth, that name must not mislead consumers, particularly as to the characteristics of the food concerned, which include its nature and composition, and as to the substitution of components naturally present or ingredients normally used with different components or different ingredients. Fifth, such requirements must be complied with when marketing and promoting any food.

In the second place, as regards legal names more specifically, the Court notes that such names may be prescribed in provisions of EU law or, in the absence thereof, in national provisions.[191] In the present case, the Court finds that there is no provision of EU law that requires the use of certain legal names for vegetable protein-based products or that prescribes the legal names applicable to products solely on account of the fact that they are defined as being of animal origin, without other indications. While observing that it is apparent from the file before it that the French authorities have rejected the premiss that the decree at issue lays down a legal name, the Court points out that the question whether those authorities adopted such a name must be assessed objectively by the referring court, to which the Court may nevertheless provide the points of interpretation of EU law which the referring court requires for that purpose.

In that regard, the Court finds that, in order to designate a food, legal names must be 'prescribed' or 'provided for'. Thus, the adoption of a legal name consists in associating a specific expression with a particular food.

The adoption of measures providing that foods must comply with certain conditions, inter alia as regards their composition, in order to be designated by terms used as a legal name cannot be regarded as being equivalent to the adoption of measures prohibiting the use of certain terms, that are not legally defined therein, for the purpose of designating foods with certain characteristics, inter alia as regards their composition.

The first category of measures makes it possible to ensure the protection of the consumer, who must be able to proceed on the assumption that a food designated by specific terms constituting a given legal name complies with the conditions specifically laid down regarding the use of that name. By contrast, the second category of measures does not limit the use of terms that have been precisely defined, as a legal name, by an authority to the designation of foods with specific characteristics.

In the present case, EU law does not lay down any rule providing that the use of legal names containing terms derived from the butchery, charcuterie and fish sectors, which are covered by the decree at issue, is limited to foods defined as being of animal origin. [192] Furthermore, the Court observes that this also appears to be the case under French law.

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191 Article 2(2)(n) of Regulation No 1169/2011.

192 That finding also applies to the terms set out in Annex I to Decree No 2024-144.

Accordingly, subject to verification by the referring court, the Court considers that the decree at issue does not contain any 'legal name', but rather concerns the question of which 'customary names' or 'descriptive names' may not be used to designate vegetable protein-based foods.

In the third place, the Court determines whether those two concepts have been specifically harmonised by Regulation No 1169/2011. It points out that Article 2(2)(o) and (p) of that regulation does not provide that Member States may adopt measures regulating the customary names or descriptive names of a particular food. In the light of the definitions adopted by the EU legislature in respect of such customary and descriptive names, their scope cannot be limited in a general and abstract manner by national authorities. Therefore, where it has not adopted a legal name, a Member State cannot, by means of a general and abstract prohibition, prevent producers of vegetable protein-based foods from fulfilling their obligation to indicate the name of those foods through the use of customary names or descriptive names. [193]

In particular, as regards the power of a Member State to adopt general and abstract measures in order to prevent the risk of consumers being misled as a result of the substitution of animal proteins with vegetable proteins, the Court notes that Article 7(1)(d) and point 4 of Part A of Annex VI to Regulation No 1169/2011 concern the substitution of components or ingredients of foods. Accordingly, that matter has also been specifically harmonised by that regulation.

In addition, the Court states that those provisions also cover the matter of the information which must be provided to consumers when the composition of the food concerned becomes completely different. The high level of consumer protection which that regulation aims to achieve [194] would risk being undermined if, paradoxically, the provisions relating to the substitution, in a food, of a component or ingredient by a different component or ingredient did not apply where that substitution concerns a component or ingredient which is particularly important within a food, or which is the only component or ingredient of that food.

Accordingly, those provisions establish a rebuttable presumption that the information provided in accordance with the detailed rules laid down by them adequately protects consumers, including where the sole component or ingredient which they may expect to find in a food designated by a customary name or a descriptive name containing certain terms is wholly substituted.

However, where a national authority considers that the specific arrangements for the sale or promotion of a food mislead the consumer, it may prosecute the food business operator concerned – which is responsible [195] for the information on that food and must ensure the presence and accuracy of that information – and demonstrate that the abovementioned presumption has been rebutted.

Consequently, in answer to the first two questions referred for a preliminary ruling, the Court rules that Articles 7 and 17 of, and point 4 of Part A of Annex VI to, Regulation No 1169/2011, read in the light of Article 2(2)(o) and (p) and Article 9(1)(a) thereof, must be interpreted as specifically harmonising, within the meaning of Article 38(1) of that regulation, the protection of consumers against the risk of being misled by the use of names, other than legal names, consisting of terms derived from the butchery, charcuterie and fish sectors for the purpose of describing, marketing or promoting foods containing vegetable proteins instead of proteins of animal origin, including in their entirety, and therefore as precluding a Member State from adopting national measures that regulate or prohibit the use of such names.

As regards the third question referred by the national court, the Court holds, first, that the specific harmonisation brought about by the abovementioned provisions does not preclude a Member State from imposing administrative penalties in the event of failure to comply with the requirements and prohibitions resulting from those provisions or from national measures that are in compliance with those provisions. Second, the setting of maximum permitted levels of vegetable proteins [196] in order

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193 Article 38(1) of Regulation No 1169/2011.

194 Article 1(1) of Regulation No 1169/2011, read in the light of recitals 1 and 3 thereof.

195 Article 8(1) and (2) of Regulation No 1169/2011.

196 Article 3(1) of Decree No 2022-947.

for foods to be designated by certain customary or descriptive names is tantamount to regulating the use of such names without adopting a legal name. Given that those provisions specifically harmonise the use of those names, a Member State cannot adopt any measure in that regard without jeopardising the uniformity of EU law.

8. INTERNATIONAL AGREEMENTS: INTERNATIONAL AGREEMENTS ON COMMON COMMERCIAL POLICY

Judgment of the Court of Justice (Grand Chamber), 4 October 2024, Confédération paysanne (Melons and tomatoes from Western Sahara), C-399/22

Link to the full text of the judgment

Reference for a preliminary ruling – Common commercial policy – International agreements – Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part – Amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement – Regulation (EU) No 1169/2011 – Article 9 – Article 26(2) – Implementing Regulation (EU) No 543/2011 – Article 3(1) and (2) – Article 5(1) and (2) – Article 8 – Article 15(1) and (4) – Annex I – Annex IV – Regulation (EU) No 1308/2013 – Article 76 – Provision of food information to consumers – Mandatory indication of the country of origin or place of provenance of foods – Fruit and vegetables harvested in Western Sahara – Request for a Member State unilaterally to ban imports of those goods in its territory – Mandatory indication of Western Sahara as the place of provenance of tomatoes and melons harvested in that territory

Hearing a request for a preliminary ruling brought by the Conseil d'État (Council of State, France), the Court of Justice, sitting as the Grand Chamber, rules that Article 207 TFEU, Regulation 2015/478 [197] and Regulation No 1308/2013 [198] do not permit a Member State unilaterally to adopt a measure banning the import of agricultural goods the labelling of which systematically fails to comply with the EU legislation concerning the indication of the country or territory of origin. It also emphasises that Article 76 of Regulation No 1308/2013, read in conjunction with Article 3(1) of Implementing Regulation No 543/2011, [199] must be interpreted as meaning that, at the stages of import and sale to the consumer, the labelling of Charentais melons and cherry tomatoes harvested in the territory of Western Sahara must indicate Western Sahara alone as the country of origin of those goods.

The request has been made in proceedings between, on the one hand, the Confédération paysanne, a French agricultural union, and, on the other, the ministre de l'Agriculture et de la Souveraineté alimentaire (Minister for Agriculture and Food Sovereignty, France) and the ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique (Minister for Economic Affairs, Finance, and Industrial and Digital Sovereignty, France) concerning the legality of an implicit decision made by those ministers rejecting the Confédération paysanne's request that they issue a decree banning the import of cherry tomatoes and Charentais melons harvested in the territory of Western Sahara ('the goods at issue in the main proceedings').

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197 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (OJ 2015 L 83, p. 16) ('the Basic Safeguard Regulation').

198 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

199 Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors (OJ 2011 L 157, p. 1), as amended by Commission Implementing Regulation (EU) No 594/2013 of 21 June 2013 (OJ 2013 L 170, p. 43).

On 2 October 2020, the Confédération paysanne brought an action before the Conseil d'État – the referring court – seeking first, annulment of the implicit decision of those ministers to reject its request, and, second, an order that those ministers issue that decree. It argues that the territory of Western Sahara is not part of the territory of the Kingdom of Morocco and that the labelling indicating that the goods at issue in the main proceedings originate from Morocco is therefore in breach of the provisions of EU law relating to the provision of information to consumers regarding the origin of fruit and vegetables offered for sale.

The referring court questions, inter alia, whether the relevant rules of EU law authorise a Member State to adopt a national measure banning imports, originating in a third country, of goods the labelling of which does not correctly indicate the country or territory from which the goods originate and whether those rules permit, at the stage of the import of the goods at issue in the main proceedings and the stage of the sale of those goods to consumers, the labelling of the goods to refer to the Kingdom of Morocco as the country of origin or whether that labelling must refer only to the territory of Western Sahara.

Findings of the Court

In the first place, regarding the question whether Article 207 TFEU, the Basic Safeguard Regulation and Regulation No 1308/2013 are to be interpreted as permitting a Member State unilaterally to adopt a measure banning the import of agricultural goods the labelling of which systematically fails to comply with the EU legislation concerning the indication of the country or territory of origin, first, the Court recalls that Article 3(1)(e) TFEU confers exclusive competence on the Union in the area of common commercial policy, which, according to Article 207(1) TFEU, is to be based on uniform principles and conducted in the context of the principles and objectives of the Union's external action.

Second, the Court states that, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts. [200] The Member States may legislate and adopt legally binding acts themselves in such an area only if so empowered by the Union or for the implementation of Union acts. Accordingly, if they are not so empowered, the Member States may not unilaterally adopt a measure banning the import of a category of goods originating in a third territory or country, such import being, moreover, permitted and regulated by a trade agreement concluded by the European Union.

It is true that Article 24(2)(a) of the Basic Safeguard Regulation provides that that regulation does not preclude the adoption or application by Member States of prohibitions, quantitative restrictions or surveillance measures on certain specific grounds. The Court nevertheless notes that that provision is without prejudice to other relevant provisions of EU law.

Thus, in the area of the import of agricultural goods, Article 194 of Regulation No 1308/2013 reserves to the European Commission the competence to take safeguard measures with regard to imports into the Union of goods falling within the scope of Regulation No 1308/2013. Article 24(2)(a) of the Basic Safeguard Regulation cannot, consequently, be understood as enabling the Member States unilaterally to adopt safeguard measures with regard to the import of agricultural goods.

In that regard, the Court emphasises that, in the event of widespread disregard by exporters for the provisions of EU law relating to the provision of information to consumers regarding the origin of fruit and vegetables offered for sale, it would in that case be not for a Member State but for the Commission to intervene, within the framework set by the cooperation mechanisms provided for by the Association Agreement.

In the second place, the Court examines the question whether Article 76 of Regulation No 1308/2013, read in conjunction with Article 3(1) of Implementing Regulation No 543/2011, is to be interpreted as meaning that, at the stages of import and sale to the consumer, the labelling of the goods at issue in the main proceedings must indicate Western Sahara – and may not refer to the Kingdom of Morocco – as the country of origin of those goods.

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200 Article 2(1) TFEU.

The Court recalls, in that regard, that recital 8 of Implementing Regulation No 543/2011, in the light of which the requirements laid down in Article 3(1) of that implementing regulation are to be read, states, in essence, that the information particulars required by marketing standards must be clearly displayed on the packaging and/or label of the goods concerned, in particular to avoid cases of misleading consumers. Thus, the indication of the country of origin which must necessarily appear on goods such as the goods at issue in the main proceedings must not be deceptive.

Having regard to Article 60 of Regulation No 952/2013, [201] the obligation to indicate the country of origin of the goods at issue in the main proceedings which stems, first, from the general marketing standards laid down in Part A of Annex I to Implementing Regulation No 543/2011 and the specific marketing standards set out in Part 10 of Part B of Annex I to that implementing regulation, and, second, from Article 76(1) of Regulation No 1308/2013, is applicable not only to goods which originate from 'countries', but also to those which originate from 'territories', which may include geographical areas which, whilst being under the jurisdiction or the international responsibility of a State, nevertheless have a separate and distinct status from that State under international law.

The goods at issue in the main proceedings having been harvested in the territory of Western Sahara, the Court recalls that that territory constitutes a territory distinct from that of the Kingdom of Morocco. [202] Annex I to Implementing Regulation 2020/1470 [203] moreover lays down separate codes and texts for Western Sahara and the Kingdom of Morocco.

In those circumstances, the Court concludes that the territory of Western Sahara must be regarded as a customs territory for the purposes of Article 60 of Regulation No 952/2013 and, consequently, of Regulation No 1308/2013 and Implementing Regulation No 543/2011. Accordingly, the indication of the country of origin which must appear on the goods at issue in the main proceedings may designate only Western Sahara as such, because those goods are harvested in that territory. The Court explains that any other indication would be deceptive, as it could mislead consumers as to the true origin of the goods at issue in the main proceedings, inasmuch as it would be likely to suggest that those goods originate from a place other than the territory in which they were harvested.

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201 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1).

202 See judgments of 21 December 2016, Council v Front Polisario (C104/16 P, EU:C:2016:973, paragraph 92), and of 27 February 2018, Western Sahara Campaign UK (C266/16, EU:C:2018:118, paragraph 62).

203 Commission Implementing Regulation (EU) 2020/1470 of 12 October 2020 on the nomenclature of countries and territories for the European statistics on international trade in goods and on the geographical breakdown for other business statistics (OJ 2020 L 334, p. 2).

9. COMMON COMMERCIAL POLICY: ANTI-DUMPING

Judgment of the General Court (Third Chamber), 2 October 2024, CCCME and Others v Commission, T-263/22

Link to the full text of the judgment

Dumping – Imports of certain iron or steel fasteners originating in China – Imposition of a definitive anti-dumping duty – Action for annulment – Admissibility – Standing to bring proceedings – Representative association of exporters – Article 2(6a) of Regulation (EU) 2016/1036 – Construction of the normal value – Choice of appropriate representative country – Article 2(10) of Regulation 2016/1036 – Adjustments – Non-cooperation – Article 18 of Regulation 2016/1036 – Calculation of the dumping margin for the non-sampled cooperating exporting producers – Definition of the product concerned – Injury to the Union industry – Assessment of injury by segment – Causal link – Calculation of price undercutting and injury margin – Macroeconomic indicators – Procedural rights – Confidential treatment

Dismissing the action for annulment of Commission Implementing Regulation 2022/191, [204] which imposes a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China ('the product concerned'), the General Court provides clarification as to the admissibility of an action brought by a representative association of exporters. It also rules on the method for constructing the normal value of the product concerned where that value is established on the basis of data from an appropriate representative country and where there are significant market distortions in the exporting country.

In the present case, the Commission, after receiving a complaint lodged by European Industrial Fasteners Institute, on behalf of the Union industry, initiated an anti-dumping investigation at the end of which it adopted the contested regulation.

It is in that context that China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('the CCCME'), an association under Chinese law, and various Chinese exporting producers brought an action for annulment of the contested regulation.

Findings of the Court

As regards the admissibility of the action for annulment brought by the CCCME on behalf of its members, the Court recalls that, in order for an association to be able legitimately to act on behalf of its members, it is necessary, first, that the natural or legal persons on whose behalf it is acting are members of that association, secondly, that it has the power to bring proceedings in their name, thirdly, that that action is brought in their name, fourthly, that at least one of the members on whose behalf it is acting could itself have brought an admissible action, and, fifthly, that the members on whose behalf it is acting have not brought an action in parallel before the EU Courts. Since those requirements are met in the present case, the action is admissible in so far as it was brought by the CCCME on behalf of its members which are exporting producers of the product concerned and which cooperated with the Commission in the investigation which led to the adoption of the contested regulation, even though they were not sampled by the Commission.

On the substance, the Court rejects, first, the plea alleging infringement of Article 2(6a)(a) of the basic regulation [205] in the construction of the normal value of the product concerned. Under that article, in case it is determined that it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions on the domestic market, the normal value of the product concerned is to be constructed exclusively on the basis of costs of production and sale

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[204] Commission Implementing Regulation (EU) 2022/191 of 16 February 2022 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2022 L 36, p. 1; 'the contested regulation').

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

reflecting undistorted prices or benchmarks. To that end, the sources of information which the Commission may use include the corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available.

In that regard, the Court finds, in the first place, that the Commission did not err in choosing Thailand as the appropriate representative country in order to construct the normal value of the product concerned.

The referring court rejects, first of all, the applicants' argument that the costs of manufacturing the product concerned in Thailand do not correspond to those of the sampled Chinese exporting producers, since Thailand uses, among the raw materials needed to manufacture that product, a special grade wire rod imported from Japan. Accordingly, in so far as that raw material is used only for the production of non-standard fasteners, whereas the Chinese producers only export standard fasteners to the European Union, the price of imports of wire rod from Japan to Thailand should have been excluded from the data used by the Commission to establish normal value.

As regards the fact that the Thai costs correspond to the costs incurred by the sampled exporting producers, the Court notes that the Commission found that the Chinese industry benefited from the Chinese Government's guidance and intervention concerning steel, the main raw material to manufacture fasteners, and concluded that the production costs incurred by the sampled exporting producers were affected by significant distortions. In that case, although the Commission must construct the normal value of the product under investigation as it would have been for the exporting producers in the country concerned in the absence of distortions, it is apparent from Article 2(6a) of the basic regulation that normal value is constructed exclusively on the basis of the data of the selected representative country.

Accordingly, the Commission did not make a manifest error of assessment in determining the normal value by taking into account the costs of raw materials for Thai producers of fasteners. In that context, the Commission may, in the exercise of its broad discretion, carry out certain approximations in constructing the normal value, provided that those approximations are justified by the data available to it.

As regards the need to disregard Japanese data when constructing the normal value, the Commission did not make an error of assessment in using those data for the purposes of the construction of that value, given, on the one hand, the existence of adequate demand for raw materials for the production of standard and non-standard fasteners in Thailand and, on the other hand, the lack of substantiated data on the proportion of raw materials imported from Japan which were intended for non-standard fasteners and on how to distinguish those raw materials out of the HS codes, [206] since the same code could cover several qualities of a raw material.

Next, the Court rejects the complaint alleging that the data of the Thai producers used by the Commission to calculate the selling, general and administrative expenses (SG&A costs) and profits are not representative, since those producers do not manufacture exactly the same product as the sampled Chinese producers.

In that respect, the Court notes that all of the fasteners were considered a single product for the purpose of the investigation. Therefore, the line of argument that the data of a Thai producer which produced some of the fasteners under investigation but whose fasteners did not correspond exactly to those produced by the sampled Chinese exporting producers should be disregarded cannot succeed. Furthermore, in investigations where the normal value is determined on the basis of data from an appropriate representative country, it is difficult to have available qualitative data which are fully calibrated to the sample of exporting producers.

Finally, as regards the need to construct the normal value in accordance with the decision-making practice of the Appellate Body of the World Trade Organization (WTO), the Court stated that the Commission was not required to interpret Article 2(6a)(a) of the basic regulation in conformity with

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[206] Harmonised commodity description and coding system codes. Those codes determine the raw materials needed to manufacture the product concerned.

the WTO rules. Although EU legislation must be interpreted, as far as possible, in the light of international law, in particular where it is intended to give effect to an international agreement concluded by the European Union, the fact remains that that provision cannot be considered to be intended to give effect to specific obligations under WTO agreements, since WTO law does not include specific rules for constructing normal value in the situations covered by the provision concerned.

In the second place, the Court holds that the Commission did not make a manifest error of assessment in the calculation of the costs of freight, [207] consumables [208] and overheads in the construction of the normal value of the product concerned. Since the transport costs incurred by the sampled Chinese exporting producers for the supply of raw materials, consumables and overheads were affected by significant distortions, they cannot be used as a reference for the calculation of ancillary costs.

In the present case, the Commission expressed the transport cost incurred by the sampled Chinese exporting producers for the supply of raw materials as a percentage of the actual cost of such raw materials and then applied the same percentage to the undistorted cost of the same raw materials in Thailand in order to obtain the undistorted transport cost. The Commission therefore did not err in calculating those costs by applying a percentage on the cost of raw materials needed to manufacture the product concerned, thereby preserving the structure of the costs of the sampled exporting producers.

Secondly, the applicants claim that, by applying adjustments only to export prices and not to the normal value, the Commission failed to make a fair price comparison, thereby infringing Article 2(10) of the basic regulation. In that regard, the Court observes that, under that provision, where a party claims adjustments for the purpose of a fair price comparison for the determination of the dumping margin, that party must prove that its claim is justified. Accordingly, the applicants were required to prove that the adjustment requested was necessary, which they have in no way done in the present case.

Thirdly, the applicants contest the fact that, in the context of constructing the normal value, the Commission used data from only one of the three sampled Chinese exporting producers to calculate the labour costs necessary to manufacture the product concerned. In so doing, the Commission failed to take account of the differences between the manufacturing processes of the products under investigation, even though those processes had an influence on the working hours needed to manufacture the product. The Court finds, however, that, in so far as none of the three sampled exporting producers was able to provide specific documentation defining the labour cost requirements on the basis of the product manufacturing method, the Commission was entitled, without making a manifest error of assessment, to rely on the verified data of only one of the three exporting producers, since they were the best facts available within the meaning of Article 18 of the basic regulation.

Fourthly, on the need to carry out a segmented analysis of the injury caused to the Union industry, the Court specifies that such an analysis may be justified, inter alia, when there is evidence of particularly marked segmentation as regards the imports concerned, provided, however, that the like product on the Union market as a whole is duly taken into account. The fact that products belong to different ranges is not sufficient to establish, in itself, that they are not interchangeable and therefore that an assessment by segment may be undertaken, since products belonging to different ranges can have identical functions or satisfy the same needs. Since the applicants have not adduced any evidence relating (i) to the distinction between standard and non-standard fasteners in relation to the different types of industry, and (ii) to the absence of competition between those two product types, the Commission did not make an error of assessment in considering the standard and non-standard fasteners to be like products for the injury analysis.

Fifthly, as regards the alleged lack of a fair comparison between Union prices and those of Chinese exporting producers, the applicants complain that the Commission failed to clarify at what level of

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207 The present case concerns the transport costs incurred by the producer for a raw material delivered at the factory gate.

208 Consumables are minor raw materials consumed in the manufacturing process.

trade the sales of the sampled Union producers were made. Since that issue has been clarified by the Commission, the Court finds that the Commission did not make a manifest error of assessment in its analysis of price undercutting, nor did the applicants claim that any adjustment was necessary to ensure a fair price comparison at the same level of trade.

Sixthly, the Court declares the plea alleging infringement of the applicants' procedural rights during the administrative investigation to be inadmissible. It recalls that procedural rights are rights specific to the person on whom they are conferred and are of a subjective nature such that it is the concerned parties themselves that must be able effectively to exercise those rights, irrespective of the nature of the proceedings to which they are subject.

An association's ability to exercise the procedural rights of its members cannot result in the circumvention of the conditions with which the undertakings in question ought to have complied if they had wished to exercise their procedural rights themselves. Accordingly, an exporting producer which is a member of the CCCME cannot merely rely on the CCCME's claims if it did not expressly assert its rights of defence during the administrative investigation. That finding is not called into question by the means of communication chosen by the Commission for the purposes of the administrative procedure, namely an electronic platform, since the status of interested party under the basic regulation and the rights attached thereto cannot in any event depend on the Commission's means of communication with those parties.

In the light of all those considerations, the Court therefore dismisses the action in its entirety.

10. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Grand Chamber), 2 October 2024, Ordre néerlandais des avocats du barreau de Bruxelles and Others v Council, T-797/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine – Prohibition on the provision of legal advisory services to the Russian Government and entities established in Russia – Fundamental role of lawyers in a democratic society – Right of lawyers to provide legal advisory services – Right to be advised by a lawyer – Articles 7 and 47 and Article 52(2) of the Charter of Fundamental Rights – Independence of lawyers – Rule of law – Proportionality – Legal certainty

The General Court, sitting as the Grand Chamber, confirms the lawfulness of the prohibition, set out in Article 5n(2) of Regulation No 833/2014, [209] on the direct or indirect provision of legal advisory services to the Russian Government or to legal persons, entities or bodies established in Russia ('the prohibition at issue'). The case concerns whether there is a fundamental right of access to a lawyer, including in situations where there is no link with judicial proceedings. The Court clarifies, inter alia, the scope of the right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and of the right to professional secrecy guaranteed in Article 7 of the Charter. The Court dismisses the action on the merits, without ruling on the pleas of inadmissibility alleging, in particular, that the applicants lack standing to bring proceedings.

This judgment arises in the context of a package of restrictive measures adopted by the European Union in response to the military aggression perpetrated by the Russian Federation against Ukraine on 24 February 2022. In support of their action seeking annulment of the acts which introduced, and

209 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), as amended by Council Regulation (EU) 2022/1904 of 6 October 2022 (OJ 2022 L 259I, p. 3).

then maintained, [210] the prohibition at issue, the applicants, including the Ordre néerlandais des avocats du barreau de Bruxelles, argued, in particular, that that prohibition entailed a breach of the right of access to legal advice from a lawyer, and interference with the professional secrecy and the independence of lawyers.

Findings of the Court

In the first place, the Court rejects the plea in law alleging infringement of the right to consult a lawyer in order to obtain legal advice.

First, the Court holds that a person must only be recognised as having the possibility of being advised, defended and represented by lawyer, which is provided for, by way of the right to an effective remedy and the right to a fair trial, by Article 47 of the Charter, where there is a link with judicial proceedings. In that regard, it recalls that the Court of Justice has recognised the fundamental role of lawyers in a State governed by the rule of law only in so far as they contribute to the proper administration of justice and ensure that clients' interests are protected. Second, the General Court notes that professional secrecy is afforded the protection enshrined in Article 7 of the Charter where there is no link with judicial proceedings. However, that protection is not intended to guarantee a fundamental right of access to a lawyer and to legal advice from a lawyer irrespective of any link with judicial proceedings, but rather its sole purpose, in the light of the right to respect for private life, is to preserve the confidentiality of correspondence between a lawyer and his or her client.

Consequently, the protection guaranteed in Article 7 of the Charter and that guaranteed in Article 47, considered in isolation or together, are not such as to form the basis of a fundamental right for all persons to have access to and be advised by a lawyer other than in the context of existing or probable litigation. The fundamental right of access to a lawyer and to advice from him or her must therefore be recognised solely if there is a link with judicial proceedings, whether such proceedings have already been commenced or can be pre-empted or anticipated, on the basis of tangible elements, at the stage at which the lawyer assesses his or her client's legal situation.

In the present case, Article 5n(5) and (6) of Regulation No 833/2014 permits a lawyer to carry out a prior assessment of the legal situation of legal persons, entities or bodies established in Russia that consult him or her, in order to determine whether the advice sought from him or her is strictly necessary in order to ensure access, in particular, to judicial proceedings, with a view to pre-empting or anticipating such proceedings or to ensuring that they are properly conducted if they have already been commenced.

First, the Court infers from the foregoing that the prohibition at issue does not infringe the right to be advised, defended and represented by a lawyer protected by Article 47 of the Charter. Second, since Article 7 of the Charter does not guarantee a right of access to a lawyer, be it in judicial proceedings or in a non-contentious context, the prohibition at issue cannot constitute interference with a right deriving from that article.

In the second place, as regards the professional secrecy of lawyers, the Court notes that the disclosure by a lawyer of, in particular, his or her identity or the fact that he or she has been consulted, where that disclosure is compulsory and takes place without the consent of the lawyer's client, constitutes interference with the client's right to respect for private and family life, home and communications guaranteed by Article 7 of the Charter.

In the present case, the Court finds that, whilst the exemption provisions enable the competent authorities to lift the prohibition at issue in certain specifically identified situations, they nevertheless grant the competent authorities discretion as to the manner in which an application for exemption must be set out, lodged and processed. Accordingly, for example, the exemption provisions do not govern who may submit the application to the competent national authorities. Similarly, the provisions at issue do not suggest that a lawyer is required to share with the competent authorities, without his or her client's consent, information that is covered by the professional secrecy guaranteed by Article 7 of the Charter. As regards the information necessary for processing applications for

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[210] Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation No 833/2014 (OJ 2022 L 322I, p. 1), and Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation No 833/2014 (OJ 2023 L 59I, p. 6).

exemption, the exemption provisions likewise do not mention the material which the competent authority must have available to it in order to carry out its examination.

Nevertheless, when defining the arrangements for implementing the exemption procedures, the Member States are implementing EU law within the meaning of Article 51(1) of the Charter, and must therefore ensure respect for Article 7 of the Charter, in compliance with the conditions laid down in Article 52(1) thereof. Consequently, the Court holds that the exemption provisions do not, in themselves, entail interference with the right guaranteed in Article 7 of the Charter.

In any event, even assuming that the exemption provisions do give rise to interference with the professional secrecy of lawyers guaranteed in Article 7 of the Charter, the Court recalls that limitations on the exercise of that right are permitted, in accordance with Article 52(1) of the Charter, provided that they are provided for by law, respect the essence of that right and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union.

In the present case, the Court notes that the prohibition at issue is provided for by law and respects the essence of the right to respect for communications between lawyers and their clients enshrined in Article 7 of the Charter. Moreover, that prohibition corresponds in an appropriate and consistent manner to the objective of further increasing the pressure on the Russian Federation to end its war of aggression against Ukraine. The exemption provisions, in so far as they allow the prohibition at issue to be lifted in specifically identified situations, themselves pursue that objective of general interest, in accordance with the objectives of the Union's external action, set out in Article 21 TEU, and appear to be proportionate in the light of those objectives. The Court makes clear in that regard that the exemption provisions intended to lift the provision at issue are themselves limited to what is necessary to achieve the aims pursued by the contested regulations.

Finally, as regards the complaint alleging interference with the independence of lawyers as the result of the prohibition at issue, the Court recalls that a person's right to legal advice given in full independence by a lawyer is inherent in the right to an effective remedy. Since the prohibition at issue does not entail any interference with the right to an effective remedy guaranteed by Article 47 of the Charter, the Court finds that it has not been established that the prohibition at issue is capable of giving rise to interference with the independence of lawyers.

In that regard, notwithstanding the absence of a rule of primary law enshrining and defining the independence of lawyers, the Court of Justice has recognised the importance of such independence for the purposes of guaranteeing the right of all persons subject to the law to an effective remedy, in contexts where there is a link with judicial proceedings. Whilst it is clear from the Code of Conduct for European lawyers that independence may also extend to legal advisory activities unconnected with judicial proceedings, the provisions of the Code of Conduct for European lawyers are not, however, rules of EU law and therefore cannot constitute a legal basis for the recognition of the independence of lawyers at EU level.

Even if the independence of lawyers, in the same way as the protection of professional secrecy under Article 7 of the Charter, were also to be recognised outside a contentious context, and that there were found to be interference with that independence, the General Court also recalls that the independence of lawyers does not mean that the profession of lawyer cannot be subject to limitations. That independence may be subject to restrictions justified by objectives of general interest pursued by the European Union, provided that such restrictions do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very essence of the independence of lawyers.

In the present case, the Court finds that, even if there were interference with the independence of lawyers, it would be justified and proportionate. First, the Court notes that the provision at issue, as delimited, inter alia, by the exemption provisions, pursues objectives of general interest. Second, although the exemption provisions afford the competent authorities the possibility of lifting the prohibition at issue in relation to certain legal advisory services, those provisions do not enable the competent authorities to influence the actual content of any advice that might be provided by the lawyer to the Russian Government or to an established in Russia. The same applies to the prohibition at issue itself. The prohibition at issue and, in particular, the exemption provisions therefore do not constitute disproportionate and intolerable interference impairing the very essence of the independence of lawyers.